

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
Social Security Administration
OFFICE OF HEARINGS AND APPEALS

ORDER OF ADMINISTRATIVE LAW JUDGE

IN THE CASE OF

CLAIM FOR

Azzie Cox Jr.
(Claimant)


Period of Disability and
Disability Insurance Benefits

(Wage Earner)

(Social Security Number)

I approve the fee agreement between the claimant and his representative subject to the condition that the claim results in past-due benefits.

My determination is limited to whether the fee agreement meets the statutory conditions for approval and is not otherwise excepted. I neither approve nor disapprove any other aspect of the fee agreement.


CAROL J. PENNOCK
Administrative Law Judge

NOV 22 1995

Date

NOTE TO PROCESSING CENTER
FURTHER ACTION NECESSARY

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
Social Security Administration
OFFICE OF HEARINGS AND APPEALS

DECISION

IN THE CASE OF

CLAIM FOR

Azzie Cox Jr.

(Claimant)

Period of Disability and
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(Wage Earner)

(Social Security Number)

Jurisdiction in this case rests with the Office of Hearings and Appeals as a result of a request for hearing filed by the claimant. After due notice, a hearing was held in Vincennes, Indiana on November 3, 1995, at which the claimant appeared and testified. The claimant was represented by Kathleen Hudelson, advocate.

PROCEDURAL HISTORY

The claimant filed an application for a period of disability and disability insurance benefits on August 2, 1994 (protective filing date), which was initially denied by the Social Security Administration. The Administration later affirmed the denial of the claim upon reconsideration and the claimant filed a request for hearing on January 23, 1995.

EVALUATION OF THE EVIDENCE

The claimant in this case, Azzie Cox, Jr., is currently 37 years of age. [REDACTED]

[REDACTED] He alleges that he has been unable to work since August 5, 1994 due to a [REDACTED] injury.

Medical evidence in the record indicates that the claimant actually injured [REDACTED] on October 9, 1992 after falling and [REDACTED]

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[REDACTED] the claimant underwent surgery

[REDACTED] According to his testimony, the claimant remained off work until April 5, 1993. At that time he returned to work with the City of Vincennes Fire Department, but on a very limited basis with very special work arrangements. He basically answered the telephone and was allowed to rest in a recliner between calls. He was terminated from this employment on August 5, 1994 when it became apparent that he was not going to be able to return to work as a fire fighter.

Later reports from the claimant's [REDACTED], Dr. G.J. Loomis, indicate that the claimant has had complaints of severe pain with significant functional limitations. In a report dated August 5, 1994, Dr. Loomis indicated that it was his opinion that the claimant was 100% disabled (Ex. 21, p. 3). In a letter dated January 24, 1995, Dr. Loomis indicated that the claimant was 100% disabled for any type of work (Ex. 25).

At the hearing held on November 3, 1995, the claimant testified that he continues to suffer [REDACTED]

[REDACTED]

The claimant has made attempts to rehabilitate himself. As noted above, he returned to work approximately six months after the injury on a trial basis. However, it is obvious that this was a very special work situation and he was eventually discharged from the Fire Department. Since that time, he has made other attempts to rehabilitate himself. [REDACTED]

[REDACTED]

James Bordieri, a qualified vocational expert, appeared and testified as to the vocational aspects of the issues involved. The witness testified that the claimant's described limitations

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would preclude him from engaging in any type of substantial gainful activity.

In my opinion, the evidence in the record documents the existence of a medically determinable impairment that could reasonably be expected to cause severe and disabling pain. In light of the clinical findings, the claimant's description of the nature and severity of his pain is credible. [REDACTED] indicated that the claimant is totally disabled and the claimant [REDACTED]

Therefore, I find the claimant's description of his limitations to be credible. As noted above, the vocational expert testified that such limitations would preclude an individual of the claimant's age, education, and past work history from performing not only past relevant work, but also any other type of substantial gainful activity.

Consequently, I find that the claimant has been under a disability in accordance with §404.1520(f) of the Social Security Regulations since August 5, 1994, as alleged. A review of the claimant's earnings records indicates that the disability insured status requirements of the Act are met. Therefore, the claimant is found to be entitled to a period of disability commencing on August 5, 1994 and to applicable disability insurance benefits on the basis of the application with a protective filing date of August 2, 1994. The formal application was filed August 18, 1994.

