U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THOMAS M. SCHUERMAN and U.S. POSTAL SERVICE,
POST OFFICE, Bloomington, IL

Docket No. 98-1797; Oral Argument Held September 21, 1999;
Issued February 24, 2000

Appearances: *Thomas Schuerman, pro se*; *Miriam D. Ozur, Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly determined appellant's pay rate for compensation purposes effective October 11, 1996.

On November 8, 1972 appellant, then a 20-year-old substitute clerk, filed a claim for a traumatic injury occurring on October 28, 1972 in the performance of duty. The Office accepted appellant's claim for back strain and a ruptured nucleus pulposus at the L4-5 interspace on the left side. The Office paid appellant compensation for temporary total disability beginning January 27, 1973.

By letter dated June 5, 1975, the Office informed appellant that he might benefit from vocational rehabilitation. On June 18, 1975 an Office rehabilitation specialist noted that appellant had been attending college since July 23, 1974. In June 1975 the Office approved a vocational training plan authorizing appellant to attend college in pursuit of his degree. The Office further approved appellant's education at Illinois State University from January 1980 to December 1981 in pursuit of a Bachelor of Science degree in Education. On June 29, 1982 an Office rehabilitation specialist closed appellant's rehabilitation file after finding that he was employed as a teacher in the public school system.

By decision dated June 25, 1982, the Office reduced appellant's compensation on the grounds that his actual earnings as a teacher fairly and reasonably represented his wage-earning capacity effective January 11, 1982.

By letter dated May 20, 1996, the employing establishment requested modification of appellant's wage-earning capacity on the grounds that appellant was making more money than he would have, had he remained in his date-of-injury position.

In a notice dated August 23, 1996, the Office informed appellant that it proposed to reduce his compensation to zero as he had no loss of wage-earning capacity.

By letter dated September 18, 1996, appellant notified the Office that he was no longer employed. Appellant submitted a medical report dated September 17, 1996 from Dr. John L. Wright, who opined that appellant was totally disabled due to his October 28, 1972 employment injury.

In a letter received by the Office on October 8, 1996, a personnel specialist with the school district which had employed appellant indicated that he had resigned his position on September 13, 1996 and would continue to receive paid sick leave until October 11, 1996.

In a letter dated November 15, 1996, the Office accepted that appellant sustained a recurrence of disability and paid him compensation for total disability beginning October 11, 1996.[1]

By decision dated February 21, 1997, the Office determined that appellant's compensation should be based on his pay rate at the time his disability began, January 23, 1973.

In a letter dated February 6, 1997, appellant requested a hearing before an Office hearing representative. At the hearing held on December 18, 1997, appellant argued that the pay rate for purposes of compensation should be the date of his recurrence of disability rather than the date of his initial onset of disability.

By decision dated March 9, 1998 and finalized March 11, 1998, the hearing representative affirmed the Office's February 21, 1997 decision.

The Board finds that the Office properly determined appellant's pay rate for compensation purposes effective October 11, 1996.

In the present case, appellant received compensation for temporary total disability beginning January 27, 1973 due to a traumatic injury on October 28, 1972. Appellant did not return to employment. In July 1974 appellant began attending college. In July 1975 the Office authorized appellant's college attendance as part of a vocational rehabilitation plan. Appellant received a degree in education and in 1982 began working as a teacher. The Office, in a decision dated June 25, 1982, reduced appellant's compensation based on its finding that his actual earnings as a teacher fairly and reasonably represented his wage-earning capacity effective January 11, 1982. Appellant worked as a teacher until he resigned on September 13, 1996 and claimed that he had sustained a recurrence of disability. The Office began paying appellant compensation for total disability effective October 11, 1996. The Office determined appellant's compensation should be based on his monthly pay at the time his compensable disability began on January 27, 1973.

[1] On January 30, 1997, the Office referred appellant to Dr. Daniel Phillips, a Board-certified neurologist, for a second opinion evaluation. In a report dated February 11, 1997, Dr. Phillips found that appellant could work for eight hours per day as a teacher.

