U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JEFFREY T. HUNTER and U.S. POSTAL SERVICE,
BULK MAIL CENTER, Springfield, MA

Docket No. 99-2385; Submitted on the Record;
Issued September 5, 2001

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly determined appellant's rate of pay for his recurrences of disability beginning May 23, 1997 and May 29, 1998.

On January 28, 1988 appellant, then a 25-year-old mailhandler, sustained an injury to his left shoulder, which the Office initially accepted as tendinitis and a strain of the left shoulder. Appellant stopped work on February 3, 1988 and returned to work on February 16, 1988. He then missed intermittent days and portions of days until he again stopped work on November 29, 1988.

Appellant underwent an anterior discectomy and fusion at C5-6 on November 30, 1988, after which he returned to limited duty on April 3, 1989. He again stopped work on June 22, 1989, and underwent an anterior discectomy and fusion at C6-7 on November 16, 1989. The Office accepted that these surgeries were causally related to appellant's employment injury.

Appellant returned to full-time limited duty on February 3, 1990. A February 1, 1990 duty status report lists a limitation of no lifting with his left arm, and describes the limited duty assigned as sorting loose flats and letters into trays. In an August 23, 1991 letter, an employing establishment injury compensation supervisor stated: "From his return to work date to the present time, he has been working limited duty in the 'rewrap area' … with limitations of a five-pound lifting restriction with no bending or stooping." A June 14, 1993 limited-duty job offer accepted by appellant was for the position of "mailhandler (rewrap) no bend/twist" with duties involving patching or rewrapping damaged mail and limitations of no lifting over 25 pounds, and no bending, stooping or reaching.

On January 10, 1994 appellant filed a claim for a recurrence of disability, though he did not stop work. In a statement attached to his claim form, appellant stated that the jobs he had performed for the past four years were not within his doctor's restrictions, but that he was presently working with empty sacks. On November 30, 1994 the employing establishment

offered appellant a job titled "modified mailhandler reassignment under rehab[ilitation] (incumbent only)." The duties were in the bypass and rewrap areas, and the limitations were no lifting over 25 pounds, no reaching above shoulder level, and no bending or stooping.

On March 6, 1996 appellant was reassigned under the rehabilitation program to a modified mailhandler position, with duties of inspecting canvas mail sacks and color coding and counting palletized skids of mail. Limitations were no lifting over 25 pounds, no reaching above shoulder level, and intermittent pushing, pulling, bending and stooping.

On May 23, 1997 appellant underwent decompressive surgery on his left shoulder. He filed a claim for compensation for the period beginning May 22, 1997, and the Office paid compensation for temporary total disability beginning May 25, 1997 using the rate of pay appellant was earning when he was injured on January 28, 1988.

By letter dated June 25, 1997, the Office asked the employing establishment if appellant had returned "to his regular job doing all aspects of his mailhandler duties without any limitations whatsoever." By letter dated June 27, 1997, the employing establishment replied, "At no time did [appellant] return to regular duty since D.O.I. [date of injury] of January 28, 1988. He has either been totally disabled for work or on limited duty."

Appellant returned to limited duty on July 21, 1997, with duties of color coding and placing tags on pallets of mail, and restrictions of no reaching or lifting with the left arm and no lifting or bending into mail hampers.

By letter dated December 15, 1997, the Office advised appellant, in response to his inquiry, that to qualify for a recurrent pay rate, an employee must return to regular, full-time duty for at least six months, that the evidence did not establish that he had returned to regular, full-time duty, and that his compensation would be paid using his pay rate on the date of his injury with all applicable cost-of-living increases.

Appellant again stopped work on May 29, 1998, claiming compensation, which the Office paid using the rate of pay appellant was earning when he was injured on January 28, 1988. Appellant underwent a discectomy and fusion from C5 to C7 on June 4, 1998. Appellant returned to limited-duty work on September 8, 1998, in his previous rehabilitation position.

In a letter dated June 24, 1998, the employing establishment submitted a copy of the Office's March 6, 1996 reassignment, and stated:

> "The reason for the 'rehab[ilitation]' assignment was he was on limited duty for so long, that he was holding up a bid that an able body person could be doing. Therefore, a so-called permanent job is made up for the injured employee in order to free up his bid for someone else who could perform the duties of the job.
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> "Although it is a so-called permanent position, they are made-up jobs (tailor made) for the injured worker to keep him or her in a productive (work) status in order to keep compensation costs down. At any time, if the employee's injury resolves, or a job comes up within his/her restrictions, they have every right to bid

on the job as long as they provide the medical documentation that they will be able to assume the bid."

