U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ACQUILLA S. HILL and NATIONAL AERONAUTICS & SPACE ADMINISTRATION, LANGLEY RESEARCH CENTER, Hampton, VA

Docket No. 02-1762; Submitted on the Record;
Issued September 29, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly refused to modify its determination of appellant's loss of wage-earning capacity determination.

On November 14, 1996 appellant, then a 52-year-old full-time computer specialist, filed a claim for pain in her lower back and hip. The Office accepted that appellant sustained an acute sacroiliac strain and disc herniation at L4-5 and authorized an L4-5 laminectomy and discectomy which was performed on January 20, 1997. Thereafter, appellant's claim was expanded to include left leg neuralgia/neuritis as consequential injuries. She stopped work on November 12, 1996. Appellant was paid appropriate compensation for all periods of disability.

Appellant submitted various medical records from Dr. Mark D. Kerner, a Board-certified orthopedic surgeon, and a magnetic resonance imaging (MRI) scan dated November 25, 1996. Dr. Kerner noted a history of appellant's work-related injury and subsequent treatment and surgeries. In an operative report dated January 20, 1997, he indicated that he performed an L4 laminectomy and discectomy. Dr. Kerner diagnosed appellant with a large extruded foramina herniation at L4-5 with a subligamentous extrusion.

Thereafter, appellant returned to work in a light-duty capacity on June 15, 1997 and stopped work on July 28, 1997. On September 15, 1997 she returned to work in a light-duty capacity. On January 20, 1998 appellant returned to full-time regular duty as a home commuter specialist, telecommuting from her residence with the approval of her treating physician, Dr. Kerner.

In a decision dated September 23, 1998, the Office reduced appellant's compensation effective that same date based on her ability to earn wages as a home computer specialist. The Office indicated that she had been employed in the position for over 60 days. The Office indicated that appellant was considered a permanent federal worker and there were no changes to her wages due to the job change. Appellant's actual earnings of the current position met or

exceeded the wages of the job she held at the date of injury. The Office concluded the position of a home computer specialist represented her wage-earning capacity.

On May 25, 1999 appellant filed a CA-2a, notice of recurrence of disability. She indicated a recurrence of back and leg pain on April 22, 1999 causally related to the work-related injury of November 7, 1996. Appellant stopped work in April 1999 and returned to part-time work, six hours per day, three to four days per week commencing February 22, 2000. The Office accepted her claim for recurrence of disability and paid appropriate compensation.

Appellant submitted various medical records from Dr. Kerner dated May 11, 1999 to February 22, 2000. In his report of May 11, 1999, Dr. Kerner noted that appellant experienced new pain in her back and legs since her fall on April 22, 1999 and advised that she was last able to work in April 1999. His August 17, 1999 report noted that appellant's back and leg symptoms flared up and advised that he would not return her to work at this time. Dr. Kerner indicated in his report of August 24, 1999 that appellant sustained a recurrence of disability on April 22, 1999 when she fell and thereafter experienced a progression of back and leg pain which rendered her unable to return to work. In a disability slip dated February 22, 2000, Dr. Kerner indicated that appellant could return to her position as a home computer specialist, subject to the same restrictions on sitting, walking and lifting previously set forth.

On February 22, 2000 the Office offered appellant a part-time position as a home computer specialist effective the same date. The position was six hours per day and three to four days per week. The job offer was within the limitations provided by Dr. Kerner which included intermittent sitting, walking, lifting and minimal commuting to her place of employment as she could not sit for long periods of time. Appellant accepted the position.

In a decision dated May 17, 2002, the Office reduced appellant's compensation effective that same date based on her ability to earn wages as a home computer specialist. The Office determined that because of the severity of appellant's accepted medical condition she would not be able to return to the date-of-injury position. The Office indicated that appellant had been employed in the position for over 60 days. The Office indicated that appellant was considered a permanent federal worker and there were no changes to her wages due to the job change. Her actual earnings of the current position met or exceeded the wages of the job she held at the date of injury. The Office concluded that the position of a home computer specialist represented appellant's wage-earning capacity.

In a loss of wage-earning capacity worksheet, dated June 11, 2002, the Office determined that appellant's pay rate when she was initially injured was $1,189.15 and the pay rate when her disability recurred on April 22, 1999 was $1,135.90. The Office noted that the wage-earning capacity loss was $488.44 and the compensation rate was 75 percent of this amount or $366.33. The Office further indicated that taking into account the consumer price index the weekly award would be $383.75 and the four-week compensation totaled $1,535.00.

The Board finds that this case is not in posture for a determination of whether the evidence warrants modification of appellant's loss of wage-earning capacity.

