U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RONALD L. IRVIN and DEPARTMENT OF THE NAVY, CIVILIAN PERSONNEL OFFICE, Camp Pendleton, Calif.

Docket No. 96-524; Submitted on the Record;
Issued March 23, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation for total disability effective November 12, 1995, based on his capacity to perform the duties of a cashier.

The present case was before the Board on two prior occasions. To briefly summarize the facts in this case, appellant, a 29-year-old boiler operator, injured his left knee when he fell after exiting his vehicle on January 26, 1980. Appellant filed a Form CA-1 claim for traumatic injury on January 26, 1980, which the Office ultimately accepted for left medial meniscus tear and severe arthritis, left knee. The Office also granted appellant a schedule award based on a 19 percent permanent disability for loss of use of the left leg.

By decision and order dated October 18, 1988, the Board found that the Office failed to meet its burden of proof to terminate appellant's benefits as of March 13, 1988 on the grounds that appellant's employment-related disability had ceased.

Appellant was subsequently referred to Dr. Myron E. Sevick, a Board-certified orthopedic surgeon, who submitted a medical report dated January 4, 1989. He reviewed appellant's medical history, noted findings on examination and stated that appellant had expressed an interest in some form of retraining. Dr. Sevick, noting that appellant had already undergone four operations on his left knee, stated that he did not detect any instability in his knee, that appellant had undergone enough surgery and that there should be many activities that he could handle. He advised that he would allow him to return to any type of activity he felt capable of performing given appellant's symptomatology and that he would be an excellent candidate for retraining. Dr. Sevick noted that appellant did have some element of permanent disability, probably in the neighborhood of 10 to 15 percent of the body due to osteoarthritis of the knee, and completed a work restriction evaluation form dated January 3, 1989.

Appellant returned to work on November 8, 1989 at a car dealership earning $4.00 per hour as a parts/counterperson, a job which Dr. Sevick approved as within appellant's restrictions. Based on appellant's acceptance of this job, the Office issued a decision on February 6, 1990, reducing appellant's compensation effective December 17, 1989. On March 26, 1990 appellant requested reconsideration on the basis that he had been released by the dealership because he had been unable to physically perform all of the job requirements. By decision dated June 27, 1990, the Office denied appellant's request for reconsideration. By decision and order dated March 15, 1991, the Board reversed the Office's February 6 and June 27, 1990 decisions, finding that the February 6, 1990 decision did not specify the factors it considered in arriving at its determination that the parts/counterperson job reasonably represented his wage-earning capacity determination and did not explain how such factors were involved in reducing appellant's compensation.

By letter dated August 21, 1991, the Office requested that Dr. Sevick provide a medical report indicating his findings pertaining to appellant's recent medical condition and treatment. By letter dated September 5, 1991, the Office advised Dr. Sevick that it was evaluating appellant's readiness for reemployment and required him to undergo vocational rehabilitation services. The Office requested that Dr. Sevick complete the enclosed work restriction evaluation form.

In a follow-up report dated September 12, 1991, Dr. Sevick stated that he had examined appellant on January 17, 1991 for a fall in which he injured his back, and that when he saw appellant on June 5, 1990 he wished to have a full knee replacement, for which he considered him too young. Dr. Sevick stated that he did not consider appellant's symptoms sufficiently significant for such an operation, and he reiterated that appellant should be able to find some type of employment. He did not complete and return the work restriction evaluation form, but did attach an August 7, 1991 report in which he stated that appellant was still having difficulties with his knee, but that he did not detect any significant instability. Dr. Sevick advised that appellant did have some permanent disability, but stated that he could not imagine how there was not some type of activity or occupation he could perform. He specifically stated that he had no specific recommendations.

By letter dated September 30, 1991, the Office referred appellant to a vocational rehabilitation counselor, who was instructed to select a suitable alternate position for appellant. The Office indicated in the referral that Dr. Sevick had stated that appellant could work, and stated that it had enclosed a summary of case information, a work restriction evaluation, and the significant medical reports of record.

On November 11, 1992, the vocational rehabilitation counselor issued a report summarizing his efforts to find suitable alternate employment for appellant within Dr. Sevick's restrictions.[1] The vocational rehabilitation counselor stated that "[t]his correspondence will service as a status report on the file of the injured worker…. Efforts to place [appellant] in an employment position have been unsuccessful." The vocational rehabilitation counselor indicated that he had subsequently consulted the state department of labor and industry, bureau of research and statistics, and, after completing a job market survey, had recommended two positions, credit card clerk and "cashier II", which were listed in the Department of Labor's *Dictionary of Occupational Titles*. The vocational rehabilitation counselor indicated that these positions reasonably reflected appellant's ability to earn wages, and were available to appellant in his commuting area.

