U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RONALD N. FORBES and DEPARTMENT OF THE NAVY, SECURITY DEPARTMENT FIRE DIVISION, San Francisco, CA

Docket No. 01-271; Submitted on the Record;
Issued December 17, 2001

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT, PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation based on its determination that the position of cashier represented his wage-earning capacity.

On May 4, 1991 appellant, then a 44-year-old firefighter captain, filed a claim alleging that the degeneration of his cervical spine resulted from "an occupational disease brought on over a period of years." By letter dated October 30, 1991, the Office accepted appellant's claim for herniated disc degeneration at C4-5 and C5-6.

By letter dated November 22, 1991, the employing establishment offered appellant a position as a communications equipment operator. Although the Office initially found this position to be suitable, it determined on May 19, 1993 after further review, that the position was not suitable.

Appellant then moved and was referred to vocational rehabilitation. On January 3, 1994 appellant underwent a physical capacities evaluation. Based on the test results, the therapist determined that "due to his significantly low fitness level and his low tolerance of bending or twisting motions, his true functional level is … in the 'light' range."

Based on this physical capacities evaluation, Dr. Guy Earle, a Board-certified family practitioner and appellant's treating physician, completed a work restriction evaluation on January 21, 1994. Dr. Earle found that appellant was capable of working eight hours a day in a "light capacity." He found that appellant could sit intermittently for five hours a day, walk and lift and stand intermittently for four hours a day and bend, squat, climb, kneel and twist intermittently one hour a day. Dr. Earle stated that appellant could lift 10 to 20 pounds frequently and 20 to 50 pounds occasionally.

Appellant attended physical therapy, but he did not tolerate work conditioning and his rehabilitation counselor noted in his March 22, 1994 report that appellant had increased symptoms and pain stemming from the therapy treatment.

The vocational rehabilitation counselor determined that the position of cashier would be suitable for appellant and on June 14, 1994, Dr. Earle stated that he would approve a return to work as a cashier. Prior to placement, appellant's rehabilitation counselor recommended that he obtain his general equivalency diploma (GED) by taking review courses at a local community college and appellant complied.

On December 12, 1994 Dr. T. Bressan, appellant's new treating physician, stated that he disagreed with Dr. Earle's assessment that appellant could perform the cashier position because he doubted that appellant could lift more than 20 pounds without problems. However, on May 10, 1995 appellant's second new treating physician, Dr. Michael McManus, a Board-certified occupational medical specialist, approved the cashier position. In an earlier work capacity evaluation dated March 20, 1995, Dr. McManus had stated that appellant should limit kneeling, bending, stooping and lifting, but that he could work eight hours a day.

Appellant's vocational counselor assisted appellant in his job search by providing him with a notice of several job openings as a cashier. However, on August 31, 1995 he signed a waiver of placement services notification, indicating that he did not wish to pursue employment as a cashier and that further, he doubted that he could work full time.

On September 15, 1995 the Office completed a job description for Cashier II wherein it noted that this was a sedentary job with no prior experience required.

On April 14, 1998 appellant had a L4-5 and L5-S1 decompressive laminectomy and left L5-S1 discectomy.

By letter to appellant dated March 4, 1999, the Office noted that in order for appellant to continue to receive compensation payments, it was necessary that they had a current medical report from his doctor.

In an April 2, 1999 medical note, Dr. David Stackhouse, a Board-certified family practitioner, stated that appellant's symptoms, diagnosis, limitations and treatment were unchanged since his treatment by Dr. McManus. Dr. Stackhouse enclosed an October 19, 1986 clinical note wherein Dr. McManus checked boxes indicating that appellant was off work and also indicating that appellant could do limited work. Dr. McManus had commented "Permanent work restrictions and is medically retired."

On May 7, 1999 the Office issued a notice of proposed reduction of compensation, wherein it noted that the medical and factual evidence of record indicated that appellant was no longer disabled but rather partially disabled in that he had a capacity to earn wages as a cashier at a rate of $270.80 a week. The Office based its determination on the medical opinion of Dr. Earle.