Section 8105(a) of the Federal Employees' Compensation Act provides: "If the disability is total, the United States shall pay the employee during the disability monthly compensation equal to 66 2/3 percent of his monthly pay, which is known as his basic compensation for total disability."[2]

Section 8101(4) of the Act defines "monthly pay" as "the monthly pay at the time of injury, or the monthly pay at the time disability begins, or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater…."[3]

Appellant contended that the third alternative provided in section 8101(4), the recurrent pay rate, is applicable in his case for computing his compensation beginning October 11, 1996. Appellant argued that attending college as part of an Office vocational rehabilitation plan was the equivalent of returning to "regular full-time employment with the United States." Appellant maintained that he met the Board's definition of a return to regular full-time employment under *Johnny A. Muro*,[4] as his vocational rehabilitation was full time and established, *i.e.*, not odd-lot or sheltered. In support of his contention, appellant further cited FECA Program Memoranda Nos. 107, 228 and 254, which provide that an appellant undergoing vocational rehabilitation is considered in the performance of duty for the receipt of compensation.[5] The Board has held that an individual participating in vocational rehabilitation is considered in the performance of duty for purposes of the receipt of compensation benefits if he or she sustains an injury while undergoing vocational rehabilitation or traveling to and from the rehabilitation.[6] The rationale for including such individuals is that the vocational rehabilitation is an activity undertaken by the individual solely due to his or her employment injury. However, the issue of whether an individual is considered in the performance of duty for the purposes of coverage for injuries sustained in pursuit of vocational rehabilitation is different than the issue of whether an individual has resumed regular full-time employment with the United States.

[2] 5 U.S.C. § 8105(a); *see id* § 8110(b) (a disabled employee with one or more dependents is entitled to have his basic compensation for disability augmented at the rate of 8 1/3 percent of his monthly pay if that compensation is payable under section 8105 or 8107(a)).

[3] 5 U.S.C. § 8101(4).

[4] 17 ECAB 537 (1966).

[5] FECA Program Memorandum No. 107 (issued November 13, 1969); FECA Program Memorandum No. 228 (issued October 7, 1977); FECA Program Memorandum No. 254 (issued June 4, 1979).

[6] *See Elvira B. Lightner (Donald F. Lightner)*, 39 ECAB 118 (1987).

In *Eltore Chinchillo*,[7] the Board addressed the issue of what constituted a return to "regular" full-time employment under section 8101(4) of the Act. In *Chinchillo*, the Board remanded the case to the Office for further development on the issue of whether appellant returned to "regular" employment and stated:

> "It is not clear from the evidence whether appellant, during the period in question, was performing the duties of a regular position, which would have been performed by another employee if appellant did not perform them, or whether the job was one which was created especially for him to fill until such time as it could be determined whether he could physically return to the duties of a shipfitter or would have to be retired on disability. It also is not clear whether a specific job classification covered the duties which appellant was performing during this period…."
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> "If the job was temporary and merely created for the purpose of keeping appellant on the payroll until his future ability to perform the duties of a shipfitter could be ascertained, the Board, under such circumstances, would find that he did not resume 'regular' full-time employment within the meaning of 5 U.S.C. § 8101(4). On the other hand, if appellant was placed in a regular classified position, which normally would be filled by some other employee, (who perhaps was absent because of sickness or other reason), it would appear, under such circumstances, that appellant did resume 'regular full-time employment' within the meaning of the statute; if such be the fact, compensation should be recomputed on the basis of his pay rate as of the date of the recurrence of disability."

In the instant case, appellant did not return to a regular position, which the employing establishment would have filled by another employee had he not returned. Instead, he began college and the Office subsequently authorized his education through its vocational rehabilitation program. Thus, the Board finds that undergoing vocational rehabilitation does not constitute a resumption of regular full-time employment with the United States under section 8104 under the standard set forth in *Chinchillo*.

Appellant further cites FECA Program Memorandum No. 268[8] for the proposition that the Office can use a nonfederal salary for purposes of determining the pay rate after a recurrence of disability. However, FECA Program Memorandum No. 268, specifically provides that in determining pay rate, "careful consideration should be given to the requirement that the claimant must return to federal employment after the original work stoppage and that the recurrence is [six] months or more after that return-to-work date."[9]

[7] 18 ECAB 647 (1967).

[8] FECA Program Memorandum Number 268 (issued December 16, 1980).

[9] Appellant further argues that the Office should have determined his compensation in accordance with the formula specified in *Albert C. Shadrick*, 5 ECAB 376 (1953). However, the issue presently before the Board is appellant's pay rate for compensation for total disability rather than a wage-earning capacity determination or modification.

Compensation under the Act is payable only under its terms, which are specific as to the method and amount of payment of compensation.[10] Neither the Office nor the Board has the authority to enlarge the terms of the Act or to make an award of benefits under any terms other than those specified in the statute.[11]

The decision of the Office of Workers' Compensation Programs dated March 9, 1998 and finalized March 11, 1998 is hereby affirmed.

Dated, Washington, D.C.
February 24, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

[10] *Helen A. Pryor*, 32 ECAB 1313 (1981).

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