U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL S. MURRAY and DEPARTMENT OF VETERANS AFFAIRS, MEDICAL CENTER, Fort Lyon, CO

Docket No. 98-653; Submitted on the Record;
Issued February 16, 2000

DECISION and ORDER

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

The issues are: (1) whether appellant has established that he sustained a recurrence of disability on or after December 5, 1996 causally related to a May 10, 1993 employment injury; (2) whether the Office of Workers' Compensation Programs properly determined that appellant had no loss of wage-earning capacity as a result of his May 10, 1993 employment injury; (3) whether the Office properly determined that an overpayment of $15,703.56 was created; (4) whether the Office properly determined that appellant was at fault in the creation of the overpayment; and (5) whether the Office properly denied appellant's request for a hearing on his overpayment.

This case has previously been before the Board. In a decision dated January 31, 1996, the Board found that the case was not in posture for decision on the issue of whether appellant had sustained an injury in the performance of duty on May 4, 1993[1] as alleged.[2] The Board set aside the decisions of the Office dated July 9 and August 27, 1993 and remanded the case for further action. The facts of the case, as set forth in the Board's January 31, 1996 decision, are incorporated by reference.

In a memorandum for file, the Office determined appellant's weekly pay rate to be $407.60 and checked "b. [i]ntermittent – [h]ours 48." The Office, in a CPS daily roll payment form noted that appellant had an annual salary of $22,000.00 and a weekly pay rate of $407.60.

In a notification of personnel action dated January 17, 1995, appellant's basic pay and adjusted base pay as a motor vehicle operator was listed as $10.95 with 0 listed under locality adjustment and other pay. Appellant was a Grade 7, step 3. On the form, it was indicated that

---

[1] This claim was assigned claim number A12-138497 and developed separately from appellant's claim for an injury sustained on May 10, 1993. The injury sustained on May 10, 1993 was assigned claim number A12-138187.

[2] Docket No. 94-705 (issued January 31, 1996).

appellant was entitled to pay retention as he was returning to a position at a lower grade than the position he held at the time of his injury due to medical restrictions.

By letter dated December 30, 1993, the Office advised appellant that the weekly amount used to compute his gross computation was $407.60.

In a report of a telephone call, the Office noted that due to a reduction-in-force effective May 15, 1996, appellant was bumped down to a library technician.

In a letter dated April 16, 1996, the Office noted that appellant was reemployed as a recreation aide at the employing establishment at $438.00 per week effective January 17, 1996. In the computation of wage-earning capacity, the Office noted appellant's weekly pay rate as $407.60 with the adjusted earning capacity in the position. The Office determined that this position fairly and reasonably represented his wage-earning capacity.

In a memorandum dated April 1996, the employing establishment informed the Office that appellant had been reassigned due to a reduction-in-force and attached his physician's approval for the position.

By letter dated May 15, 1996, the employing establishment issued a notice of reassignment by reduction-in-force to appellant and offered him the position of library technician GS-4. The employing establishment noted that the position of recreation assistant, GS-4 was used in determining his retention rights.

In an April 30, 1996 letter, the Office informed appellant that it had made a preliminary determination that he had received a $15,703.56 overpayment because he returned to work on January 17, 1995, with no loss of wages, yet continued to receive and accept compensation for temporary total disability from January 17, 1995 through March 6, 1996. The Office further found that appellant was at fault in the matter of the overpayment. The Office informed appellant that he had the right to submit any evidence or arguments if he disagreed that the overpayment had occurred, disagreed with the amount of the overpayment, believed the overpayment occurred through no fault of appellant's, or believed that recovery should be waived. The Office also informed appellant that he had a right to a prerecoupment hearing before an Office hearing representative.

In a letter dated May 14, 1996, appellant disagreed with the Office's April 16, 1996 wage-earning decision and requested a hearing before an Office hearing representative.

Appellant filed claims for a recurrence of disability on December 15 and 19, 1996 alleging that on December 5, 1996 he incurred a recurrence of disability causally related to his accepted May 10, 1993 employment injury.

