U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CLIFFORD K. KLEIDON and DEPARTMENT OF THE NAVY, LONG BEACH NAVAL SHIPYARD, CA

Docket No. 97-1817; Submitted on the Record;
Issued February 14, 2000

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether appellant sustained a recurrence of disability beginning September 28, 1996 causally related to his employment injury; (2) whether the Office of Workers' Compensation Programs properly determined appellant's wage-earning capacity based on his actual earnings.

On October 2, 1987 appellant, a 37-year-old marine insulator, filed a claim for benefits alleging that he sustained a back condition while in the performance of duty. He stated that he became aware of this condition on September 3, 1987, the date he stopped working. Appellant subsequently missed work for intermittent periods, but never returned to regular duty at his preinjury position. He submitted a medical report dated November 23, 1987 from Dr. Harry L. Gibson, a Board-certified orthopedic surgeon, who stated that he had performed back surgery on appellant on September 18, 1987 to repair a herniated disc. Dr. Gibson stated:

> "I feel that he should not return to his former work. I think he could do a light[-]duty type of work at this time that did not entail repetitive bending. He could lift on occasion up to 30 pounds, but not on a regular basis, and I would avoid some of the twisting."

By decision dated March 24, 1988, the Office denied benefits, finding that appellant failed to submit medical evidence sufficient to establish that his claimed condition was causally related to his employment. By letter dated April 4, 1988, appellant requested reconsideration. By decision dated July 21, 1988, the Office set aside the March 24, 1988 decision and remanded for further development of the medical evidence.

In a report dated September 2, 1988, Dr. Andrew J. Shaffer, a Board-certified orthopedic surgeon, stated that appellant's diagnosed condition of acute herniated disc, L5-S1, was causally related to factors of his federal employment and opined that it would be unrealistic to allow him to return to his previous occupation. Dr. Shaffer advised that appellant should be restricted from

doing any heavy lifting, weight lifting greater than 20 pounds, and repetitive stooping and bending below the waist. Based on Dr. Shaffer's report, the Office accepted appellant's claim for herniated lumbar disc at L5-S1.

Appellant found modified work as a supply technician based on the restrictions outlined by Drs. Gibson and Shaffer. He commenced employment in this position on November 4, 1990, at an annual salary of $30,511.94.

Appellant filed a claim for benefits on June 16, 1993, alleging that he had again injured his back as a result of his work activities as a supply technician. The Office accepted this claim for acute lumbar strain, resolved April 27, 1993.

By memorandum dated July 30, 1996, the employing establishment issued a notice of reduction-in-force to appellant, advising him that he would be terminated, effective September 28, 1996, due to the closure of his division at the employing establishment.

On August 1, 1996 appellant filed a claim for recurrence of disability, alleging that, due to the impending reduction-in-force, he was entitled to compensation as of September 28, 1996, the date of his termination from the employing establishment, although he stated that his condition was fairly stable.

In support of his claim, appellant submitted an August 13, 1996 report from Dr. Gibson, who stated that x-rays indicated he had multiple levels of degenerative lumbar disc disease, with marked loss of disc spaces from L1 to the sacrum with osteophytic spur formation and definite signs of instability. Dr. Gibson diagnosed diffuse degenerative disc disease, with chronic back discomfort, and stated that appellant was complaining of constant stiffness in the back with discomfort that varied at times, depending on how much physical activity he performed, *e.g.*, repeated bending and stooping, which caused his pain to escalate to 9 on a scale of 0 to 10. He further stated:

> "[Appellant] should be doing no more than light work, with no repeated bending or lifting. He should certainly not lift anything over 30 to 40 pounds on a regular basis. He could conceivably do that on a very occasional one-time basis, without hurting himself.
>
> "He does not need medical care at this time, but it is conceivable that he will need this in the future."

Dr. Gibson concluded that appellant could return to work with the restrictions outlined above.

By decision dated September 24, 1996, the Office denied appellant's claim for recurrence of disability on the grounds that the evidence of record failed to establish that he had sustained a recurrence of disability on that date.

By decision dated September 24, 1996, the Office found that appellant's wage-earning capacity was represented by his actual earnings of $586.77 per week as a supply technician as of

November 4, 1990, and that he had no loss of wage-earning capacity due to his employment injury.

By letter dated January 15, 1997, appellant requested reconsideration of both September 24, 1996 Office decisions. In support of his claim, appellant submitted an October 10, 1996 report from Dr. Gibson, who stated:

> "When I evaluated appellant on August 13, 1996, it was apparent to me that there had been a gradual increase in [appellant's] disability from a diffuse degenerative disc disease. His original injury was a herniated lumbar disc, but he had also had a start of degenerative disc disease which the herniated disc was part of that complex. Even though ... he has been on modified work, he has gradually deteriorated and he has shown more objective evidence of disability regarding his lumbar spine. At this point, I would have to restrict him only to light work or semi-sedentary work as designed by the [w]orkers' [c]ompensation [c]ode. He might be able to do light-duty work without repetitive bending and lifting of any kind and be able to shift position from stand to sit. (sic) It appears that he has progressed and he is worse now than he was in 1990. I think that, since his job can no longer be accommodated to the restrictions, [appellant] will have to be considered as a [q]ualified [i]njured [w]orker and go to vocational rehabilitation with the restrictions as outlined above."