FINDINGS

1. The claimant met the special earnings requirements of the Act on August 5, 1994, the date he stated he became unable to work, and continues to meet them through the date of this decision.
2. The claimant has not engaged in substantial gainful activity since August 5, 1994.
3. The medical evidence of record establishes that the [REDACTED]
4. The claimant's impairments have precluded him from engaging in all substantial gainful activity since August 5, 1994.

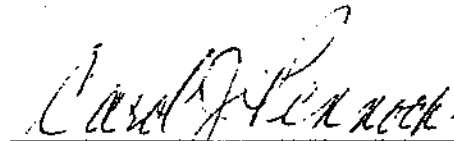
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5. The claimant has been under a "disability", as defined in the Social Security Act, since August 5, 1994 (20 CFR 404.1520(f)).

DECISION

It is my decision that, based on the application filed on August 2, 1994 (protective filing date), the claimant is entitled to a period of disability commencing on August 5, 1994, and to disability insurance benefits under Sections 216(i) and 223, respectively, of the Social Security Act.



Carol J. Pennock
Administrative Law Judge

WAS 1994

Date

STATE OF INDIANA

Before An Administrative Law Judge
in Administrative Hearing for the
Board of
Public Employees Retirement Fund

In the matter of)
Azzie Eugene Cox, Jr.)
)
Petitioner)

Administrative Law Judge's
Findings of Fact, Conclusions of Law and Order

Comes now Linda C. Anderson, Administrative Law Judge designated by the Board of Trustees of the Public Employees Retirement Fund ("Board") in this proceeding, and a hearing having been held on October 18, 1996, in the offices of the P.E.R.F., 143 West Market Street, Suite 602, Indianapolis, Indiana 46204, now issues and files this Order. Notice is hereby given that any objection to the Administrative Law Judge's Order must be filed with the Board, identifying the basis of the objection with reasonable particularity, no later than eighteen days from the date of issuance of this Order unless such date is a Saturday, Sunday, or legal holiday under state statute or a day that P.E.R.F.'s offices are closed during regular business hours, in which case the deadline would be the first day thereafter that is not a Saturday, Sunday, or legal holiday under state statute or a day that the P.E.R.F.'s offices are closed during regular business hours. This Administrative Law Judge's Order is not the final Order of the Board in this proceeding. However, in the absence of any objection, the Board will either affirm the Administrative Law Judge's Order as its final Order, or will serve notice of its intent to review any issue related to the Administrative Law Judge's Order.

Findings of Fact

1. That Petitioner is thirty-eight (38) years old.
2. That Petitioner was employed as a first class fire-fighter with the City of Vincennes Fire Department from January 1, 1992, to August 5, 1994.
3. That on October 3, 1992, Petitioner sustained injuries

[REDACTED]

4. That Petitioner returned to work and was restricted to light duty from April, 1993, to August, 1994.

5. That on August 5, 1994, Dr. Gregory J. Loomis stated in a letter to Chief Mike Siewers of the Vincennes Fire Department that Petitioner had undergone a functional capacity evaluation and, in Loomis' opinion, Petitioner, at that time, was one hundred percent (100%) disabled from the job he was then performing.

6. That after reviewing Dr. Loomis' letter and an assessment completed by the Work Place Industrial Medicine Program through Deaconess Hospital, Dr. Donald L. Snider also found Petitioner to be disabled from performing his job with the Vincennes Fire Department and endorsed the program's recommendation that Petitioner [REDACTED] strengthening and stretching exercises and vocational consultation for possible job placement or to learn new skills.

7. That Dr. Gabriel J. Rosenberg, medical consultant for P.E.R.F., determined Petitioner to have a thirty-two percent (32%) total body impairment after reviewing Petitioner's application for disability benefits and medical file. Dr. Rosenberg recommended in an August 31, 1994, letter to P.E.R.F. Director Phillip Smith that P.E.R.F. grant Petitioner's request for disability benefits.

8. That P.E.R.F. determined Petitioner to have a Class 3 disability and eligible to receive twenty-four and two-tenths percent (24.2% of his salary in benefits from September 23, 1994, to September 22, 1997. Petitioner testified he has been receiving monthly payments in the amount of [REDACTED]

9. That Indiana Code 36-8-8-13.5 states in part the following:

(d) For applicants hired before March 2, 1992, a fund member who is determined to have a Class 3 impairment and for whom it is determined that there is no suitable and available work within the fund member's department, considering reasonable accommodations to the extent required by the Americans with Disabilities Act, is entitled to a monthly base benefit equal to the product of the member's years of service (not to exceed thirty (30) years of service) multiplied by one percent (1%) of the monthly salary of a first class patrolman or firefighter in the year of the local board's determination of impairment.

