U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT A. MONTGOMERY and DEPARTMENT OF THE NAVY, NAVAL WEAPONS STATION, Concord, CA

Docket No. 02-935; Submitted on the Record;
Issued November 12, 2003

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly modified its determination of appellant's loss of wage-earning capacity; and (2) whether appellant sustained a recurrence of disability as of July 26, 2001 causally related to his accepted April 19, 1993 lower back injury.

On April 19, 1993 appellant, then a 31-year-old stevedore, filed a claim alleging that he injured his lower back when he was struck by a board while opening a rail car door. The Office accepted the claim for lumbar strain and lumbar disc herniation/displacement. The Office paid temporary total disability compensation for appropriate periods and placed him on the periodic rolls. Appellant did not return to his federal employment.

On August 28, 1995 appellant began working as a security guard/surveillance person, a job which was procured by a vocational rehabilitation counselor, whose services were obtained by the Office; the position entailed weekly wages of $250.00. Appellant stopped working at this position in December 1995. He obtained employment with various other private entities.

By decision dated February 21, 1996, the Office advised appellant that it was reducing his compensation effective March 2, 1996, because the weight of the medical evidence showed that he was no longer totally disabled for work due to residuals of his April 19, 1993 employment injury and that the evidence of record showed that his actual wages as a surveillance worker/guard, a job at which he had worked for 60 days, represented his wage-earning capacity. The Office also determined that appellant had a 41 percent wage-earning capacity, which was computed by comparing the pay rate at the time of his stevedore position with the pay rate for his position of surveillance worker/guard. Thereafter, he annually reported his earnings to the Office on its CA-1032 forms.

In a Form CA-1032 dated December 10, 2000, appellant informed the Office that he had obtained employment as a warehouse forklift loader with Associated Wholesale Grocery, Inc., in Kansas City, Kansas, with weekly earnings of $469.60. On February 12, 2001 Associated

Wholesale Grocery, Inc. confirmed that appellant was employed as an order filler and warehouse worker since August 9, 1998. The employer indicated that, as of December 24, 2000, appellant earned $12.52 an hour, or $500.80 a week

On April 5, 2001 the Office issued appellant a notice of proposed reduction of compensation. The Office indicated that the proposed reduction was based on his earnings as an order filler and warehouse worker of $500.80. The Office stated that, because this figure represented an increase in pay exceeding 25 percent of his current wage-earning capacity of $320.00, it was adjusting appellant's wage-earning capacity accordingly.

In a decision dated May 18, 2001, the Office modified appellant's wage-earning capacity to reflect his earnings as an order filler and warehouse worker of $500.80 a week. The Office determined that appellant's wage-earning capacity was 69 percent of the current pay rate for his date-of-injury position and his compensation was reduced to reflect his wage-earning capacity.

On August 21, 2001 appellant filed a Form CA-2a claim for benefits, alleging that he sustained a recurrence of disability on July 26, 2001, which was caused or aggravated by his April 19, 1993 employment injury.[1]

By letter dated September 27, 2001, the Office advised appellant that it required additional factual and medical evidence, including a medical report, to support his claim that his current condition/or disability as of July 26, 2001, was caused or aggravated by his accepted April 19, 1993 employment injury.

Appellant submitted reports dated October 11 and 19, 2002 from Dr. Mark Wellington, an osteopath. In his October 11, 2001 report, Dr. Wellington noted appellant's complaints of persistent right lumbar radicular pain during his August 14, 2001 examination. He related that appellant had significant disability with limitations on ambulation and walking and stated:

> "[Appellant] apparently has terminated his position because his employer had not position, which would allow the restrictions we imposed. He is currently limited in his performance activity secondary to lumbar pain and will require retraining for a different light[-]duty position. [Appellant] was not able to perform the duties of his normal activity under current circumstances."

In his October 19, 2001 report, Dr. Wellington noted that the results of a lumbar magnetic resonance imaging (MRI) scan indicated a left paramedian disc protrusion at L4-5 on the left, with degenerative changes at L2-3 and L5-S1.

By decision dated November 21, 2001, the Office denied appellant compensation for a recurrence of his accepted lower back condition. The Office found that appellant failed to submit medical evidence sufficient to establish that the claimed condition or disability as of July 26, 2001, was caused or aggravated by the April 19, 1993 employment injury.

[1] By letter dated November 12, 2001, Associated Wholesale Grocery, Incorporation confirmed to the Office that appellant was employed with them as an order selector and forklift operator from August 9, 1998, until his resignation on August 29, 2001. Accompanying the letter was a job title and description.

The Board finds that the Office failed to meet its burden of proof to modify appellant's loss of wage-earning capacity based on his capacity to perform the duties of an order selector and forklift operator.