By decision dated January 24, 1997, the Office denied modification of the September 24, 1996 decisions.

The Board finds that appellant did not sustain a recurrence of disability commencing September 28, 1996 causally related to his employment injury.

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that she can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.[1]

In the instant case, the record does not contain any medical opinion showing a change in the nature and extent of appellant's injury-related condition. Indeed, appellant has failed to submit any medical opinion containing a rationalized, probative report which relates his condition or disability as of September 28, 1996 to his employment injury. For this reason, he 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.

[1] *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

The only medical evidence which appellant submitted consisted of the August 13, 1996 and October 10, 1996 reports from Dr. Gibson. In his August 13, 1996 report, Dr. Gibson stated that appellant had diffuse degenerative disc disease, with chronic back discomfort and signs of instability. He indicated that the discomfort in appellant's back would vary in accordance with the amount of repetitive bending and stooping he did at work, which caused his pain to escalate to severe levels. However, the Office never accepted a claim for degenerative disc disease, and Dr. Gibson had already restricted him from repetitive bending and lifting in his November 23, 1987 report. Appellant accepted reemployment in a modified supply technician job on November 4, 1990 based on the restrictions in the November 23, 1987 report, and on those outlined by Dr. Shaffer in his 1990 report, and performed this job for almost six years without no apparent difficulties until being terminated due to a reduction-in-force on September 28, 1996. In fact, Dr. Gibson stated in his August 13, 1996 opinion that appellant did not require medical care at that time, and could return to work with the restrictions outlined above. Thus, as Dr. Gibson's August 13, 1996 report did not provide a rationalized, probative medical opinion that appellant's condition and disability as of September 28, 1996 was causally related to his employment injury, the Office properly denied his claim for recurrence of disability.

Following the September 24, 1996 denial of compensation, appellant submitted an October 10, 1996 report from Dr. Gibson. He discussed an August 13, 1996 examination of appellant and noted a gradual increase in disability due to a diffuse degenerative disc disease. Dr. Gibson stated that, although appellant's original injury was a herniated lumbar disc, he had also noted the start of degenerative disc disease as part of the same injury complex. He indicated that, while appellant had been on modified work, his condition had gradually deteriorated and he had shown more objective evidence of disability regarding his lumbar spine. Dr. Gibson therefore concluded that he had to restrict him to only light or semi-sedentary work, where he might be able to do light-duty work without repetitive bending and lifting of any kind, as long as he were allowed to shift from standing to sitting positions. This report, however, does not significantly broaden the restrictions Dr. Gibson originally outlined for appellant in November 1987, as it allowed appellant to perform light work as long as he was restricted from repetitive bending and lifting; thus, the October 10, 1996 report does not support that appellant became totally disabled commencing on September 28, 1996 due to residuals of his accepted conditions.

Dr. Gibson's reports do not constitute sufficient medical evidence demonstrating a causal connection between appellant's employment injury and his alleged current back condition and disability. Causal relationship must be established by rationalized medical opinion evidence. Dr. Gibson's opinion on causal relationship is of limited probative value in that he did not provide adequate medical rationale in support of his conclusions.[2] His 1996 reports were inconsistent, as he did not explain why he stated in his October 10, 1996 report that it was apparent at the time of his August 1996 examination that appellant's condition was worsening due to degenerative disc disease, which was part of the original injury complex and herniated lumbar disc from 1987, when he had stated two months previously in his August 13, 1996 report that appellant did not require medical care at that time, and could return to work with the same restrictions. Thus, Dr. Gibson's opinion did not establish a worsening of appellant's condition,

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

and was therefore not a probative, rationalized opinion demonstrating that a change occurred in the nature and extent of the injury-related condition.

In addition, the Board finds that the evidence fails to establish that there was a change in the nature and extent of appellant's limited-duty assignment such that he no longer was physically able to perform the requirements of his light-duty job as a supply technician. The record demonstrates that appellant was separated from his supply technician position as part of division-wide reduction-in-force, in conjunction with the closure of his division at the shipyard. Accordingly, as appellant has not submitted any factual or medical evidence supporting his claim that he was totally disabled from performing his light-duty assignment as of July 29, 1996 as a result of his employment, appellant failed to meet his burden of proof.