In a handwritten letter, Dr. Alan G. Herrington, an orthopedic surgeon, noted that he treated appellant on December 27, 1996 and that appellant stated that he had injured himself on December 5, 1996. He indicated that appellant believed that injury on December 5, 1996 was an aggravation of his May 4, 1993 employment injury. Dr. Herrington recommended appellant

wear a brace and stated that he considered appellant's December 5, 1996 injury to be a recurrence and exacerbation of his May 4, 1993 employment injury.

In a letter dated January 21, 1997, the Office informed appellant that the evidence of record was insufficient to establish a recurrence of disability and advised appellant that if he was in a light-duty position he needed to submit evidence that the light-duty position changed such that it no longer met the restrictions by his physician.

By decision dated March 28, 1997, the Office denied appellant's claim for a recurrence of disability causally related to his accepted May 10, 1993 employment injury.

In a letter dated April 8, 1997, appellant requested an oral hearing before an Office hearing representative on the denial of his claim for a recurrence of disability.

A hearing was held on May 16, 1997 at which appellant was represented by counsel and allowed to testify.

In a June 5, 1997 report, Dr. Herrington noted that appellant had a "recurrence of discomfort in December 1996." He stated that he treated appellant for a recurrence of sciatic discomfort and that appellant had a kidney stone and other problems at the time. Based upon a magnetic resonance imaging scan, Dr. Herrington diagnosed a "moderate sized [herniated] nucleus pulposus [HNP] extending centrally into the right at the L5-S1 level with a slight disk bulge at [L]4-5" and that this was the source of appellant's discomfort. Lastly, he recommended that appellant see Dr. Dexter Koons, a neurosurgeon, for his recurrent disk problem on the right at L5-S1.

By decision dated August 5, 1997, the hearing representative affirmed the Office decisions dated April 16, 1996 and March 28, 1997. In the attached memorandum, the hearing representative rejected appellant's argument that the position of recreation aid did not fairly and accurately represent his wage-earning capacity. The hearing representative found that while appellant might have lost the opportunity to earn holiday pay, per diem pay and overtime due to his working as a recreation aid instead of a motor vehicle operator, those earnings were not considered in the computation of compensation. Regarding appellant's claim of a recurrence of disability, the hearing representative noted that appellant had not submitted medical evidence establishing that he could not perform his light-duty position. The hearing representative found the report of Dr. Herrington insufficient to meet appellant's burden of establishing a causal relationship between his current disability and his accepted employment injury as he gave no opinion as to the cause of appellant's disability.

By final overpayment decision dated September 10, 1997, the Office found that an overpayment had occurred in the amount of $15,703.56, as appellant returned to light-duty work and was still receiving compensation. The Office found that appellant was at fault in the creation of the overpayment as the Office had advised appellant in writing to report any return to work and return any further checks. In the attached memorandum to file, the Office noted that appellant never responded to the preliminary finding so that the finding of fault was now final. The Office advised appellant that he had the right to appeal to the Board.

By letter dated September 17, 1997, appellant requested a hearing on the overpayment.

By letter dated September 23, 1997, appellant's representative requested a hearing before an Office hearing representative on appellant's overpayment.

By letter decision dated November 13, 1997, the Office denied appellant's request for an oral hearing regarding the September 10, 1997 final determination of overpayment.

The Board finds that appellant has not met his burden of proof in establishing that he sustained a recurrence of total disability on or after December 5, 1996 causally related to his accepted May 10, 1993 employment injury.