In order to modify a formal loss of wage-earning capacity determination, the Office must establish either that the original rating was in error, that the claimant's medical condition had changed or that the claimant has been vocationally rehabilitated.[2] The burden is on the Office to establish that there had been a change so as to affect the employee's capacity to earn wages in the job determined to represent his earning capacity. The Office may modify a wage-earning capacity determination if the claimant is employed in a new job earning 25 percent more than the current rate of pay for the job, for which the claim was rated.[3]

In the present case, appellant was working as a stevedore at the time of his employment injuries. After receiving medical evidence that he was permanently precluded from performing the duties of this position, the Office referred appellant to a vocational rehabilitation counselor, who obtained reemployment for him as a security guard/surveillance person. The Office then reduced his compensation for temporary total disability to that for partial disability, based on his actual earnings as a security guard/surveillance person. Appellant eventually stopped working at this position and obtained several other jobs until August 9, 1998, when he obtained employment with Associated Wholesale Grocery, Inc. as an order selector and forklift operator. Appellant advised the Office in his December 10, 2000 Form CA-1032, that he had obtained employment with Associated Wholesale Grocery, Inc. as an order filler and warehouse worker with earnings of $469.60. The Office, on April 5, 2001, issued a notice of proposed reduction of compensation based on his actual earnings in this position. The Office formally reduced appellant's loss of wage-earning capacity based on actual earnings of $500.80 a week since December 24, 2000, which represented an increase exceeding 25 percent of his prior wage-earning capacity of $320.00 as a security guard.

An increase in pay by itself, however, is not sufficient evidence that there has been a change in an employee's capacity to earn wages. The Board has held that without a showing of additional qualifications obtained by appellant through retraining, it is improper to make a new loss of wage-earning capacity determination based only on increased earnings.[4] Prior to such a modification, the Office is required to determine the duration, exact pay, duties and responsibilities of the new job; determine whether the claimant underwent training or vocational preparation to earn the current salary; and assess whether the actual job differs significantly in duties, responsibilities or technical expertise from the job, at which the claimant was rated.[5]

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[2] Federal (FECA) Procedure Manual, Part 2 -- *Claims, Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11(a) (June 1996).

[3] *Id.*

[4] *Odessa C. Moore*, 46 ECAB 681 (1995); *Willard N. Chuey*, 34 ECAB 1018 (1983).

[5] *Id*; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11(d) (June 1996).

In this case, the Office determined the duration and exact pay of the current job, but did not assess the duties of the order filler and warehouse worker position or whether appellant underwent training or vocational preparation to earn the current salary. The case record does not contain sufficient information to permit a determination of whether appellant has been retrained or otherwise rehabilitated so as to permit the use of the new position in determining his wage-earning capacity. Only after all the factors have been examined can the Office properly determine whether appellant has been retrained or otherwise vocationally rehabilitated such that modification of his loss of wage-earning capacity is warranted.

As noted above, it is the Office's burden to establish that appellant has been vocationally rehabilitated. Since the Office failed to follow its procedures and adequately address the relevant factors, the Board finds that the Office failed to meet its burden in this case. The Board will reverse the May 18, 2001 Office decision modifying the 1996 wage-earning capacity determination.

The Board finds that appellant has not sustained a recurrence of disability as of July 26, 2001, causally related to the April 19, 1993 employment injury.

An individual who claims a recurrence of disability resulting from an accepted employment injury has the burden of establishing that the disability is related to the accepted injury. This burden requires furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and who supports that conclusion with sound medical reasoning.[6]

The record contains no such medical opinion. Appellant has failed to submit any medical report containing a rationalized opinion, which relates his disability for work as of July 26, 2001 to his April 19, 1993 employment injury. For this reason, appellant has not discharged his burden of proof to establish his claim that he sustained a recurrence of disability as a result of his accepted employment injury.

The only relevant medical evidence appellant submitted in support of his claim for a recurrence of disability was Dr. Wellington's October 11 and 19, 2001 reports. He noted appellant's complaints of lumbar and radicular pain and indicated MRI scan findings of disc bulging and degeneration, but did not indicate whether appellant's condition or disability was causally related to the April 19, 1993 employment injury. Dr. Wellington's reports, therefore, do not constitute sufficient medical evidence demonstrating a causal connection between appellant's current condition and his accepted lower back condition. Causal relationship must be established by rationalized medical opinion evidence. Dr. Wellington's opinion on causal relationship is of limited probative value in that he did not provide adequate medical rationale in support of his conclusions.[7] He did not describe appellant's work-related symptoms in any detail or indicate how his current condition could have been caused or aggravated by the April 19, 1993 employment injury. As Dr. Wellington's reports constituted the only evidence appellant

[6] *Dennis E. Twardzik*, 34 ECAB 536 (1983); *Max Grossman*, 8 ECAB 508 (1956); 20 C.F.R. § 10.121(a).

[7] *William C. Thomas*, 45 ECAB 591 (1994).

submitted in support of his claim for a recurrence of disability, appellant failed to provide a rationalized, probative medical opinion indicating that his current condition was causally related to the accepted April 19, 1993 employment injury.

As there is no medical evidence addressing and explaining why the claimed condition and disability as of July 26, 2001 was caused or aggravated by his April 19, 1993 employment injury, appellant has not met his burden of proof in establishing that he sustained a recurrence of disability.

The November 21, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed and the May 18, 2001 Office decision is reversed.

Dated, Washington, DC
November 12, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member