U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GREGG A. WALKER and DEPARTMENT OF THE ARMY, ARMY MISSLE COMMAND, REDSTONE ARSENAL, Ala.

Docket No. 96-1493; Submitted on the Record;
Issued June 3, 1993

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM, BRADLEY T. KNOTT

The issues are: (1) whether the position of fire fighter fairly and reasonably represents appellant's wage-earning capacity; and (2) whether appellant has greater than a six percent impairment of his left leg, for which he has received a schedule award.

On June 25, 1990 appellant, then a 28-year-old fire fighter, filed a claim alleging that he injured his back in the performance of duty on June 23, 1990. The Office of Workers' Compensation Programs accepted appellant's claim. Appellant received appropriate compensation benefits and thereafter returned to work as a fire fighter.

On April 5, 1994 appellant filed a claim for recurrence of disability commencing February 15, 1994. He alleged that the prior injury caused a bulging disc which was now herniated. The Office accepted appellant's recurrence claim and paid appropriate compensation benefits. Appellant returned to work on April 19, 1994 but stopped again on September 20, 1994, undergoing a discectomy at L4-5 and L5-S1 on the right. Appellant again was paid compensation and on February 13, 1995 underwent implantation of epidural thoracolumbar spinal cord stimulating electrodes. He returned to work as a fire fighter on April 18, 1995. Thereafter he submitted a copy of his duty requirements which described specific activities he was expected to perform.

A physical capacities evaluation performed on April 10, 1995 indicated that appellant could lift 60 pounds occasionally and 30 pounds frequently, and could carry 70 pounds occasionally and 35 frequently, and could climb stairs occasionally and ladders frequently. It was recommended that appellant limit prolonged bending, stooping, and working below 24 inches in height, and limit pushing and pulling to 61.4 pounds of force on an occasional basis and 30.7 pounds of force or less on a more frequent basis.

On April 24, 1995 appellant was seen by Dr. K. Dean Willis, a Board-certified anesthesiologist specializing in pain management, who noted that appellant's boss had placed

him back on full duty without following the physical capacity evaluation recommendations. Dr. Willis noted that on April 18, 1995 appellant was lifting a fire hose that weighed in excess of 60 pounds when his left leg gave out. Dr. Willis adjusted appellant's spinal electrode pulse generator amplitude and pulse width rate.

On August 24, 1995 the Office did a loss of wage-earning capacity evaluation noting that appellant had gone back to work as a fire fighter on April 18, 1995, that this position fairly and reasonably represented his wage-earning capacity, that he was then being paid more than he had previously earned as a fire fighter, and that his current pay was greater than the current pay of his former position at that time, because when he returned to work he was given a step increase over the step level of his former position.

On September 28, 1995 appellant's treating Board-certified orthopedic surgeon, Dr. F. Calame Sammons, recommended that he be restricted to the proposed limitations set out in his functional capacities evaluation. Dr. Sammons used the American Medical Association, *Guides to the Evaluation of Permanent Impairment* and opined that appellant reached maximum medical improvement as of September 28, 1995 and had a 17 percent whole body impairment with a 5 percent lower extremity impairment due to loss of function, sensory deficit and pain.

On October 18, 1995 Dr. Willis advised the employing establishment of appellant's functional capacity evaluation restrictions, indicated that according to appellant his current position did not allow him to remain within these limitations, and recommended that a replacement position could be made available.

On November 30, 1995 an Office medical adviser calculated, using the A.M.A., *Guides,* that appellant had a six percent impairment of his left lower extremity.

On December 12, 1995 the Office granted appellant a schedule award for a six percent impairment of his left lower extremity for the period October 2, 1995 to January 30, 1996.

On December 15, 1995 Dr. Willis opined that appellant should be retrained in the hopes of embarking on a new career, and indicated that appellant had epidural fibrosis and facet arthropathy secondary to his employment injury.

