

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FREDERICK D. HOUGH, JR. and DEPARTMENT OF THE INTERIOR,
BUREAU OF LAND MANAGEMENT

*Docket No. 97-1358; Submitted on the Record;
Issued July 2, 1999*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant established that he was totally disabled due to his accepted back injury from October 15, 1994 through September 19, 1995; and (2) whether the Office of Workers' Compensation Programs correctly determined that appellant's wages working for the State of Idaho fairly and reasonably represented his wage-earning capacity and properly reduced his compensation effective July 1, 1996.

The Office accepted that appellant sustained a herniated disc while in the performance of duty on September 27, 1992 and appellant received compensation for total temporary disability.

Appellant returned to limited duty as a modified forestry technician (materials handler) on May 2, 1994. The position required appellant to perform work on hard surfaces on areas that required standing, stooping, bending and stepping in uncomfortable positions. The position required work at a rapid pace for long periods of time. It required lifting and carrying exceeding 70 pounds.

By decision dated August 14, 1994, the Office reduced appellant's compensation effective May 2, 1994 based on his wages as a modified forestry technician (materials handler). The Office found that this position fairly and reasonably represented appellant's wage-earning capacity.

On September 30, 1994 appellant filed a notice of traumatic injury alleging that he injured his lower back in the course of his federal employment on September 28, 1994.

On October 4, 1994 Dr. John A. Ellis, appellant's treating physician and an osteopath, diagnosed a back strain and indicated that appellant should perform no lifting for a week.

On March 28, 1995 appellant called the Office and informed it that he would not be rehired. On April 6, 1995 the employing establishment indicated that appellant was selected to the position of range technician effective May 14, 1995 and ending September 30, 1995.

On April 13, 1995 Dr. Ellis reported that appellant's physical examination was essentially normal. Dr. Ellis, however, urged that appellant not return to his duties as a firefighter because "he would probably reinjure himself." He, therefore, opined that appellant was not capable of performing the job of a firefighter.

On April 18, 1995 the employing establishment indicated that its job offer failed to meet appellant's physical requirements and the offer was revoked.

By decision dated September 7, 1995, the Office indicated that the medical evidence failed to establish that appellant could no longer perform the limited-duty position he previously held. The Office indicated that the employing establishment's failure to rehire appellant was not considered a valid reason for modifying its August 12, 1994 loss of wage-earning capacity decision.

On September 18, 1995 Dr. Ellis diagnosed left sciatica, probable herniated disc versus pinched nerve/chronic and slowly worsening.

On September 19, 1995 Dr. Ellis restated his opinion given on April 13, 1995 that appellant should not be allowed to perform the strenuous duties of a firefighter. He stated that appellant would probably be unable to perform the duties of his modified job. He stated that appellant could not lift 50 to 100 pounds 2 hours per day, twist for 6 hours per day, stoop for 4 hours per day, or bend for 4 hours per day. He stated that appellant had deteriorated to the point where he needed a sedentary job without bending, twisting or lifting.

On October 9, 1995 Dr. Ellis opined that appellant's worsening back complaints were due to his injury on September 28, 1994 and the physical requirements of his limited-duty position. Dr. Ellis restated that appellant was physically unable to work in his modified position because of the physical activity and lifting involved.

On December 11, 1995 Dr. Michael D. Lahey, a Board-certified orthopedic surgeon, diagnosed degenerative lumbar disc disease L4-5, L5-S1 with bulging disc and mild stenosis L4-5. He stated that appellant was probably capable of doing light to sedentary work.

On February 14, 1996 Dr. Lahey stated that appellant had underlying degenerative disc disease and facet disease at two levels of the lumbar spine. He indicated that it was possible that there was borderline narrowing of the lumbar spine. He also stated that it was possible that a lumbosacral strain may have aggravated a preexisting injury. He assumed that these episodes occurred in 1992 and 1994. He indicated that appellant was probably capable of doing light to occasionally medium levels of activity.

On April 9, 1996 Dr. James R. Burton, a Board-certified orthopedic surgeon, indicated that appellant's injury on September 28, 1994 caused a permanent worsening of appellant's low back condition. He stated that he did not see evidence of deterioration, but only the natural progression of his underlying disc disease. He stated that a permanent aggravation of appellant's low back condition should be accepted as a result of his September 27, 1992 and September 28, 1994 injuries. He indicated that he did not have a description of appellant's job as a modified

materials handler. He stated that appellant should not do prolonged, frequent bending or lifting. He stated that appellant needed to be able to sit and stand as he pleased.

On July 8, 1996 appellant requested compensation for temporary total disability.

