U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BILLY R. COOKSEY and DEPARTMENT OF THE ARMY, ARMY AMMUNITION ACTIVITY, Crane, IN

Docket No. 99-317; Submitted on the Record;
Issued October 3, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly determined that the selected position of information clerk represented appellant's wage-earning capacity.

In the present case, the Office accepted that appellant, a warehouse worker, sustained an L5-S1 herniated disc as causally related to his federal employment. Appellant underwent back surgery in January 1983 and did not return to work. By decision dated March 4, 1998, the Office reduced appellant's compensation to reflect that appellant had the wage-earning capacity of an information clerk. In a decision dated September 8, 1998, an Office hearing representative affirmed the wage-earning capacity determination.

The Board has reviewed the record and finds that the Office did not meet its burden of proof in reducing 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 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

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

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]

In this case, the Office found that a conflict in the medical evidence existed under 5 U.S.C. § 8123(a). An attending physician, Dr. T. Michael Turner, an orthopedic surgeon, continued to opine that appellant remained totally disabled due to residuals of his employment injury. A second opinion referral physician, Dr. R.J. Burkle, an orthopedic surgeon, opined in an April 2, 1996 report that appellant was capable of working in a position that did not involve significant lifting. The case was referred to Dr. Bryant A. Bloss, a Board-certified orthopedic surgeon, for resolution of the conflict.

The Board finds that Dr. Bloss's October 10, 1996 report is not sufficiently detailed to establish that appellant could perform the selected position. Dr. Bloss opined that appellant could work "six to eight hours a day, if it were light or sedentary." He did not explain whether appellant could initially work six hours and then progress to eight hours, or otherwise clarify his statement that appellant could work six to eight hours. Moreover, he did not provide specific lifting limitations, or indicate whether there were specific restrictions on other physical activity. The Office apparently recognized the deficiencies in Dr. Bloss's report, because it sent a November 6, 1996 letter requesting that Dr. Bloss complete a work restriction evaluation that would provide specific work restrictions. It does not appear from the record that Dr. Bloss responded to the request for a supplemental report. There is no indication that any physician of record reviewed the job description of information clerk position and opined that appellant was capable of performing the position.[5] In the absence of such evidence, the Board finds that the medical evidence is not sufficient to establish whether appellant could perform the duties of the selected position. Since it is the Office's burden of proof, the Board finds that the Office did not meet its burden in this case.

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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* 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.")

The decisions of the Office of Workers' Compensation Programs dated September 8 and March 4, 1998 are reversed.

Dated, Washington, DC
October 3, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member