On January 8, 1996 appellant requested reconsideration of the August 24, 1995 loss of wage-earning capacity decision claiming that he was no longer able to work as a fire fighter. He also mentioned the schedule award decision, noting that it only considered his left leg.

On January 12, 1996 appellant filed a Form CA-20a claiming compensation from December 10, 1995 through January 6, 1996. A Form CA-8 was also filed for the same period with the fire chief noting on the form that appellant's physical condition would not allow him to perform as a fire fighter.

On February 13, 1996 the Office received a letter from the employing establishment fire chief, which stated that appellant could no longer perform his duties as a fire fighter. The chief noted appellant's fire fighting duties and indicated that safety regulations required that he wear full protective clothing including a self-contained breathing apparatus, which weighed up to

60 pounds, depending on the type of apparatus and size of the air bottle used. The chief indicated that the self-contained breathing apparatus was worn like a pack and struck appellant just at the point where his operations had taken place, and further noted that fire fighters were expected to be able to raise an unconscious person up to their shoulder and to carry the person to safety, which he could not do in accordance with his functional capacity evaluation restrictions. The chief also noted that appellant was a member of the hazardous materials response team and was expected to wear a self-contained breathing apparatus and a fully encapsulating chemical suit while rescuing personnel, carry them to safety, and carry tools and equipment to stop the release of hazardous materials. The chief further noted that most hazardous materials were stored in 55 gallon drums, and handling them required appellant to roll a drum around, over pack it with another drum, and invert the entire package. He indicated that these materials could weigh as much as 500 pounds or more, which was an enormous strain even for a healthy fire fighter. The chief stated that these were only a couple of examples of the weights and strains placed on fire fighters, and expressed hope that this was enough to show that with the restrictions placed on appellant about weights, he was placed in a dangerous situation. The chief explained that he had to remove appellant from his fire fighting duties to avoid crippling him for life.

By nonmerit decision dated March 19, 1996, the Office denied appellant's request reconsideration review finding that the evidence submitted in support of the request was repetitious and was not sufficient to warrant review of the prior decision on its merits. The Office noted that the issue for which reconsideration was requested was whether appellant had greater than a six percent impairment of his left lower extremity, and that the medical evidence submitted, namely a September 28, 1994 medical report stating the need for a percutaneous discectomy, and the April 10, 1995 physical capacities evaluation containing appellant's recommended work restrictions, had been previously reviewed for the Office's December 12, 1995 decision. The Office did not address reconsideration of the August 24, 1995 loss of wage-earning capacity decision, appellant's contention that he was unable to work as a fire fighter, or the evidence from the fire chief stating that appellant could not perform as a fire fighter due to his medical restrictions and physical limitations.

The Board finds that the position of fire fighter does not fairly and reasonably represent appellant's wage-earning capacity.

Section 8115(a) of the Federal Employees' Compensation Act provides that the wage-earning capacity of an employee is determined by actual earnings if actual earnings fairly and reasonably represent his wage-earning capacity.[1] The claims examiner will determine whether a claimant's actual earnings fairly and reasonably represent his wage-earning capacity only after the claimant has been working for 60 days.[2] Once loss of wage-earning capacity is determined, a modification of such determination is not warranted unless there is a material change in the

[1] *Don J. Mazurek*, 46 ECAB 447 (1995).

[2] *Corlisia L. Sims*, 46 ECAB 172 (1994).

nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.[3]

In the instant case appellant returned to the same position he had held prior to his accident but at a higher step level pay rate, however, the Board notes that the evidence of record supports that appellant was not successful in performing the fire fighter position because it required full duty which exceeded his work restriction limitations. The Board notes that appellant's physical capacities evaluation performed April 10, 1995 demonstrated that appellant could lift 60 pounds occasionally 30 pounds frequently, and could carry 70 pounds occasionally, 35 pounds frequently. However, when appellant returned to duty on April 18, 1995 he was returned to full duty which required that he lift and handle a fire hose weighing in excess of 60 pounds. On April 24, 1995 this fact was noted by Dr. Willis, and Dr. Willis noted that on April 18, 1995, appellant's first day back on full duty, while lifting and handling a 60 plus pound fire hose, his left leg gave out, which necessitated subsequent medical treatment.