In a status report dated November 19, 1992, the Office stated that appellant's case had been closed as nonrehabilitated. In addition, the Office concluded that, following review of the vocational rehabilitation counselor's job availability report, the data for a loss of wage-earning capacity determination was complete and accurate.

By letter dated August 3, 1993, the Office requested that Dr. Sevick submit a current medical report concerning all recent examinations and care, and to complete and submit a work capacity evaluation form based on appellant's current physical condition and limitations. The Office also requested that Dr. Sevick review the job descriptions of the credit card clerk and cashier II positions selected by the vocational rehabilitation counselor and advise whether appellant would be medically capable of performing these duties.

By letter dated August 26, 1993, Dr. Sevick stated that he had reviewed the two positions as credit card clerk and cashier and opined that appellant should be able to handle either one of these occupations without any difficulty.

Dr. Sevick completed and submitted a work restriction evaluation on August 30, 1993. He indicated that appellant could do intermittent sitting, walking, lifting and bending, no squatting, two hours per day of climbing, one hour per day of kneeling, and intermittent twisting and standing; Dr. Sevick also advised that appellant should lift no more than 75 pounds. He opined that appellant could work an eight-hour day, that he had reached maximum medical improvement, and that he would require vocational rehabilitational counseling in order to return to work.

In a status update report dated August 30, 1993, the vocational rehabilitation counselor stated that he had researched the availability in appellant's commuting area of the two job openings posted in his previous report and noted that there were numerous openings for both the cashier and credit card clerk positions.

[1] The vocational rehabilitation counselor also relied on a June 29, 1992 report from Dr. Paul S. Lieber, Board-certified in physical medicine and rehabilitation. He indicated that he had recently examined appellant, and that he required a cane in order to ambulate. Dr. Lieber further advised that appellant was currently utilizing a left hinged knee extension assist orthosis on the left, which appeared to adequately provide him with knee stability, and was required for further ambulation to prevent knee buckling.

In a status update report dated May 17, 1995, the vocational rehabilitation counselor indicated that he had conducted another survey regarding the availability of the cashier and credit card clerk positions and found that the number of vacancies was substantially similar to that indicated in the August 1993 report.

In an Office vocational rehabilitation and job availability report dated May 15, 1995, the Office indicated that appellant was able to perform the job of cashier II, which entailed a weekly wage of $197.81, that it was within his physical restrictions stemming from his January 26, 1980 employment injury, and that the job was reasonably available within his commuting area.[2]

On September 18, 1995 the Office calculated that appellant's compensation rate should be adjusted to $117.25 using the *Shadrick*[3] formula. The Office indicated that appellant's salary on January 26, 1980, the date of injury, was $310.40 per week, that his current, adjusted pay rate for his job on the date of injury was $581.15, and that appellant was currently capable of earning $197.81 per week, the rate of a cashier. The Office therefore determined that appellant had a 34 percent wage-earning capacity, which when multiplied by $310.40 amounted to an adjusted wage-earning capacity of $105.83, and a wage loss of $204.87. The Office calculated that 3/4 of $204.87 amounted to a compensation rate of $153.65, and that based on the current consumer price index as of January 26, 1981, appellant's current adjusted compensation rate was $260.75.

By notice of proposed reduction on September 18, 1995, the Office advised appellant of its proposal to reduce his compensation because the weight of the evidence established that he was no longer totally disabled and that he had the capacity to earn wages as a cashier II at the weekly rate of $197.81 in accordance with the factors outlined in 5 U.S.C. § 8115.[4] The Office stated that its rehabilitation section had worked with appellant for a period of time but had been unsuccessful in obtaining a job for appellant. The Office stated that the vocational rehabilitation counselor provided the Office with a job market survey based on appellant's physical restrictions and that based on this survey that the Office had selected the cashier II position. The Office further stated that appellant's physician, Dr. Sevick, had reviewed and approved the requirements of the cashier position as within appellant's capabilities. The Office further stated that the vocational rehabilitation counselor had advised that the cashier II position was geographically available in appellant's commuting area and that entry level pay for this position was $197.81 per week. The Office allotted appellant 30 days in which to submit any contrary evidence. Appellant did not respond to this offer within 30 days.