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee 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 to show that he or 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.[3]

In the present case, the record indicates that appellant had worked for approximately two years in a light-duty position when he claimed a recurrence of total disability commencing December 5, 1996 causally related to his May 10, 1993 employment injury. As noted above, it is appellant's burden to show a change in the nature and extent of his injury-related condition.[4] A December 27, 1995 report from Dr. Herrington indicated that appellant exhibited findings of recurrent sciatic discomfort. He diagnosed a moderately-sized HNP at L5-S1 and recommended that appellant see Dr. Koons to see if further surgery is required. Dr. Herrington did not attempt to explain how appellant's condition had changed such that he was now totally disabled. Moreover, the condition which causes total disability must be "injury related" in order to be compensable. In this case, that would require evidence establishing that appellant's recurrent sciatic discomfort was causally related to the May 10, 1993 employment injury. The Board finds that the medical evidence is not sufficient to meet appellant's burden of proof in this case as there is no medical evidence regarding appellant's ability to perform his light-duty position or that he was unable to work due to his accepted employment injury.[5]

Next, the Board finds that the Office properly determined that appellant had no loss of wage-earning capacity as a result of his May 10, 1993 employment injury.

---

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

[4] The Office adjusted appellant's compensation to reflect his wage-earning capacity in his modified distribution clerk position. To the extent that appellant seeks to modify the wage-earning capacity determination, it remains his burden to establish that modification is warranted; *see Jack E. Rohrabaugh*, 38 ECAB 186 (1986).

[5] Subsequent to the hearing representative's August 5, 1997 decision, appellant submitted additional evidence. The Board cannot consider new evidence on appeal, however, appellant can submit new evidence to the Office and request reconsideration, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.138(b); *see* 20 C.F.R. § 501.2(c).

In the present case, appellant sustained a back injury in the performance of his federal duties on May 10, 1993. Due to appellant's physical restrictions caused by this injury, appellant was transferred from a WG-7, step 3 motor vehicle operator position in January 1995 to a GS-4 recreation aid retained pay position. Due to a reduction-in-force, appellant was reassigned to a GS-4 library aid retained pay position

The Federal Employees' Compensation Act[6] provides for payment of loss of wage-earning capacity as follows:

> "If the disability is partial, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of the difference between his monthly pay and his monthly wage-earning capacity after the beginning of the partial disability, which is known as his basic compensation for partial disability."

Regulations implementing the Act further provide 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."[7]

An employee who is partially disabled as a result of an employment injury is therefore entitled to a loss of wage-earning determination if he has met the threshold requirement of establishing that he is unable to return to his former employment or to earn equivalent wages. In the present case, appellant was transferred from his date-of-injury position to the retained pay position and appellant earned more in the retained pay position then he earned in his date-of-injury position.

Appellant has alleged that he had a loss of wage-earning capacity because the current position does not include holiday pay, overtime pay and per diem pay such that he earned less than he would have currently earned in the date-of-injury position. The Office may in determining loss of wage-earning capacity, however, select any time for the comparison of

[6] 5 U.S.C. § 8106(a).

[7] 20 C.F.R. § 10.303(a).

earnings and "current" pay rate for the date-of-injury position. The applicable regulation which details the formula to be used by the Office in determining loss of wage-earning capacity provides as follows:

> "[A]n employees' wage-earning capacity in terms of percentage is obtained by dividing the employee's earnings by the current pay rate. The comparison of earnings and current pay rate for the job held at the time of injury need not be made as of the beginning of partial disability. Any convenient date may be chosen by the Office for making the comparison as long as the two wage rates are in effect on the date used for comparison."[8]

As the Office is able to choose "any convenient date" to evaluate loss of wage-earning capacity, the Office may within its discretion choose a date when appellant was in retained pay. While appellant was in retained pay he had no loss of wage-earning capacity.[9]

The Board finds that the Office properly determined that appellant had no loss of wage-earning capacity while he was in retained pay because appellant had been earning greater earnings than his date-of-injury position. Although appellant alleges that he has incurred a loss of wage-earning capacity as he is unable to earn holiday pay, overtime and per diem pay, he has not submitted any evidence to support that he earned holiday pay, overtime or per diem pay while employed as a motor vehicle operator. Furthermore, the Act excludes overtime and per diem pay from the calculation of the pay rate.[10] Appellant has therefore not established that the calculation of his wage-earning capacity was erroneous.

The Board further finds that, the Office properly determined that appellant received an overpayment of compensation in the amount of $15,703.56 for the period from January 17, 1995 through March 2, 1996. The record shows that appellant continued to receive compensation even though he had returned to a light-duty position.