Once the Office properly determines the wage-earning capacity of an injured employee, modification of such a determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was erroneous. The burden of proof is on the party attempting to show a modification of the wage-earning capacity.[1]

In this case, appellant filed a recurrence of disability on May 25, 1999 which was accepted by the Office. Accompanying her claim she submitted medical evidence from Dr. Kerner, her treating physician, which supported that there had been a material change in the nature and extent of her injury-related condition.

In his report of May 11, 1999, Dr. Kerner noted that appellant experienced new pain in her back and legs since her fall on April 22, 1999 and advised that she was last able to work in April 1999. His report of August 17, 1999 indicated that appellant's back and leg symptoms flared up and advised that he would not return her to work at this time. On August 24, 1999 Dr. Kerner noted that appellant sustained a recurrence of disability on April 22, 1999 after a fall and was unable to return to work at this time due to a progression of her symptoms.

These medical reports indicate that appellant sustained a recurrence of disability on April 22, 1999 causally related to her November 7, 1996 employment injury. Furthermore, the Office accepted the recurrence of disability as causally related to her November 7, 1996 employment injury. Therefore, the Board finds that the medical evidence submitted by appellant supports that there was a material change in the nature and extent of her injury-related condition.

Additionally, the Board notes that section 8115(a) of the Federal Employees' Compensation Act[2] provides that in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his actual earnings if his actual earning fairly and reasonably represent his wage-earning capacity.[3] Generally, wages actually earned are the best measure of a wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such a measure.[4] However, if actual earnings are derived from a make-shift position designed for the employee's particular needs[5] or when the job constitutes part-time, sporadic, seasonal or temporary work,[6] actual earnings may not represent wage-earning capacity.

The record shows that appellant was originally employed in a full-time computer specialist prior to her work-related injury of November 7, 1996. Following her return to work,

[1] *See Gary L. Moreland*, 54 ECAB ___ (Docket No. 03-1063, issued June 20, 2003); *Taylor Hodgson*, 54 ECAB ___ (Docket No. 03-346, issued June 25, 2003).

[2] 5 U.S.C. §§ 8101-8193.

[3] 5 U.S.C. § 8115(a); *Clarence D. Ross*, 42 ECAB 556 (1991).

[4] *Stanley B. Plotkin*, 51 ECAB 700 (2000).

[5] *William D. Emory*, 47 ECAB 365 (1996).

[6] *See Monique L. Love*, 48 ECAB 378 (1997).

appellant sustained a recurrence of disability in April 1999 which was accepted by the Office and thereafter returned to work on February 22, 2000 as a part-time home computer specialist position. This position was six hours per day, three to four days per week; however, it was not full time.[7]

Section 2-814.7 of the Office procedure manual states:

> "7. Determining WEC [wage-earning capacity] Based on Actual Earnings. When an employee cannot return to the date-of-injury job because of disability due to work-related injury or disease, but does return to alternative employment with an actual wage loss, the CE [claims examiner] must determine whether the earnings in the alternative employment fairly and reasonably represent the employee's WEC. Following is an outline of actions to be taken by the CE when a partially disabled claimant returns to alternative work:
>
> > a. Factors Considered. To determine whether the work obtained by the claimant fairly and reasonably represents his or her WEC, the CE should consider such factors as whether:
> >
> > > The job is part time (**unless the claimant was a part-time worker at the time of injury**) or sporadic in nature."[8]

The record indicates that appellant accepted the part-time home computer specialist position which was six hours per pay three to four days per week; however, it was not the full-time computer specialist position appellant had prior to the November 7, 1996 injury. The evidence in this case is insufficient to support that appellant's appointment and tour of duty as a part-time home computer specialist position was equivalent to those in her date-of-injury position as a full-time computer specialist. The first appointment was full-time, eight hours per day, permanent position and the second appointment was a part-time, six-hour per day, three to four days per week position. The evidence clearly shows that the position accepted on February 22, 2000, six hours per day, was not the equivalent of the date-of-injury position. The Board finds that this position was not consistent with her original computer specialist position. Therefore, the Office improperly accepted these earnings as the best measure of his wage-earning capacity.

Accordingly, the Board will set aside the Office's May 17, 2002 decision and remand the case for further development based on the medical evidence submitted by appellant and the legal argument that there has been a material change in the nature and extent of her injury-related condition. Appellant has submitted sufficient evidence to require a review of the Office's May 17, 2002 wage-earning capacity determination.

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[7] *See Richard M. Knight*, 42 ECAB 320 (1991).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (July 1997).

Likewise, the evidence of record demonstrates that the position of part-time home computer specialist position did not fairly and reasonably represent her wage-earning capacity because appellant was not a part-time worker at the time of the original injury in 1996, rather she was a full-time computer specialist. Therefore, the Board finds that the Office improperly calculated appellant's wage-earning capacity.

The May 17, 2002 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision.

Dated, Washington, DC
September 29, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member