U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THOMAS D. BRYAN and, DEPARTMENT OF TRANSPORTATION FEDERAL AVIATION ADMINISTRATION, West Mifflin, Pa.

Docket No. 96-2090; Submitted on the Record;
Issued November 24, 1998

DECISION and ORDER

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

The issues are: (1) whether appellant has met his burden of proof to establish that his emotional condition was causally related to the accepted January 26, 1990 employment-related injury; (2) whether the Office of Workers' Compensation Programs properly adjusted appellant's compensation to reflect his wage-earning capacity in the position of cashier; and (3) whether the Office used the correct rate of pay for appellant's wage-loss compensation.

Appellant submitted a claim for compensation pertaining to an injury sustained on January 26, 1990 which was accepted by the Office for cervical strain on July 14, 1990.[1] The Office later expanded appellant's accepted conditions to include bilateral carpal tunnel syndrome on August 30, 1994. Appellant was placed on the periodic rolls.

In a letter dated September 5, 1991, Barbara R. Baronis, Registered Nurse, opined that "the stress you are experiencing at this time due to your disability and continuing problems with compensation would definitely be helped by ongoing counseling."

By letter dated September 6, 1991, the Office advised appellant that he had the burden of proof to submit medical evidence supporting that any additional injury was due to his accepted employment injury.

On January 27, 1992 appellant filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that his stomach pain, erythema and esophagitis are due to medications he is taking for his accepted January 26, 1990 employment injury.

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[1] At the time of injury appellant was a grade 11, step 4 with an hourly salary of $13.88. Appellant also received an additional five percent for "operational responsibility differential." The Office on November 27, 1992 adjusted appellant's compensation checks to reflect this higher pay rate.

In a letter dated February 25, 1992, Dr. Barbara L. Rush, a psychologist, noted that appellant indicated "feelings of powerlessness in dealing with his injury and was very frustrated by what he perceived as the lack of assistance by the compensation system in developing a plan for his rehabilitation." Dr. Rush indicated that these "feelings can certainly compound the impact of an injury."

On August 25, 1992 appellant filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that his stomach pains were due to medication taken for his cervical strain.

On September 30, 1992 appellant filed a claim alleging that his stress-related depression was aggravated by financial and physical restrictions brought about by his employment injury.

By letter dated October 27, 1992, the Office advised appellant that medical evidence of record did not support any injury other than the accepted employment injury of cervical strain. The Office also informed appellant that no medical evidence had been received for the period beginning October 1, 1992.

In a letter dated August 31, 1994, the Office advised appellant that his compensation received every 28 days was $1,746.08 with a gross compensation of $1,788.00 less $41.92 for health benefits.

In a notice of proposed reduction of compensation dated September 1, 1994, the Office proposed to reduce appellant's compensation on the grounds that the medical and factual evidence of record established that appellant could work part time as a cashier at the hourly rate of $4.40.

By decision dated October 11, 1994, the Office finalized the proposed reduction of compensation and reduced appellant's weekly wage of $582.96 by $151.57, the weekly wage he could earn as a cashier. This resulted in a loss in wage-earning capacity of $431.39 and a new four weeks compensation rate of $1,323.00.

On October 18, 1994 appellant requested a written review of the record by an Office representative.

In a decision dated February 9, 1995, the Office hearing representative found the case not in posture for a decision, as the medical evidence of record did not demonstrate that appellant was capable of performing the cashier position. The hearing representative remanded the case to the Office to make a definitive determination as to appellant's current work capabilities. The hearing representative also found that the evidence did not establish that the position of cashier was available with appellant's commuting area at 40 hours per week.

By letter dated March 2, 1995, the Office, in accordance with the Office hearing representative's decision, enclosed a copy of the position description for cashier and asked Dr. Vydialinga Raghavan[2] for clarification on his opinion regarding appellant's work

[2] Dr. Raghavan had been selected as an impartial medical examiner to resolve the conflict in the medical opinion

capabilities. In a letter dated March 24, 1995, Dr. Raghavan reviewed the position description of cashier and opined that appellant was capable of performing the position and working eight hours in a sedentary job.

In a memorandum to file dated April 20, 1995, the Office indicated that it had tried to contact Dr. Raghavan several times as the physician had not provided the information requested by the Office. The Office recommended referring appellant to another physician to resolve the issues.

By letter dated May 9, 1995, the Office referred appellant, together with a statement of accepted facts, copies of all medical records and a position description for the position of cashier, to Dr. Guy Thompson Vise, a Board-certified orthopedic surgeon. In a report dated June 8, 1995, Dr. Vise noted on physical examination that appellant had full range of motion in his cervical spine. Dr. Vise diagnosed "Min. C.T." and "Resolved Cervical spine." Under discussion, Dr. Vise opined "that the patient is not impaired significantly to prevent work as a cashier."