The Board further finds that, the Office properly determined that appellant was at fault in the creation of an overpayment of $15,703.56 for the period January 17, 1995 to March 2, 1996, based on his acceptance of compensation checks for total disability which he knew or should have known were incorrect.

[8] 20 C.F.R. § 10.303(b).

[9] *Domenick Pezzetti*, 45 ECAB 787 (1994).

[10] 5 U.S.C. § 8114(e).

In determining whether an individual is with fault, section 10.320(b) of the Office's regulations provide in relevant part:

"An individual is without fault in creation of an overpayment who:

> (1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or
>
> (2) Failed to furnish information which the individual knew or should have known to be material; or
>
> (3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect."[11]

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment. In order for the Office to establish that appellant was at fault in creating the overpayment of compensation, the Office must establish that at the time appellant received the compensation checks in question, he knew or should have known that the payment was incorrect.[12]

In the present case, the evidence of record establishes that appellant returned to light-duty work on January 17, 1996 with no loss of wages. However, following his return to work, appellant continued to receive and accepted compensation checks. Under these circumstances, the Board finds that appellant accepted payment of compensation to which he was not entitled and knew or should have known were incorrect. For this reason the Office properly found appellant at fault in the creation of the overpayment of compensation and it is not subject to waiver.

Lastly, the Board finds that the Office properly denied appellant's request for a hearing on the September 10, 1997 final overpayment decision, as he was not entitled to such a hearing under section 20 C.F.R. § 10.321(h) of the Act's implementing regulations.

In this case, the Office issued a final overpayment decision on September 10, 1997 finding that an overpayment of $15,703.56 had occurred and that appellant was at fault in its creation. Prior to issuing the September 10, 1997 decision, the Office issued a preliminary determination of overpayment on April 30, 1996, which afforded appellant the opportunity to submit evidence supporting his contention that he was not at fault in the creation of the

[11] 20 C.F.R. § 10.320(b).

[12] The Office's regulations further provide that whether an individual is "without fault" depends on all the circumstances surrounding the overpayment in the particular case. The Office must consider factors such as the individual's understanding of any reporting requirements and his or her understanding and knowledge of events that effect the payment of compensation, as well as such factors as the individual's age, comprehension, memory, physical and mental condition, and "degree of care." The degree of care expected of an individual may vary with the complexity of the circumstances giving rise to the overpayment and the capacity of the particular payee to realize that he or she is being overpaid; *see* 20 C.F.R. § 10.320(c).

overpayment. The record reveals that the Office followed the proper procedural steps to ensure that appellant was given the opportunity to establish either that he did not receive an overpayment of compensation, or that he was without fault. However, appellant did not submit persuasive evidence demonstrating either that no overpayment existed or that he was without fault in the creation of the overpayment.

Appellant thereafter requested an oral hearing in letters dated September 17 and 23, 1997. By letter decision dated November 13, 1997, the Office found that appellant was not entitled to a hearing, because a final overpayment decision is not subject to the hearing provision of section 5 U.S.C. § 8124(b) of the Act under section 20 C.F.R. § 10.321(h) of the Office's regulations.

Section 5 U.S.C. § 8124(b)(1) of the Act provides that a claimant "not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim." However, section 10.321(h)[13] of the Office's regulations provides that "[t]he final decision concerning an overpayment, whether rendered subsequent to a prerecoupment hearing or in the absence of the submission of additional written evidence, is not subject to the hearing provision of 5 U.S.C. § 8124(b)."

Therefore, the Office properly denied appellant's request for a hearing on the final overpayment decision, as appellant is not entitled to a hearing on the final overpayment decision under section 10.321(h) of the Office's regulations.

The decisions of the Office of Workers' Compensation Programs dated November 13, September 10, August 5 and March 28, 1997 are hereby affirmed.

Dated, Washington, D.C.
February 16, 2000

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[13] 20 C.F.R. § 10.321(h).