(f) If a fund member is entitled to a monthly base

benefit under subsection (b), (c), (d), or (e), the fund member is also entitled to a monthly amount that is no less than ten percent (10 %) and no greater than forty-five percent (45%) of the monthly salary of a first class patrolman or firefighter in the year of the local board's determination of impairment. The additional monthly amount shall be determined by the P.E.R.F. medical authority based on the degree of impairment.

(g) Benefits for a Class 2 and Class 3 impairment are payable: (1) for a period equal to the years of service of the member, if the member's total disability benefits is less than thirty percent (30%) of the monthly salary of a first class patrolman or firefighter in the year of the local board's determination of impairment and the member has fewer than four (4) years of service; or (2) until the member becomes fifty-five (55) years of age if the member's benefit is: (A) equal to or greater than thirty percent (30%) of the monthly salary of a first class patrolman or firefighter in the year of the local board's determination of impairment; or (B) less than thirty percent (30%) of the monthly salary of a first class patrolman or firefighter in the year of the local board's determination of impairment if the member has at least four (4) years of service.

10. That although a fund member can be determined to have a degree of impairment from zero percent (0%) to one hundred percent (100%) there is only a thirty-five percent (35%) variance between the minimum and maximum benefit entitlement that can be granted under subsection (f) of the statute. Therefore in 1990, P.E.R.F. developed a method in which the degree of impairment can be converted to a monthly benefit. Under this method, the thirty-five percent (35%) variance is divided into one hundred (100) units with each unit representing a degree of impairment. In other words, thirty-five hundredths percent (.35%) of benefit entitlement is equal to one percent (1%) degree of impairment. Under P.E.R.F.'s calculation, the range begins at the ten percent (10%) minimum; and an additional thirty-five hundredths percent (.35%) benefit is added for each degree of impairment beyond the minimum.

11. That Petitioner's thirty-two percent (32%) total body impairment was divided by thirty-five hundredths percent (.35%), resulting in eleven and two-tenths percent (11.2%). This figure was added to the minimum ten percent (10%) of impairment, resulting in a monthly benefit under subsection (f) of twenty-one and two-tenths percent (21.2%) of a first class firefighter's salary. The twenty-one and two-tenths percent (21.2%) was added to Petitioner's monthly base benefit of three percent (3%) which was calculated in accordance with subsection (d) of the statute.

12. That Petitioner, through his legal counsel, did not dispute the impairment rating determined by P.E.R.F.'s medical consultant but disputed the administrative method developed and used to convert the degree of impairment to a monthly benefit.

Conclusions of Law

1. That the amount of Petitioner's monthly disability benefits and the period of time he is entitled to receive those benefits are controlled by Indiana Code 36-8-8-13.5, specifically subsections (d), (f) AND (g).

2. That Petitioner is entitled to a monthly base benefit of three percent (3%) of his salary as a first class firefighter under subsection (d) and an additional twenty-one and two tenths percent (21.2%) under subsection (f). Under subsection (g), Petitioner is not entitled to receive P.E.R.F. disability benefits beyond September 22, 1997.

3. That the additional amount referred to in subsection (f) can range from ten percent (10%) to forty-five percent (45%) of a fund member's monthly salary as a first class firefighter; therefore, Petitioner's degree of impairment of thirty-two percent (32%) cannot be equated to his benefit entitlement.

4. That a method to convert degree of impairment determined by the P.E.R.F. medical consultant to a monthly benefit payment is necessary to comply with subsection (f) of the statute.

5. That the conversion method developed by P.E.R.F. is logical and just.

6. That Petitioner failed to meet his burden of proof.

ORDER

IT IS HEREBY ORDERED, AJUDGED AND DECREED, that Azzie Eugene Cox, Jr., shall continue to receive disability benefits in the amount of twenty-four and two-tenths percent (24.2%) of his salary as a first class firefighter with the Vincennes Fire Department and said benefits shall continue to September 22, 1997.

ISSUED this 14th day of November, 1996.



Linda C. Anderson
Administrative Law Judge

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