By letter dated November 6, 1995, the Office enclosed a copy of the position description for cashier and asked Dr. Vise whether appellant was capable of performing this position.

In a letter dated January 19, 1996, Dr. Vise noted that in his prior report he opined "that the patient is not impaired significantly to prevent work as a cashier."

In a memorandum to file to rehabilitation, the Office requested whether the position of cashier was readily available in appellant's commuting area and the number of hours. The response indicated that there are many positions for cashier in the Louisville, Kentucky area for as many hours as appellant is cleared to work. The Office indicated that the area was Louisville, Mississippi and the response from rehabilitation was that positions were available in sufficient numbers for as many hours as appellant was cleared to work.

In a notice of proposed reduction of compensation dated February 8, 1996, the Office proposed to reduce appellant's compensation on the grounds that the medical and factual evidence of record established that appellant could work as a full-time cashier earning $176.00 per week. This resulted in a loss of wage-earning capacity of $454.71 and a new four weeks compensation rate of $1,429.84 using the principles enunciated in *Shadrick* for determining wage-earning capacity.[3]

By letter dated February 12, 1996, appellant disagreed with the Office's proposed reduction and submitted a report dated January 15, 1996 by Dr. David S. Malloy, appellant's treating Board-certified neurological surgeon, in support of his request as well as other evidence. Dr. Malloy diagnosed "chronic myofascial pain disorder secondary to old cervical injury.

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evidence between Dr. Robert Zaleski, appellant's treating physician, and Dr. W.B. Mitka, an Office referral physician.

[3] *Albert C. Shadrick*, 5 ECAB 376 (1953).

Bilateral carpal tunnel syndrome which is mild." Dr. Malloy opined that appellant was "clearly disabled for any activities involving lifting, bending, carrying, working above the head or any activities which require a lot of twisting of the neck or looking behind him."

In support of his contention that his pay was incorrectly computed, appellant submitted an undated paper indicating pay raises for Washington and other areas with locality pay and net increase indicated. The rate of $40,803.00 for a WG-11/4 is highlighted for the Washington, D.C. area.

By decision dated May 14, 1996, the Office finalized the proposed reduction of compensation and reduced appellant's compensation based on his ability to earn $176.00 a week as a cashier. Appellant's new four weeks compensation rate was $1,469.00. The Office also noted that appellant argued that his pay rate was incorrect, but found that appellant had not submitted any evidence in support of his argument.

The Board finds that appellant has failed to meet his burden of proof to establish that his emotional condition was causally related to the accepted January 26, 1990 employment-related injury.

Appellant has the burden of establishing by reliable, probative and substantial evidence that the condition for which he seeks compensation is causally related to his employment. As part of this burden he must present rationalized medical opinion evidence supporting an employment relationship, based on a specific and accurate history of employment incidents or conditions which are alleged to have caused or exacerbated the condition. The fact that the condition became apparent during a period of employment is not sufficient to establish the causal relationship, which must be established in each case by affirmative medical evidence.[4]

In the instant case, appellant has submitted reports from Dr. Rush, a psychologist, and Ms. Baronis, a nurse, in support of his claim that his stress and stomach problems are due to his accepted employment injury. To be of probative value the medical evidence must contain a reasoned opinion by a qualified physician, based on an accurate factual and medical background, that establishes an injury causally related to the employment incident.[5] The September 5, 1991 note from Ms. Baronis, a nurse, is of no probative value since she is not a physician under the Federal Employees' Compensation Act.[6] Since appellant has failed to submit sufficient medical evidence to establish his claim, he has failed to meet his burden of proof and his claim was properly denied. Dr. Rush's opinion is also of no probative value as she failed to provide an opinion with medical rationale explaining the causal relationship between appellant's stress and his accepted employment injury.

[4] *Brian E. Flescher*, 40 ECAB 532 (1989).

[5] *See Robert J. Krstyen*, 44 ECAB 227 (1992); *Joseph N. Fassi*, 42 ECAB 677 (1991).

[6] 5 U.S.C. § 8101(2); *Betty G. Myrick*, 35 ECAB 922 (1984).

As appellant has failed to submit any evidence addressing the issue of causal relationship with regard to his emotional condition, he has failed to meet his burden of proof to establish that his emotional condition was causally related to his January 26, 1990 employment injury.

The Board further finds that the Office properly adjusted appellant's compensation to reflect his wage-earning capacity in the position of cashier.

