U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT L. CROSS and DEPARTMENT OF TRANSPORTATION, COAST GUARD, New York, NY

Docket No. 00-2093; Submitted on the Record;
Issued February 8, 2002

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden to reduce appellant's compensation effective October 29, 1997, based on his capacity to perform the duties of a sales representative.

On September 1, 1994 appellant, a 42-year-old pipe fitter, injured his lower back while carrying a fire extinguisher up a ladder. He filed a claim for benefits, which the Office accepted for lumbar subluxation, L3-S1. The Office paid appellant compensation for temporary total disability, and placed him on the periodic rolls. He has not returned to work since the date of his injury.

In a report dated November 29, 1994, Dr. Gautam Sehgal, a specialist in neurology, advised that appellant's September 1, 1994 work injury had resulted in significant limitation of use of his lumbar spine. Dr. Sehgal stated that the prognosis for full and complete recovery was poor, since these kinds of post-traumatic injuries were frequent precursors to chronic neuro-fibromyositic conditions as well as traumatic arthritis to the involved areas. He concluded:

> "Based upon [appellant's] history, examination, physical findings, as well as the persistence of symptoms, it is my impression that [appellant] has suffered permanent loss of use of the lumbar spine which leaves him with great difficulty performing ... his usual and customary ... [daily] activities....
>
> "It is also my impression that [appellant] has been left with permanent residuals of severe myofascitis involving the lumbar area which will result in pain, stiffness, discomfort, and will significantly affect him in that there is permanent restriction of motion, inability to engage in any kind of lifting, or physical stressful activity without pain, discomfort and fatigue."

On February 22, 1995 the Office referred appellant for a second opinion evaluation with Dr. Gregory S. Gallick, a Board-certified orthopedic surgeon. In a report dated March 21, 1995, Dr. Gallick stated:

> "Based on [appellant's] history, on his physical examination and on his [magnetic resonance imaging] MRI, we clearly have a gentleman here who is exaggerating all of the symptomatology. I see absolutely no reason why he cannot return to all normal working activities tomorrow ... without restrictions. Considering that [appellant] had a back problem dating back to 1988, and that he described his injury at that time was in the exact same location as his present complaints, I think that the accident of [September 1, 1994] probably aggravated a preexisting problem with regard to his lumbar spine. I would consider this aggravation at this point to be resolved.
>
> "[Appellant] is clearly able to return to work as of [March 22, 1995] and is able to perform his regular duties at this time without restrictions."

In a form report dated April 17, 1995, appellant's treating chiropractor, Dr. Ettore C. Carchia, indicated that appellant could do light work for 8 hours, but permitted only intermittent sitting, walking and standing, and lifting up to 10 pounds, and restricted him from bending, squatting, climbing, kneeling and twisting. He also stated that his recovery was proceeding slowly.

The Office determined that there was a conflict in the medical evidence regarding whether appellant still had residuals from his September 1, 1994 employment injury, and it referred him for an impartial examination with Dr. Enrique Hernandez, Board-certified in psychiatry and neurology.

In a report dated June 6, 1995, Dr. Hernandez stated findings on examination, reviewed the medical records and the statement of accepted facts, and stated:

> "I believe [appellant] has reached maximum medical benefits and has returned to his previous base line of [September 1, 1994]. The patient has a mild injury to the low back region, and the severity of his symptoms seems to be out of proportion in correlation to the objective data. I believe that [appellant] would benefit from rehabilitation with muscle strengthening. I do not believe that [appellant] is permanently disabled. He can return to work. I expect that a period of rehabilitation of [four to six] weeks should be sufficient."

In a report dated April 10, 1996, Dr. Hernandez stated:

> "I reached a conclusion that the injuries of September 1, 1994 may represent an exacerbation of underlying lumbar disc degeneration dating back to 1988 although I do not have any definitive evidence to reach this conclusion with complete medical certainty.
>
> "It is my impression that [appellant] is able to work at his previous occupations with the only limitations being inability to stand continuously for greater than two

hours at which point I would recommend periods of sitting down or kneeling from 10 to 15 minutes to rest the lower back and then continuing in a standing position after that. [Appellant] also should avoid lifting greater than 50 pounds. Otherwise, no further restrictions are necessary."

By letter dated December 23, 1996, the Office referred appellant to a vocational rehabilitation counselor for the development of a vocational rehabilitation program in order to locate a suitable alternate job, within the restrictions imposed by his employment injury, based on the reports from Dr. Hernandez.[1]

On July 11, 1997 the vocational rehabilitation counselor issued a report summarizing his efforts to find suitable alternate employment for appellant within the restrictions outlined by Drs. Hernandez and Carchio. The vocational counselor recommended three positions for appellant listed in the Department of Labor's *Dictionary of Occupational Titles*, which he determined reasonably reflected appellant's ability to earn wages. The vocational counselor stated:

"Continued efforts in job placement in the private sector is not recommended to continue as [appellant] displayed subtle and blatant indications of sabotage and obstruction. He cooperates by keeping all appointments and [by] ... making some effort to seek out work, but he does this while still telling employers, employment counselors, etc. that 'he is not ready for competitive employment due to his medical condition.' ... [I believe] it would be an exercise in futility and a waste of government time and money to continue in the job placement process. The jobs submitted ... are suitable for [appellant] and ones for which he is employable. These jobs are reasonably available within the local labor market."