By letter decision dated October 27, 1995, the Office advised appellant that his compensation would be reduced effective November 12, 1995 because the weight of the medical

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[2] In a handwritten, undated Office memorandum, the Office indicated that Dr. Sevick, appellant's treating physician, had approved the position of cashier II as within appellant's physical restrictions. Although this memorandum was undated, it appeared to be written in conjunction with the Office's September 1995 wage-earning capacity determination. Dr. Sevick's August 26, 1993 report is the most recent medical evidence pertaining to appellant's ability to perform the selected cashier II position.

[3] *Albert C. Shadrick*, 5 ECAB 376 (1953); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.814.2 (April 1995).

[4] 5 U.S.C. § 8115.

evidence showed that he was no longer totally disabled for work due to effects of his January 26, 1980 employment injury, and that the evidence of record showed that the position of cashier II represented his wage-earning capacity.[5]

The Board finds that the Office properly reduced appellant's compensation for total disability effective November 12, 1995, based on his capacity to perform the duties of a cashier.

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 benefits.[6]

In the present case, the Office properly found in its September 18, 1995 proposed reduction of compensation that appellant was no longer totally disabled for work due to the effects of his January 26, 1980 employment injury. The Board notes that Dr. Sevick, a Board-certified orthopedic surgeon, indicated in a work restriction evaluation dated August 30, 1993 that appellant could perform an eight-hour workday of light work, with limitations on sitting, walking, lifting, bending, squatting, climbing, kneeling, twisting and standing.

The Office has stated that in some situations extensive rehabilitation efforts will not succeed. In such circumstances, the Office procedures instruct the rehabilitation officer to submit a final report summarizing that placement efforts were not successful and submitting relevant information to the Office.[7]

In the instant case, the Office contacted the vocational rehabilitation counselor on September 30, 1991 and authorized him to provide rehabilitational services to appellant. On November 11, 1992 the vocational rehabilitation counselor issued a status report summarizing his efforts to find suitable alternate employment for appellant in which he stated that efforts to place appellant in an employment position had been unsuccessful. In a status report dated November 19, 1992, the Office stated that appellant's case had been closed as nonrehabilitated, and that following review of the vocational rehabilitation counselor's job availability report, the data for a loss of wage-earning capacity determination was complete and accurate.

[5] The Office recomputed appellant's compensation rate prior to the issuance of its October 27, 1995 decision finalizing its reduction of appellant's compensation. An Office worksheet indicates that the Office adjusted its earlier date of injury salary figure to $327.91 per week, which was the correct figure. Based on a 34 percent wage-earning capacity, which when multiplied by $327.91 amounted to an adjusted wage-earning capacity of $111.35, appellant sustained a $216.16 weekly loss in earning capacity. The Office multiplied $216.16 by 3/4, which amounted to a compensation rate of $162.12. The Office concluded that based on the current consumer price index as of January 26, 1981, appellant's current adjusted compensation rate was $275.00, or about $13.00 more than its initial, September 18, 1995 calculation. *Shadrick, supra* note 3.

[6] *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

[7] See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.814.8 (April 1995).

The Office then properly followed established procedures for determining appellant's employment-related loss of wage-earning capacity.

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.[8] Accordingly, the evidence must establish 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.[9]

In the instant case, the rehabilitation counselor assigned to assist appellant in placement efforts identified two positions listed in the Department of Labor's *Dictionary of Occupational Titles*, appropriate for appellant based on the most recent work restriction evaluation obtained by both the Office and the rehabilitation counselor, Dr. Sevick's August 30, 1993 report. Based on these restrictions, the Office selected a position as a cashier II which it found suitable for appellant, one of the two positions listed by the rehabilitation counselor which was most consistent with appellant's background. The Office used the information provided by the rehabilitation counselor of the prevailing wage rate in the area for a cashier II, and established that jobs in the position selected for determining wage-earning capacity were reasonably available in the general labor market in the geographical commuting area in which the employee lived, as confirmed by state officials. Finally, the Office properly applied the principles set forth in the *Shadrick*[10] decision to determine appellant's loss of wage-earning capacity.

The Office properly found that appellant was no longer totally disabled as a result of his January 26, 1980 employment injury and it followed established procedures for determining appellant's employment-related loss of wage-earning capacity. The Board therefore finds that the Office has met its burden of justifying a reduction in appellant's compensation for total disability.

[8] *Samuel J. Chavez*, 44 ECAB 431 (1993); *Hattie Drummond*, 39 ECAB 904 (1988); *see* 5 U.S.C. § 8115(a); A. Larson, The Law of Workmen's Compensation § 57.22 (1989).

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

[10] *Shadrick, supra* note 3.

The decision of the Office of Workers' Compensation Programs dated October 27, 1995 is hereby affirmed.

Dated, Washington, D.C.
March 23, 1999

George E. Rivers
Member

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member