Wage-earning capacity is the measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[7] Section 8106(a)[8] of the Act provides for compensation for the loss of wage-earning capacity during an employee's disability by paying the difference between his monthly pay and his monthly wage-earning capacity after the beginning of the partial disability. Section 8115 of the Act provides that the wage-earning capacity of an employee is determined by his actual earnings if these fairly and reasonably represent his or her wage-earning capacity.[9]

If the actual earnings do not fairly and reasonably represent the employee's wage-earning capacity, or if the employee has no actual wages, wage-earning capacity is determined by considering the nature of the injury, the degree of physical impairment, the employee's usual employment, age and qualifications for other employment, the availability of suitable employment, and other factors and circumstances which may affect his wage-earning capacity in his disabled condition.[10] A job in the position selected for determining wage-earning capacity must be reasonably available in the general labor market in the commuting area in which the employee lives.[11]

The Office found that the selected position of cashier was reasonably available in the labor market within appellant's commuting distance.[12] Thus, the Office properly followed its procedures[13] in determining appellant's wage-earning capacity.[14] Accordingly, the Board finds that the Office has met its burden of justifying a reduction in appellant's compensation for total disability.

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[7] *Dennis D. Owen*, 44 ECAB 475, 479 (1993); *Hattie Drummond*, 39 ECAB 904, 907 (1988).

[8] 5 U.S.C. § 8106(a).

[9] 5 U.S.C. § 8115(a); *Lawrence D. Price*, 47 ECAB ___ (Docket No. 93-2007, issued October 4, 1995).

[10] *Mary Jo Colvert*, 45 ECAB 575, 579 (1994); *Samuel J. Chavez*, 44 ECAB 431, 436 (1993).

[11] *Barbara J. Hines*, 37 ECAB 445, 450 (1986).

[12] *See Dorothy Lams*, 47 ECAB ___ (Docket No. 94-1577, issued May 8, 1996) (finding that appellant failed to submit evidence specifically showing the unavailability of the selected position in his immediate labor market).

[13] The Office's procedures governing the determination of wage-earning capacity based upon a selected position are set forth in Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.814.8 (December 1993).

[14] *See Phillip S. Deering*, 47 ECAB ___ (Docket No. 94-2050, issued August 20, 1996) (finding that the Office properly applied the principles set forth in *Albert C. Shadrick*, *supra* note 3, for determining appellant's loss of wage-earning capacity).

The Board finds that the medical evidence establishes that appellant is capable of performing the duties of the selected position of cashier. Dr. Vise stated in his opinion that appellant was "not impaired significantly to prevent work as a cashier." Inasmuch as Dr. Vise approved the cashier position as medically acceptable and that appellant's physical restrictions were within the duties of the position, the Board finds that the Office properly determined that appellant had the physical capability to earn wages as a cashier.

The Board finds that the Office properly computed appellant's pay rate for payment of monetary compensation.

In the present case, appellant was injured on July 14, 1990 while employed in a WG-11/4 position. Appellant's compensation pay rate was calculated utilizing his WG-11/4 wages as well and later calculated to include an additional five percent for "operational responsibility differential." The Office adjusted appellant's compensation to reflect his wage-earning capacity as a cashier and adjusted his compensation accordingly. Appellant alleges that his compensation pay rate is improper as his compensation should be calculated upon the "current" earnings of the date-of-injury WG-11/4 position.

The terms of the Act[15] are specific as to the method and amount of payment of compensation; neither the Office nor the Board has the authority to enlarge the terms of the Act nor to make an award of benefits under any terms other than those specified in the statute.[16] The applicable provisions of the Act specify that compensation for disability shall be computed on the basis of the employee's monthly pay as defined in the Act.[17]

Appellant has not submitted any evidence supporting his contention that the Office incorrectly calculated his pay rate for his WG-11/4 position. Appellant has submitted an undated piece of paper indicating the pay rates for the various positions for the Washington, D.C. area and elsewhere in the United States. This is not sufficient to establish that the Office incorrectly calculated his pay rate. Appellant has not offered any other evidence supporting his allegation that the Office incorrectly calculated his pay rate. The Board finds that the Office had properly computed appellant's monthly pay based upon his WG-11/4 position.

[15] 5 U.S.C. § 8101 *et seq*.

[16] *Dempsey Jackson, Jr*., 40 ECAB 942 (1989).

[17] *Estelle J. Boimah*, 42 ECAB 871 (1991).

The decision of the Office of Workers' Compensation Programs dated May 14, 1996 is hereby affirmed.

Dated, Washington, D.C.
November 24, 1998

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member