U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PAUL DAY and DEPARTMENT OF DEFENSE,
NAVY PARTS CONTROL CENTER, Mechanicsburg, Pa.

Docket No. 96-1888; Submitted on the Record;
Issued October 8, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant could perform the duties of an automobile service station attendant and therefore had a 45 percent loss of wage-earning capacity.

On June 26, 1986 appellant, then a 41-year-old forklift operator, slipped and fell at the employing establishment, sustaining a comminuted fracture of the left arm at the elbow. He underwent surgery the next day for an open reduction and internal fixation of the left olecranon. The Office accepted appellant's claim. Appellant received continuation of pay from June 27 through August 10, 1986 and began to receive compensation for temporary total disability effective August 11, 1986. On April 22, 1987 appellant underwent additional surgery for excision of a left olecranon nonunion fragment.

On January 14, 1991 the employing establishment offered appellant a position as a laborer, indicating that it was a temporary position not to exceed one year. Appellant accepted the position and returned to work on January 22, 1991. On January 21, 1992 appellant's position was terminated due to the expiration of the temporary appointment. On June 24, 1992 appellant filed a claim for recurrence of disability effective January 21, 1992. In a July 1, 1994 decision, the Office determined that appellant could perform the duties of an automobile service station attendant[1] and therefore had a 45 percent wage-earning capacity. The Office began payment of compensation based on the loss of wage-earning capacity retroactive to January 22, 1992. Appellant requested a hearing before an Office hearing representative which was conducted on May 25, 1995. In a September 6, 1995 decision, the hearing representative affirmed the Office's July 1, 1994 decision. Appellant requested reconsideration. In a February 26, 1996 merit decision, the Office denied appellant's request for modification of the prior decisions.[2]

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[1] Department of Labor, *Dictionary of Occupational Titles*, DOT No. 915.477.010 (4th ed. 1977).

[2] In a June 6, 1996 decision, the Office issued a schedule award for a 17 percent permanent impairment of the left

The Board finds that the Office did not meet its burden of proof that appellant could perform the duties of the selected position.

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction of compensation benefits. Once the medical evidence suggests that a claimant is no longer totally disabled but rather is partially disabled, the issue of wage-earning capacity arises.[3] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions given the nature of the employee's injuries and the degree of physical impairment, his or her usual employment, the employee's age and vocational qualifications, and the availability of suitable employment.[4] Accordingly, the evidence must establish that appellant can perform the duties of the job selected by the Office and that jobs in the position selected for determining wage-earning capacity are reasonably available in the general labor market in the commuting area in which the employee lives. In determining an employee's wage-earning capacity, the Office may not select a makeshift or odd lot position or one not reasonably available on the open labor market.[5]

The position of automobile service station attendant requires the ability to lift up to 20 pounds, stoop, kneel and crouch, reach, handle, finger and feel. Appellant's treating physician, Dr. Morton Rubin, a Board-certified orthopedic surgeon, indicated that appellant could lift only up to 10 pounds. In a December 7, 1993 report, Dr. Peter J. VanGiesen, a Board-certified orthopedic surgeon selected by the Office to give a second opinion, stated that appellant had a residual contracture of the left elbow secondary to traumatic fracture and nonunion of the left olecranon with retained loose bodies. He indicated that appellant had restriction as far as full extension of the elbow as a result of the employment injury and concluded that appellant would not return to normal elbow function because of the injury. Dr. VanGiesen commented that appellant was partially disabled for any employment that would include heavy manual labor. He indicated that he would keep appellant at a 10-pound restriction of the left arm. Dr. VanGiesen concluded that appellant was partially disabled based upon the restricted range of motion of the elbow and had a light-duty restriction of a 20-pound maximum lifting. In a November 10, 1995 report, Dr. Rubin stated that as of June 13, 1994 appellant had fatigue of the left elbow, paresthesias over the ulnar distribution, occasional tingling and numbness in the hand and restriction of motion in the left arm. He concluded that with the decreased range of motion and the ulnar nerve problems appellant had a functional loss of use of the arm.

Dr. VanGiesen gave conflicting information in his report, stated that appellant could only lift 10 pounds with his left arm but could perform light duty with the ability to lift up to 20 pounds. He did not clarify whether he anticipated that appellant would be lifting up to 20

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arm. Appellant did not appeal this decision.

[3] *Garry Don Young*, 45 ECAB 621 (1994).

[4] *See generally*, 5 U.S.C. § 8115(a); A. Larson *The Law of Workers' Compensation* § 57.22 (1989).

[5] *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

pounds with just his right arm or was expected to be lifting up to 20 pounds with both arms used together. His report, therefore, has reduced probative value because of its internal contradictions. The Office only made a general finding that appellant could perform the duties of the selected position based on Dr. VanGiesen's statement that appellant could perform light duty with lifting up to 20 pounds. As his report has reduced probative value, the Office cannot use it as a basis for determining appellant's work restrictions. In addition, the Office did not consider whether the position would be available to a person with loss of use of one arm such as appellant. Appellant testified at his hearing that, although a rehabilitation counselor had identified a service station attendant position as available, the manager of the service station indicated that he could not hire appellant because his restricted ability to lift which would prevent him from stocking shelves, unloading trucks or lifting tires. The Office therefore has not established appellant's work restrictions and has not established that the position of automobile service station attendant is within appellant's work restrictions, particularly with regard to the restricted use of his left arm.

The rehabilitation counselor stated in a May 7, 1990 report that the position of automobile service station attendant was reasonably available within appellant's commuting area, based on a labor market analysis of the geographic area.[6] However, the Office's decision finding that appellant could perform the duties of the selected position was made over four years later. The Office decision was also made retroactive by over two years, to a point 16 months after the labor market analysis was done. The use of a labor market analysis so far removed in time from the date of the retroactive use of that labor market analysis cannot be considered as probative of the general availability of the position because such availability can change over time depending on economic events. There is no evidence of record to show that the Office determined whether the job was reasonably available to appellant as of January 22, 1992, the time he stopped working at his former position, through to the present time.[7]

The Office should clarify appellant's work restrictions, with referral of appellant to an appropriate physician for an examination and description of his work restrictions, particularly in regard to his left arm. The Office must then determine whether the selected position would have been available to appellant, taking into account the limited use of his left arm. The Office must also determine whether the position was reasonably available within appellant's commuting area as of January 22, 1992 and through to the present time.

[6] While the rehabilitation counselor referred to the position as self-service cashier, he cited the same DOT number as the position eventually selected, automobile service station attendant.

[7] *Louis E. Allen*, 37 ECAB 341 (1986).

The decisions of the Office of Workers' Compensation Programs, dated February 26, 1996 and September 6, 1995, are hereby reversed and the case remanded for further action in accordance with this decision.

Dated, Washington, D.C.
October 8, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member