U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LAWRENCE D. PRICE and DEPARTMENT OF AGRICULTURE, FOREST SERVICE, CLEARWATER NATIONAL FOREST, Orofino, ID

Docket No. 02-1541; Submitted on the Record;
Issued May 19, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON, MICHAEL E. GROOM

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

On June 14, 1991 appellant, then a 33-year-old forestry technician, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that he suffered from shoulder impingement as a result of his federal employment. He identified July 12, 1990 as the date he first became aware of his condition. The Office accepted appellant's claim for right shoulder impingement syndrome and authorized two arthroscopic surgical procedures, which were performed in October 1991 and January 2000.

By decision dated April 3, 2002, the Office determined that the constructed position of dispatcher with weekly earnings of $300.00 represented appellant's wage-earning capacity.[1]

The Board finds that the Office properly determined that the constructed position of dispatcher represented appellant's wage-earning capacity.

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[2] An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.[3]

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[1] The Office issued a proposed decision to reduce appellant's wage-loss compensation on February 7, 2002.

[2] *James B. Christenson*, 47 ECAB 775, 778 (1996); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

[3] 20 C.F.R. §§ 10.402, 10.403 (1999); *see Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

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 labor 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 open labor market should be made through contact with the state employment service or other applicable service.[4] In determining the availability of suitable employment, 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.[5]

The physical requirements of the constructed position of dispatcher are sedentary in nature and include frequent reaching, handling, fingering, talking, hearing with occasional near acuity. On November 20, 2000, Dr. Stephen G. Powell, a Board-certified orthopedic surgeon, released appellant to return to full-time work with a restriction of no work at or above shoulder height. Dr. Powell subsequently completed a work-capacity evaluation (Form OWCP-5c) on December 10, 2000. Appellant has not challenged the selected position on the basis that it is not medically suitable and the evidence of record establishes that appellant is both physically and vocationally capable of performing the duties of a dispatcher. The fact that appellant is unable to secure employment as a dispatcher does not establish that the constructed position is not vocationally suitable.[6]

Appellant challenged the Office's selection of the dispatcher position because it required a daily commute of approximately 120 miles. While appellant resides in Superior, Montana, the selected position of dispatcher is available in Missoula, Montana, which is approximately 60 miles from appellant's residence. When appellant raised the issue of the commute to Missoula, Montana, the Office responded: "The nearest viable labor market is within customary and reasonable commuting distance as determined by [the Office] rehabilitation specialists." In a January 10, 2001 email to the Office, the rehabilitation specialist indicated that the 57-mile commute was "customary" as workers in Superior, Montana, generally undertake the commute to Missoula, Montana, "because it is the nearest viable labor market." He further noted that "[m]any who choose to live around Superior, Montana, must commute long distances to work." Additionally, the rehabilitation specialist considered the Missoula, Montana, commute "reasonable" because travel was *via* U.S. Interstate 90.

The Office's procedure manual provides that "[b]ecause the [rehabilitation specialist] is an expert in the field of vocational rehabilitation, the [claims examiner] may rely on his or her opinion as to whether the job is reasonably available and vocationally suitable."[7] In this instance, the rehabilitation specialist stated the commute from Superior to Missoula, Montana,

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

[5] *David Smith*, 34 ECAB 409, 411 (1982).

[6] *See Phillip S. Deering*, 47 ECAB 695 (1996).

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

was both "customary" and "reasonable." While appellant argued the amount of travel was excessive and the cost of a 120-mile daily commute would almost equal the expected earnings of the selected position, he did not submit any evidence to establish that Missoula, Montana, was not within his commuting area. The Board finds that the Office properly relied on the rehabilitation specialist's expertise in determining that the constructed position of dispatcher was reasonably available within appellant's commuting area. Accordingly, the Office met its burden of proof to justify termination or modification of compensation benefits.[8]

The April 3, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
May 19, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[8] *James B. Christenson*, *supra* note 2.