In response, appellant submitted a May 17, 1999 note from Dr. Stackhouse wherein he stated:

> "[Appellant] is unable to stand in the occupation of a cashier for 40 hours a week because of his ongoing back problems/back pain. He has frequent exacerbations of the back pain which would totally prohibit him from working."

By decision dated June 9, 1999, the proposed reduction in compensation benefits was made final, again based on the medical opinion of Dr. Earle.

The Board finds that the Office improperly reduced appellant's monetary compensation to reflect a capacity to earn wages in the position of 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.[1] 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."[2] 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. Generally, efforts to reemploy an injured worker are focused on reemployment possibilities with the employing establishment.[3] Where reemployment with the employing establishment is not possible, the vocational rehabilitation counselor assists in either additional job training or in job placement efforts. Where vocational rehabilitation efforts are unsuccessful, Office procedures instruct the vocational rehabilitation counselor to identify three positions from the Department of Labor's *Directory of Occupational Titles* and obtain information from the state employment service with respect to the availability and wage rate of the position.[4] The procedures provide for the claims examiner to select one of the positions in view of such factors as appellant's skills, aptitude, mental alertness, personality factors, etc. and to determine the medical suitability taking into consideration medical conditions due to the accepted work-related injury and any preexisting medical condition. Medical conditions arising subsequent to the work-related injury or disease are specifically excluded from consideration.[5] 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]

The Board has held that the Office may not base a determination of wage-earning capacity on medical evidence that is not current. In *Ellen G. Trimmer*,[7] for example, the Board found that the Office had not met its burden of proof to justify the reduction of the claimant's monetary compensation when it based its decision on a medical report that was almost two years old. The Board found that the passage of time had lessened the relevance of the report. In

[1] *James B. Christenson*, 47 ECAB 775, 778 (1996).

[2] *Samuel J. Chavez*, 44 ECAB 431 (1993); *see* 5 U.S.C. § 8115(a); 2 A. Larson, The Law of Workers' Compensation § 57.22 (1989); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814 (December 1993).

[3] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.8136(b) (December 1993).

[4] *Id; see also Carla Lechter*, 46 ECAB 452 (1995); *Harold D. Snyder*, 38 ECAB 763 (1987).

[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(d) (December 1993).

[6] *Albert C. Shadrick*, 5 ECAB 376 (1953).

[7] 32 ECAB 1878 (1981).

Samuel J. Russo,[8] the Office determined the claimant's wage-earning capacity without a current medical evaluation of the claimant's work limitations. The most recent medical reports regarding such limitations in that case were made two years prior to the Office's determination. In *Anthony Pestana*,[9] the Board held that the Office failed to ensure that the record contained a detailed current description of the claimant's disabled condition and ability to perform work. In that case, the Office made its wage-earning capacity determination nearly five years after the claimant's most thorough physical examination and evaluation.

The Office in this case based its determination of wage-earning capacity on medical determination by Dr. Earle that appellant could do the work of a cashier. This determination was made on June 14, 1994, almost five years prior to the Office's June 9, 1999 decision. Dr. McManus, who also determined that appellant could work as a cashier, set working restrictions and made his determination on May 10, 1995. Consistent with its case precedent, the Board finds that this evidence is stale and cannot form a valid basis for a loss of wage-earning capacity determination.

It is well established that, once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[10] The Board finds that the Office failed to meet its burden of proof because the selected position of cashier was inconsistent with appellant's current work tolerance limitations.

The decision of the Office of Workers' Compensation Programs dated June 9, 1999 is reversed.

Dated, Washington, DC
December 17, 2001

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member

[8] 28 ECAB 43 (1976).

[9] 39 ECAB 980 (1988).

[10] *Harold S. McGough*, 36 ECAB 332 (1984).