By decision dated November 30, 1998, the Office found that appellant was not entitled to a recurrent pay rate for the reason that he did not return to regular full-time employment.

Appellant requested a hearing, which was held on April 28, 1999. Appellant testified that for three and one-half years, until 1996, he worked in the warehouse with empty equipment doing the same work as the other mailhandlers except for the lifting of heavy sacks, that the job he did beginning in 1996 was also done by other workers on a disability of some sort, and that tagging, which was all that he did, was done 24 hours per day and was also done by other employees, including casuals who were not performing modified duty. Appellant submitted five statements from coworkers dated May 7 or 8, 1999 that in their jobs they exchanged empty for full containers and did tagging.

By decision dated June 24, 1999, an Office hearing representative found that appellant had not returned to regular full-time employment and therefore was not entitled to a recurrent pay rate for his recurrences of disability in 1997 and 1998. The Office hearing representative found that appellant did not perform the full range of duties performed by other workers and there was no evidence of a specific job classification for the duties he performed.

The Board finds that the Office properly determined appellant's rate of pay for his recurrences of disability beginning May 23, 1997 and May 29, 1998.

In all situations under the Federal Employees' Compensation Act, compensation is based on the employee's pay rate as determined under section 8101(4). This section 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."[1]

Following his employment injury on January 28, 1988, appellant stopped work on February 3, 1988. Thereafter he worked intermittently, with extended periods off work following two surgeries, until he returned to full-time employment on February 3, 1990. As appellant then worked full time for over seven years before sustaining a recurrence of disability on May 25, 1997, the determinative question, for purposes of appellant's rate of pay for this recurrence and for the one beginning May 29, 1998, is whether appellant returned to "regular" employment.

The Board has defined "regular" employment, stating that it means "established and not fictitious, odd-lot or sheltered"[2] and contrasting it with a job "that was created especially for him."[3] The Board has also indicated that the duties of "regular" employment are covered by a

[1] 5 U.S.C. § 8101(4).

[2] *Johnny A. Muro*, 17 ECAB 537, 540 (1966).

[3] *Ralph W. Moody*, 42 ECAB 364 (1991).

specific job classification,[4] and that such duties would have been performed by another employee if appellant did not perform them.[5] The Board has also pointed out that the legislative history of the 1960 amendments to the Act, which added the alternative provisions to section 8101(4), demonstrates that "Congress was concerned with the cases in which the injured employee had 'recovered' or had 'apparently recovered' from the injury."[6]

Applying these principles to the facts in the case at hand, it is apparent that appellant did not return to "regular" employment. The evidence establishes, and appellant does not dispute, that he worked only limited duty, as opposed to the full duties of a mailhandler after his return to work following his employment injury. The employing establishment's June 24, 1998 letter states that each of the jobs appellant performed was "made-up" or "tailor-made" for him. The test is not whether the tasks that appellant performed during his limited duty would have been done by someone else, but instead whether he occupied a regular position that would have been performed by another employee.[7] The employing establishment also stated that appellant was provided with a permanent rehabilitation position "in order to free up his bid for someone else who could perform the duties of the job." As the evidence shows that appellant did not perform all of the duties of the position of mailhandler or of any other regular classified position at any time after his return to work following his employment injury, he did not resume "regular" employment within the meaning of section 8101(4) of the Act.

[4] *Wilbur L. Hargrove*, 34 ECAB 1143 (1983).

[5] *Eltore Chinchillo*, 18 ECAB 647 (1967).

[6] *Johnny A. Muro*, *supra* note 2 at 546 (*Schwartz, T.M.*, dissenting) (dissent was not on question of the meaning of the word "regular").

[7] *Contrast* the situation in the present case with that in *Ralph W. Moody*, *supra* note 3 where the employee, an air traffic controller, was reassigned to another regular classified position as a mail clerk (the Board found he resumed "regular" employment).

The decision of the Office of Workers' Compensation Programs dated November 30, 1998 is affirmed.

Dated, Washington, DC
September 5, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member