The Board finds that this evidence establishes that appellant was unable to perform the regular duty requirements of his fire fighter position and that the regular-duty position to which he was returned was not suitable to his partially disabled condition or in accordance with appellant's physical capacities evaluation. As such, the Office has not demonstrated that this position reasonably and fairly represented his wage-earning capacity, as the physical lifting and carrying requirements clearly exceeded appellant's working limitations. Subsequent to the Office's loss of wage-earning capacity determination, appellant was taken off his regular duty. It was noted that fire fighting duty and safety regulations required that appellant be able to wear full protective clothing and self-contained breathing apparatus, which weighed approximately 60 pounds, and still be able to carry an unconscious person on his shoulders to safety, requirements which exceed his physical limitations. These full-duty job requirements were in place on April 18, 1995 when appellant returned to work, and these full-duty job requirements exceeded appellant's physical restrictions at that time. The Board, therefore, finds that appellant returned to work in a position that exceeded his physical limitations and not suitable to his partially disabled condition. In *Mary Jo Colvert*,[4] the Board found that the position of part-time clerk did not fairly and reasonably represent the employee's wage-earning capacity. Although the employee had actual earnings, she remained totally disabled due to her accepted condition. The Board found in the *Colvert* case that the Office could not use her part-time position as a basis for determining her wage-earning capacity as it failed to investigate the nature of the position or develop the medical evidence as to her capacity for work. In the present case, the Office failed to develop the record as to the actual weight lifting and carrying requirements of the position to which appellant was returned and failed to develop the record as to appellant's capacity to perform the position of fire fighter. The Board notes that the policy that an appellant's actual earnings may fairly and reasonably represent his wage-earning capacity if he has such earnings for 60 days, can only be invoked "in the absence of contrary evidence." In the present case, the record contains medical evidence establishing that appellant was restricted from full duty by weight lifting and carrying limitations and other physical activity limitations.

[3] *See supra* note 2.

[4] 45 ECAB 575 (1994).

Appellant returned to full duty exceeding his physical capacity limitations. There is no medical evidence of record that the partially disabling residuals of appellant's employment-related back condition had resolved such that he could perform the full duties of the position of fire fighter.

Under these circumstances, the Board cannot find that the position of fire fighter fairly and reasonably represented appellant's wage-earning capacity.[5] Consequently, the decision of the Office dated August 24, 1995 will be reversed.

The Board further finds that the evidence of record establishes that appellant has no more than a six percent impairment of his left lower extremity, for which he received a schedule award.

The schedule award provision of the Act[6] and its implementing regulations[7] set forth the number of weeks of compensation to be paid for permanent loss, or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.[8] However, neither the Act nor its regulations specify the manner in which the percentage of loss of a member is to be determined. For consistent results and to ensure equal justice under the law to all claimants, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants seeking schedule awards. The A.M.A., *Guides* (fourth edition) have been adopted by the Office for evaluating schedule losses, and the Board has concurred in such adoption.[9]

The medical evidence appellant submitted in support of the claim applied the A.M.A., *Guides*, found a 5 percent left lower extremity impairment, but also found a 17 percent whole body impairment which included impairment of his back.

The schedule award provisions of the Act[10] and its implementing federal regulations[11] provide for payment of compensation for the permanent loss or loss of use of specified members, functions, and organs of the body. No schedule award is payable for a member, function, or organ of the body not specified in the Act or in the regulations.[12] Neither the Act nor the

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[5] *See supra* note 5; *see also Elizabeth E. Campbell*, 37 ECAB 224 (1985); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.813.12(a)(2)(January 1992): "In making this determination the will consider the factors set forth in 5 U.S.C. § 8115(a)."

