U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN F. INFORZATO and DEAPRTMENT OF THE NAVY, NAVAL SHIPYARD, Philadelphia, PA

Docket No. 99-1849; Submitted on the Record;
Issued August 24, 2000

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
VALERIE D. EVANS-HARRELL

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation effective April 27, 1997 based on his capacity to earn wages as an information and reception clerk.

The Board finds that the Office properly reduced appellant's compensation effective April 27, 1997 based on his capacity to earn wages as an information and reception clerk.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[1] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[2]

Under section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, his degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect his wage-earning capacity in his disabled condition.[3] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[4] The job selected for determining wage-earning capacity must be a job reasonably

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[1] *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

[2] *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

[3] *See Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

[4] *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

available in the general labor market in the commuting area in which the employee lives.[5] When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by the Office or to an Office wage-earning capacity specialist for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open labor market, that fits that employee's capabilities with regard to his physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service. Finally, application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.[6]

In the present case, the Office accepted that appellant sustained a right knee strain and a torn right medial meniscus.[7] The Office subsequently authorized a right knee arthroscopy, a right medial meniscectomy and chondoplasty surgery, and awarded compensation for total temporary disability. By decision dated April 9, 1997, the Office reduced appellant's compensation effective April 27, 1997 based on his capacity to earn wages as an information and reception clerk. The Office determined that appellant's wage-earning capacity was represented by the selected position of an information and reception clerk. By decision dated July 17, 1998 and finalized July 29, 1998, an Office hearing representative affirmed the Office's April 9, 1997 decision.

On October 16, 1995 Dr. Jeffrey Daniels, appellant's treating physician and a Board-certified orthopedic surgeon, completed a work capacity evaluation, Form OWCP-5. Dr. Daniels stated that appellant should limit kneeling, squatting, climbing and standing for more than two hours per day. He stated that within these limitations that appellant could work eight hours per day and indicated that these restrictions were permanent. The information and reception clerk position is described as a sedentary position, which involved answering inquiries and providing information to people entering the new employing establishment. The position did not require lifting more than 10 pounds.

Appellant's vocational rehabilitation counselor determined that appellant was capable of performing the position of an information and reception clerk and that the state employment services showed the position was available in sufficient numbers so as to make it reasonably available within appellant's commuting area. The Office properly relied on the opinion of the rehabilitation counselor that appellant was vocationally capable of performing the information and reception clerk position, and a review of the medical evidence, including Dr. Daniels' October 16, 1995 report, reveals that appellant was physically capable of performing the position. The Board notes that the fact that an employee has been unsuccessful in obtaining

[5] *Id.*

[6] *See Dennis D. Owen*, 44 ECAB 475, 479-80 (1993); *Wilson L. Clow, Jr.*, 44 ECAB 157, 171-75 (1992); *Albert C. Shadrick*, 5 ECAB 376 (1953).

[7] In a separate claim, the Office accepted that appellant sustained a left knee strain on September 18, 1995.

work in the selected position does not establish that the work is not reasonably available in his commuting area.[8]

Appellant subsequently submitted additional reports from Dr. Daniels to support his argument that he was unable to work eight hours per day in the selected position. In work capacity evaluations dated July 2 and July 15, 1997, Dr. Daniels limited appellant to working four hours per day and limited the amount of sitting appellant could perform to three and six hours, respectively. Dr. Daniels, however, failed to explain why he changed his assessment of appellant's physical capabilities and, therefore, these opinions are entitled of diminished weight.[9] In reports dated July 24, 1996 and January 21, 1997, Dr. Daniels documented his treatment of appellant for knee pain, but he did not address appellant's physical capabilities. However, as late as April 17, 1996, Dr. Daniels still found that appellant was capable of working eight hours per day with no squatting, kneeling or climbing. In reports dated April 8, 1997, April 28 and October 10, 1998, Dr. Jeffrey S. Leitman, a doctor of osteopathy, addressed appellant's physical capabilities. On April 8, 1997 Dr. Leitman indicated that appellant was incapable of work due to a lumbar injury, on April 28, 1997 he indicated that appellant's knee condition rendered him incapable of working and on October 10, 1998 he stated that appellant's knee condition resulted in a lower back condition, which allowed him to work in a sedentary position only four to five hours per day. Dr. Leitman failed to support his conclusions with any explanations of why appellant's physical activities were limited in these reports. These reports are, therefore, entitled to little weight.[10] Similarly, Dr. John Hassman, a doctor of osteopathy, also failed to provide any explanation supporting his July 23, 1997 work capacity evaluation opining that appellant was incapable of working any hours per day and incapable of lifting 0 to 10 pounds. Finally, the June 5, 1997 report of Dr. Paul Axelrod, a podiatrist, failed to address appellant's physical capabilities and is therefore insufficient evidence to establish that appellant was incapable of performing the duties of an information and reception clerk.

The Office considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment, age and employment qualifications, in determining that the position of information and reception clerk represented appellant's wage-earning capacity effective April 27, 1997.[11] The weight of the evidence of record establishes that, at the time his compensation was adjusted effective April 27, 1997, appellant had the requisite physical ability, skill and experience to perform the position of information and reception clerk and that such a position was reasonably available within the general labor market of appellant's commuting area. Therefore, the Office properly based appellant's wage-earning capacity effective April 27, 1997 on the position of information and reception clerk.

[8] *See Leo A. Chartier*, 32 ECAB 652, 657 (1981).

[9] *See George Randolph Taylor*, 6 ECAB 986, 988 (1954) (finding that a medical opinion not fortified by medical rationale is of little probative value).

[10] *Id.*

[11] *See Clayton Varner*, 37 ECAB 248, 256 (1985).

The decisions of the Office of Workers' Compensation Programs dated January 6, 1999 and July 17, 1998 and finalized July 29, 1998 are affirmed.

Dated, Washington, D.C.
August 24, 2000

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

Valerie D. Evans-Harrell
Alternate Member