On July 11, 1996 Dr. Burton indicated that appellant had a permanent aggravation of his low back condition due to work-related injuries on September 27, 1992 and September 28, 1994. He stated that there has been a natural progression of appellant's underlying condition. He indicated that appellant could not return to the modified position of materials handler. In this regard, Dr. Burton stated that appellant must limit bending, twisting and lifting. He stated that appellant could intermittently bend 4 hours per day, twist 2 hours per day and lift 10 to 50 pounds 1 hour per day. He stated that appellant could not lift more than 50 pounds.

On August 20, 1996 Dr. Burton indicated that x-rays showing the collapse of the L5-S1 interspace indicated that appellant's condition had deteriorated.

On August 29, 1996 the Office determined that appellant's recurrence of back symptomology on September 28, 1994 was related to residuals of his September 27, 1992 injury.

In a letter dated August 30, 1996, the employing establishment indicated that appellant was terminated from his seasonal employment on October 15, 1994 due to lack of work or funds.

Appellant subsequently wrote a letter indicating that he began working for the State of Idaho with its Fish and Game Department at an hourly rate of \$6.90 on July 1, 1996. Appellant submitted a statement of earnings verifying the pay rate.

The employing establishment subsequently indicated that appellant's pay rate on July 1, 1996 for his previous employment was \$8.51 per hour.

By decision dated December 13, 1996, the Office determined that appellant was not disabled from October 16, 1994, the day after he was terminated from the seasonal employment he was performing, until September 19, 1995 when Dr. Ellis' medical opinion established that he was disabled. The Office, however, found that appellant was entitled to receive compensation for total disability from September 19, 1995 through June 30, 1996. Beginning July 1, 1996 the Office found that appellant was only entitled to compensation for temporary partial disability. The Office indicated that it would address appellant's loss of wage-earning capacity after July 1, 1996 in a separate decision.

In a separate decision dated December 13, 1996, the Office reduced appellant's compensation effective July 1, 1996 based on his wages, \$262.44 per week, with the State of Idaho. The Office found that this position fairly and reasonably represented appellant's wage-earning capacity.

The Board finds that appellant failed to establish that he was totally disabled due to his accepted back injury from October 15, 1994 through September 19, 1995.

On September 30, 1994 appellant filed a notice of traumatic injury alleging that he injured his lower back in the course of his employment on September 28, 1994. The Office determined that this injury was a recurrence of appellant's previously accepted September 27, 1992 injury in a letter dated August 29, 1996. Appellant's treating physician, Dr. Ellis had indicated on April 13, 1995 that appellant could not return to his previous duties because he would probably reinjure himself. The fear of the recurrence of a disability if appellant returns to work, however, does not constitute a basis for compensation.¹ Dr. Ellis' September 19, 1995 report is the first medical opinion establishing that appellant was disabled from his duties as a modified forestry technician (materials handler) after his September 28, 1994 injury. In that report, Dr. Ellis, an osteopath, indicated that appellant could not perform the duties of his modified position. He noted that appellant could not lift 50 to 100 pounds for more than 2 hours per day and that he could not perform bending or twisting. Because appellant's modified position included such physical requirements, Dr. Ellis' report established disability from September 19, 1995. The subsequent medical evidence submitted by Dr. Lahey, a Board-certified orthopedic surgeon and Dr. Burton, a Board-certified orthopedic, failed to establish any disability from his modified duties prior to September 19, 1995. In his reports dated December 11, 1995 and February 14, 1996, Dr. Lahey only indicated that appellant was probably capable of doing either light to sedentary work or light to occasionally medium levels of activity. Dr. Burton indicated that appellant was incapable of performing his modified duties in his report dated July 11, 1996, but he failed to indicate the date in which the disability ensued. Accordingly, the first medical evidence establishing disability is Dr. Ellis' September 19, 1995 report. The Office, therefore, properly refused to award compensation for total disability from the time appellant was terminated from his modified position until September 19, 1995, the date of Dr. Ellis' report.

The Board further finds that the position appellant obtained with the State of Idaho on July 1, 1996 fairly and reasonably represented his present wage-earning capacity.

In the present case, appellant had actual earnings with the State of Idaho beginning July 1, 1996. It was proper for the Office in its December 13, 1996 decision, to use appellant's actual earnings as the basis for his loss of wage-earning capacity, as there is no evidence that appellant's actual earnings did not fairly and reasonably represent his wage-earnings capacity effective July 1, 1996. This determination is consistent with Board precedent which provides that, generally, wages actually earned are the best measure of a wage-earning capacity and that in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, they must be accepted as such measure.²

¹ *Dominic M. DeScala*, 37 ECAB 369 (1986).

² *Floyd A. Gervais*, 40 ECAB 1045 (1989).

The decisions of the Office of Workers' Compensation Programs dated December 13, 1996 are affirmed.

Dated, Washington, D.C.
July 2, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member