[6] 5 U.S.C § 8101 *et seq.*; *see* 5 U.S.C. § 8107(c).

[7] 20 C.F.R. § 10.304.

[8] 5 U.S.C. § 8107(c)(19).

[9] *See i.e., Thomas D. Gauthier*, 34 ECAB 1060 (1983).

[10] 5 U.S.C. § 8107(a).

[11] 20 C.F.R. § 10.304.

[12] *William Edwin Muir*, 27 ECAB 579 (1976) (this principle applies equally to body members that are not enumerated in the schedule provision as it read before the 1974 amendment, and to organs that are not enumerated

regulations provide for the payment of a schedule award for the permanent loss of use of the back.[13] As such, appellant is not entitled to such an award.[14]

In *Gary L. Loser*,[15] the Board noted that there is no provision under the Act for providing schedule awards based on "whole man" estimates of physical impairment. As appellant's examining physician, Dr. Sammons, gave his impairment rating in terms of a whole body impairment, such a rating is not compensable under the Act.

Dr. Sammons provided a five percent impairment for appellant's left leg weakness and discomfort. The Office medical adviser reviewed Dr. Sammons' report and calculated, using the A.M.A., *Guides*, fourth edition, that appellant had a six percent impairment of his left lower extremity. The Office medical adviser noted that appellant had no muscle atrophy, no abnormal reflexes, and no motor weakness, but did have persistent left lower extremity pain and decreased sensation of the dorsum of the left foot, which were ratable. Using Table 83, page 130 and Table 20, page 151 of the A.M.A., *Guides*, the Office medical adviser calculated that maximum unilateral spinal nerve root impairment affecting the lower extremity due to pain or sensory deficit was 5 percent for L5 and 5 percent for S1, that classification for determining impairment due to pain or sensory deficit resulted in appellant being rated as Class 3, for a 26 to 60 percent impairment, and that 5 percent times 60 percent equaled 3 percent, which, when 3 percent for L5 and 3 percent for S1 were added, equaled a total 6 percent impairment of the left lower extremity. The Board finds the Office medical adviser's determination is as proper and in conformance with the A.M.A., *Guides.* There is no evidence of greater impairments.

The medical evidence appellant submitted from Dr. Sammons merely restated that the five percent impairment for the left lower extremity was based upon Table 83, but indicated that impairment of the S1 nerve root was not considered by him, as it had been by the Office medical adviser. Further, the medical evidence from Dr. Sammons did not follow the directions of the section on lumbar nerve root impairment, which indicates that the value from Table 83 should be multiplied by the percent from Table 11, Chapter 3.1k on classification to determine the percent of impairment.[16] Consequently, Dr. Sammon's impairment rating of five percent is incorrect as he omitted one involved nerve root and failed to follow the instructions of the A.M.A., *Guides*. Therefore, the Office medical adviser's opinion on impairment constitutes the weight of the medical evidence in establishing that appellant had a six percent impairment of his left lower extremity.

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in the regulations promulgated pursuant to the 1974 amendment); *see also Ted W. Dietderich*, 40 ECAB 963 (1989); *Thomas E. Stubbs*, 40 ECAB 647 (1989); *Thomas E. Montgomery*, 28 ECAB 294 (1977).

[13] The Act specifically excludes the back from the definition of "organ." 5 U.S.C. § 8101(19).

[14] *E.g., Timothy J. McGuire*, 34 ECAB 189 (1982).

[15] 38 ECAB 673, 679 (1987).

[16] Although the Office medical adviser used Table 20, p.151, instead of Table 11, p.48, to determine the percentage of impairment, the Board notes that these two Tables are the same in content, with Table 11 referring to an upper extremity and Table 20 referring to a lower extremity or other impairment.

The decision of the Office of Workers' Compensation Programs dated December 12, 1995 is hereby affirmed, and the decision of the Office dated August 24, 1995 is reversed.

Dated, Washington, D.C.
June 3, 1993

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member