As there is no medical evidence addressing and explaining why the claimed condition and disability as of September 28, 1996 was caused or aggravated by his employment injury, appellant has not met his burden of proof in establishing that he sustained a recurrence of disability. The Board therefore affirms the Office's decision denying benefits based on a recurrence of his work-related disability.

The Board finds that the Office improperly computed appellant's loss of wage-earning capacity based on his actual earnings.

Where an employee sustains an injury-related impairment that prohibits the employee from returning to the employment held at the time of injury, or from earning equivalent wages, but that does not render the employee totally disabled for all gainful employment, the employee is considered partially disabled and is entitled to compensation for his loss of wage- earning capacity as provided for under section 8115 of the Federal Employees' Compensation Act.[3] Thus, if an employee is not totally disabled for all gainful employment, the threshold question which must be addressed before a loss of wage-earning capacity determination is required is whether appellant is prohibited by her injury from returning to his employment held at the time of injury or from earning equivalent wages.

In this case, appellant was ultimately prohibited by residuals of his accepted injury from returning to the position he held at the time of his September 3, 1987 employment injury. However, appellant's condition improved such that he was able to accept on November 4, 1990 a supply technician position at the employing establishment in a modified, light-duty capacity until September 28, 1996, when the employing establishment terminated him due to a reduction-in-force.

The Board initially discussed the necessity for payment of compensation where an employee has sustained a loss of wage-earning capacity, but has actual earnings, in the case of *Albert C. Shadrick*.[4] *Shadrick* provides that appellant's wage-earning capacity shall be determined by actual earnings, if such actual earnings fairly and reasonably represent appellant's wage-earning capacity. The formula for determining loss of wage-earning capacity based on

[3] 5 U.S.C. § 8115.

[4] 5 ECAB 376 (1953).

actual earnings, developed in the *Shadrick* decision, has been codified by regulation at 20 C.F.R. § 10.303. Section (a) of this regulation recognizes the basic premise that an injured employee who is unable to return to the position held at the time of injury (or to earn equivalent wages) but who is not totally disabled for all gainful employment is entitled to compensation computed on loss of wage-earning capacity.[5]

Section (b) of this regulation provides the formula to be utilized by the Office for computing compensation payable for partial disability.[6] First, the Office must determine appellant's "wage-earning capacity in terms of percentage" by dividing his earnings by the current, or updated, pay rate for the position he held at the time of injury. Next, the Office must proceed with a consideration of appellant's "wage-earning capacity in terms of dollars" by applying section 8101(4) of the Act to determine his "pay rate for compensation purposes." This requires a comparison of the highest pay rate by comparing the rate as of the date of injury, the date disability begins or the date of recurrence if more than six months after returning to work.[7] Finally, the Office must compute appellant's "wage-earning capacity in terms of dollars" by multiplying the pay rate for compensation purposes by the percentage of wage-earning capacity. This figure must be subtracted from the pay rate for compensation purposes to obtain the employee's loss of wage-earning capacity. The Office must then determine whether appellant has any dependents; if he does, he is entitled to three-fourths of the total amount. If appellant has no dependents, he is entitled to two-thirds of the total amount.[8]

The Board finds that the Office improperly computed appellant's compensation based on his loss of wage-earning capacity as of September 28, 1996, as it failed to determine appellant's loss of wage-earning capacity based on the procedure outlined above. In the instant case, the Office found that, as of September 3, 1987, the date he was initially disabled by his work-related herniated disc, appellant earned $12.85 per hour, or $514.00 per week. The Office stated that because the annual salary of the supply technician position, at the time appellant commenced reemployment wages on November 4, 1990, was $30,511.94 or $586.77 per week, appellant had sustained no loss of wage-earning capacity. Thus, the Office found that appellant's actual wages fairly and reasonably represented his wage-earning capacity. The Office did not, however, indicate what the updated pay rate was for appellant's September 3, 1987 position before comparing it to his salary as of November 4, 1990. The Office, therefore, in determining appellant's wage-earning capacity based on actual wages, failed to determine appellant's wage-earning capacity in accordance with the procedure outlined in 20 C.F.R. § 10.303(b). Accordingly, the Office's September 24, 1996 wage-earning capacity determination is set aside and remanded for a determination consistent with 20 C.F.R. § 10.303(b).

[5] 20 C.F.R. § 10.303(a).

[6] 20 C.F.R. § 10.303(b).

[7] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computation of Compensation*, Chapter 2.900.4 (April 1995); *see also Fernando O. Valles*, 44 ECAB 776 (1993).

[8] *See* 5 U.S.C. § 8106.

Accordingly, the September 24, 1996 decision of the Office of Workers' Compensation Programs denying compensation is affirmed. The September 24, 1996 decision of the Office determining appellant's wage-earning capacity is set aside and remanded for redetermination of appellant's wage-earning capacity in accordance with the above decision.

Dated, Washington, D.C.
February 14, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member