U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BRUCE A. CHILDERS and DEPARTMENT OF THE NAVY, PUGET SOUND NAVAL SHIPYARD, Bremerton, WA

Docket No. 99-600; Submitted on the Record;
Issued December 1, 2000

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that the constructed position of tractor-trailer truck driver was appropriate for a wage-earning capacity determination under 5 U.S.C. § 8115; and (2) whether the Office properly determined that appellant's request for reconsideration was insufficient to warrant merit review of the claim.

The Office accepted that appellant sustained a lumbar strain, and herniated nucleus pulposus L5 in the performance of duty on January 22, 1991. By letter dated March 21, 1996, the Office notified appellant that it proposed to reduce his compensation because he had the capacity to earn wages as a tractor-trailer truck driver at the rate of $360.00 per week. In a decision dated April 22, 1996, the Office reduced appellant's compensation to reflect his capacity to earn wages as a tractor-trailer truck driver.

In a decision dated October 22, 1997, an Office hearing representative affirmed the prior decision. By decision dated January 12, 1998, the Office reviewed the case on its merits and denied modification. In a decision dated October 5, 1998, the Office determined that appellant's request for reconsideration was insufficient to warrant merit review of the claim.

The Board has reviewed the record and finds that the Office did not meet its burden of proof to reduce appellant's compensation.

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 in such benefits.[1]

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

[1] *Carla Letcher,* 46 ECAB 452 (1995).

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.[2]

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case 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 market, that fits the employee's capabilities with regard to his or her physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the labor market should be made through contact with the state employment service or other applicable service.[3] Finally, application of the principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.[4]

It is well established that the medical evidence must demonstrate that the selected position is within the claimant's work restrictions.[5] In this case, the selected position of tractor-trailer truck driver (DOT No. 904.383-010) requires occasional lifting of up to 50 pounds. The Office, in a memorandum accompanying the March 21, 1996 notice of proposed reduction of compensation, indicated that, in a January 14, 1994 report, Dr. William Furrer, Jr., an orthopedic surgeon serving as a second opinion physician, had provided a 50-pound lifting restriction. The Board notes that this report was over two years old at the time the notice of proposed reduction was issued. A wage-earning capacity determination, however, must be based on a reasonably current medical evaluation.[6] The Office cannot properly determine appellant's wage-earning capacity without a detailed current description of his condition and ability to perform work.[7]

Moreover, there is no indication that any physician of record reviewed the job description of the tractor-trailer truck driver position and opined that appellant was capable of performing the position.[8] The medical evidence must be "clear and unequivocal," or the Office should secure an opinion that the selected position is within appellant's work restrictions.[9] The Office

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[2] *See Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); *see also* 5 U.S.C. § 8115(a).

[3] *See Dennis D. Owen*, 44 ECAB 475 (1993).

[4] 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.303.

[5] *See Francisco Bermudez*, 51 ECAB ___ (Docket No. 98-1395, issued May 11, 2000).

[6] *Carl C. Green, Jr.*, 47 ECAB 737, 746 (1996).

[7] *See Anthony Pestana*, 39 ECAB 980 (1988); *Samuel J. Russo*, 28 ECAB 43 (1976) (medical reports submitted two years prior to the wage-earning capacity determination were not sufficient to establish appellant's current work capacity).

[8] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.8(d) (December 1995) ("if the medical evidence is not clear and unequivocal, the CE [claims examiner] will seek medical advice from the DMA, [district medical adviser] treating physician, or second opinion specialist as appropriate").

[9] *Id.*

noted, for example, that a May 1994 physical capacity examination established only a 40-pound lifting maximum for appellant. The record contains a form report from Dr. James Krueger dated November 1995, which also indicates a 40-pound lifting restriction. The Board cannot find that the record was clear and unequivocal with respect to appellant's lifting restrictions.

The March 21, 1996 memorandum also states that a "treating physician approved of employment as a truck driver," without additional explanation. The record indicates that appellant worked temporarily as a truck driver from September to November 1995. It is not clear what the specific requirements of that position were, nor is the Board able to find a current medical report from an attending physician establishing that the selected position (DOT No. 904.383-010) was within appellant's work restrictions.

It is, as noted above, the Office's burden to reduce appellant's compensation. In this case, the Office did not secure a current medical report containing an opinion that appellant was capable of performing the selected position based on a review of that position description. The medical evidence was neither current nor clear and unequivocal, and therefore the Board finds that the Office did not properly consider all of the factors enumerated under section 8115(a).

In view of the Board's findings, the issue raised under the nonmerit Office decision denying a request for reconsideration will not be addressed.

The decisions of the Office of Workers' Compensation Programs dated October 5 and January 12, 1998 are reversed.

Dated, Washington, DC
December 1, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member