By notice of proposed reduction dated September 19, 1997, the Office advised appellant of its proposal to reduce his compensation because the factual and medical evidence established that he was no longer totally disabled and that he had the capacity to earn wages as a sales representative, hardware supplies (wholesale), DOT #274.357-034,[2] at the weekly rate of

[1] The Office noted in a January 16, 1997 memorandum that the employing establishment had advised the Office that it had no light duty available for appellant.

[2] The job description for sales representative, hardware supplies (wholesale trade), one of the three positions selected by the vocational counselor, stated:

"Sells products to business and industrial establishments or individuals for manufacturer or distributor at sales office, store, showroom, or customer's place of business, utilizing knowledge of product sold.

"Tasks: (1) Compiles lists of prospective customers for use as sales leads, based on information from newspapers, business directories, and other sources; (2) Travels throughout assigned territory to call on regular and prospective customers to solicit orders or talks with customers on sales floor or by phone; (3) Displays or demonstrates product, using samples or catalog, and emphasizes salable features; (4) Quotes prices and credit terms and prepares sales contracts for orders obtained; (5) Estimates date of delivery to customer, based on knowledge of own firm's production and delivery schedules; and (6) Prepares reports of business transactions and keels expense accounts."

$384.62 in accordance with the factors outlined in 5 U.S.C. § 8115.[3] The Office calculated that appellant's compensation rate should be adjusted to $248.75 using the *Shadrick*[4] formula. The Office indicated that appellant's salary on September 1, 1994, the date of injury, was $666.40 per week, that his current, adjusted pay rate for his job on the date of injury was $725.60, and that appellant was currently capable of earning $384.62 per week, the rate of a sales representative, hardware supplies (wholesale). The Office therefore determined that appellant had a 53 percent wage-earning capacity, which when multiplied by 3/4 amounted to a compensation rate of $234.91. The Office found that based on the current consumer price index, appellant's current adjusted compensation rate was $248.75.

The Office stated that the case had been referred to an independent medical examiner, Dr. Hernandez, whose opinion indicating that appellant was capable of working 40 hours per week with restrictions represented the weight of the medical evidence. The Office stated that the case had been referred to a vocational rehabilitation counselor, who located a position as a sales representative, hardware supplies (wholesale), which it found appellant capable of performing given Dr. Hernandez's restrictions and was available in appellant's commuting area. The Office allowed appellant 30 days in which to submit any contrary evidence.

By letter dated October 2, 1997, appellant responded to the proposed termination by claiming that he was totally disabled due to his work-related lower back condition and was therefore unable to perform any form of part-time or full-time work.

By decision dated October 29, 1997, the Office advised appellant that it was reducing his compensation because the weight of the medical evidence showed that he was no longer totally disabled for work due to the effects of his September 1, 1994 employment injury, and that the evidence of record showed that the position of sales representative, hardware supplies (wholesale) represented his wage-earning capacity.

By letter dated November 8, 1997, appellant requested an oral hearing, which was held on April 8, 1999.

By decision dated June 21, 1999, an Office hearing representative affirmed the October 29, 1997 Office decision.

The Board finds that the Office did not meet its burden to reduce appellant's compensation effective October 29, 1997, based on his capacity to perform the duties of a sales representative, hardware supplies.

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation benefits. After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the

[3] 5 U.S.C. § 8115.

[4] *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).

employment.[5] As used in the Federal Employees' Compensation Act the term disability means incapacity because of an employment injury to earn the wages the employee was receiving at the time of injury; that is, a physical impairment resulting in a loss of wage-earning capacity.[6][7]

A review of the medical evidence in the present case indicates that there is no sufficient medical evidence to support a finding that the selected position as sales representative was within appellant's physical limitations. Dr. Hernandez, the referee examiner, opined that appellant could work a 40-hour per week job, but recommended periodic 10- to 15-minute intervals of sitting down or kneeling to rest his lower back. The Office referred appellant to a vocational rehabilitation counselor, who on July 11, 1997 located a job as a sales representative that the Office found was within appellant's physical restrictions as stated by Dr. Hernandez. Dr. Hernandez, however, did not specifically approve the sales representative position, and the job description requires appellant to travel prolonged distances by automobile for indefinite periods. The selected position makes no allowance for appellant to intermittently sit and kneel to rest his lower back, as indicated by Dr. Hernandez, and does not explicitly prevent him from engaging in activities contrary to Dr. Hernandez's restrictions. For this reason, the Board finds that the job requirements of the selected sales representative position exceed appellant's work restrictions. As it is the Office's burden of proof to establish that a selected position represents appellant's wage-earning capacity, the Office did not meet its burden of proof in this case to reduce appellant's compensation benefits based on his capacity to perform the duties of a sales representative, hardware supplies. The Office hearing representative therefore erred in affirming the October 29, 1997 Office decision.

[5] *Id.*

[6] *Ralph W. Baker*, 39 ECAB 1413 (1988).

[7] *See Catherine G. Hammond,* 41 ECAB 375, 385 (1990).

Accordingly, the decision of the Office of Workers' Compensation Programs dated June 21, 1999 is reversed.

Dated, Washington, DC
February 8, 2002

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member