U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FRANK A. WILSON and DEPARTMENT OF THE NAVY, PHILADELPHIA NAVAL SHIPYARD, Philadelphia, PA

Docket No. 01-943; Submitted on the Record;
Issued July 12, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that the position of telephone solicitor represented appellant's wage-earning capacity, effective January 28, 2001, the date the Office reduced his compensation benefits.

On February 24, 1987 appellant, then a 51-year-old electrician, sustained an employment-related contusion to the left lateral epicondyle with radial nerve entrapment of the left elbow when he injured his arm and elbow while pulling a cable. He stopped work that day and was placed on the periodic rolls. The Office continued to develop the claim and in 1987 and 1989, appellant was referred for vocational rehabilitation. On November 16, 1998 the Office referred appellant to Dr. Donald F. Leatherwood, II, a Board-certified orthopedic surgeon, for a second opinion evaluation. In 1999, appellant was again referred for vocational rehabilitation.

Finding that a conflict in the medical evidence existed between Dr. Leatherwood and Dr. Ernest M. Baran, a treating Board-certified physiatrist, on September 1, 2000, the Office referred appellant to Dr. E. Michael Okin, a Board-certified orthopedic surgeon, for an independent medical evaluation.[1] In November 2000, John Heathcote, a rehabilitation counselor, completed a labor market survey and determined that the position of telephone solicitor, based on the Department of Labor's *Dictionary of Occupational Titles*, fit appellant's capabilities. By letter dated November 3, 2000, the Office submitted the position description for a telephone solicitor to Dr. Okin for his review.

[1] Drs. Leatherwood and Okin were furnished with the medical record, a set of questions and a statement of accepted facts.

On December 13, 2000 the Office advised appellant that it proposed to reduce his compensation based on the opinion of Dr. Okin.[2] The Office determined that the position of telephone solicitor and corresponding wages represented appellant's wage-earning capacity and found that the position was available in appellant's commuting area. The Office advised appellant that if he disagreed with its proposed action, he should submit contrary evidence or argument within 30 days.

In a letter dated December 18, 2000, Dr. Okin advised that appellant could perform the position of telephone solicitor. Hearing nothing further from appellant, by decision dated January 25, 2001, the Office finalized the reduction of appellant's compensation, effective January 28, 2001, based on his capacity to earn wages as a telephone solicitor. The instant appeal follows.

The Board finds that the Office properly reduced appellant's compensation benefits.

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.[3] Under section 8115(a) of the Federal Employees' Compensation Act,[4] wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity or if the employee has no actual earnings, wage-earning capacity is determined with due regard to the nature of injury, degree of physical impairment, usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect the employee's wage-earning capacity in his or her disabled condition.[5]

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 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

[2] Dr. Okin provided an October 4, 2000 report in which he noted that appellant's left upper extremity was his nondominant extremity and diagnosed status post radial nerve release of the left elbow, status post radial epicondylitis of the left elbow, ulnar nerve entrapment of the left elbow unrelated to the employment injury and medial epicondylitis of the left elbow unrelated to the employment injury. In a work capacity evaluation dated September 28, 2000, Dr. Okin advised that appellant could work eight hours per day with a five-pound restriction with pushing, pulling and lifting of the left upper extremity. Appellant was further limited to one hour of reaching and repetitive movement with the left upper extremity and no reaching above the shoulder with the left upper extremity.

[3] *Garry Don Young*, 45 ECAB 621 (1994).

[4] 5 U.S.C. §§ 8101-8193.

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

employment service or other applicable services.[6] Finally, by applying the principles set forth in *Albert C. Shadrick*, the employee's loss of wage-earning capacity can be ascertained.[7]

In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[8] Here the Office determined that a conflict of medical opinion existed between appellant's treating physician, Dr. Baran, and Dr. Leatherwood who provided second opinions for the Office. The Office then referred appellant, along with the medical record, a statement of accepted facts and a list of questions, to Dr. Okin to resolve the conflict who specifically advised that appellant could perform the selected position of telephone solicitor. Thus, there is no indication that the selected position of general clerk is outside the restrictions set forth by Dr. Okin. The Board, therefore, finds that the Office properly assessed appellant's physical impairment in determining that the position of telephone solicitor represented his wage-earning capacity.

As noted above, the selected position must not only be medically suitable but must also be available in appellant's commuting area. The rehabilitation counselor in this case indicated that the recommended position was reasonably available and that the position paid $317.60 per week in the open market. Appellant's compensation was accordingly reduced to reflect such wage-earning capacity under the principles set forth in *Shadrick*.[9]

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

[7] 5 ECAB 376 (1953); *see* 20 C.F.R. § 10.403 (1999).

[8] *See Kathryn Haggerty*, 45 ECAB 383 (1994); *Edward E. Wright*, 43 ECAB 702 (1992).

[9] *Supra* note 7.

The decision of the Office of Workers' Compensation Programs dated January 25, 2001 is hereby affirmed.

Dated, Washington, DC
July 12, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member