U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM H. WOODS and DEPARTMENT OF THE ARMY, Fort Hood, TX

Docket No. 99-1433; Submitted on the Record;
Issued August 10, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined appellant's wage-earning capacity based on his ability to work as a collection clerk.

On April 19, 1978 appellant, then a 36-year-old boiler plant equipment mechanic, filed a claim for an injury occurring on April 18, 1978 in the performance of duty. The Office accepted appellant's claim for chronic lumbosacral strain, a herniated disc at L5-S1 with nerve root pressure and a small defect at L5-S1. The Office authorized a decompression and fusion from L4 through the sacrum of appellant's spine in 1980.

By decision dated September 29, 1998, the Office adjusted appellant's compensation effective that date to reflect his capacity to earn wages as a collection clerk.

In a decision dated and finalized February 16, 1999, an Office hearing representative affirmed the prior decision.

The Board has duly reviewed the case record and finds that the Office improperly determined appellant's wage-earning capacity based on his ability to work as a collection clerk.

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] Under section 8115(a) of the Federal Employees' Compensation Act,[2] 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 the employee has no

[1] *David W. Green*, 43 ECAB 883 (1992); *Harold S. McGough*, 36 ECAB 332 (1984).

[2] 5 U.S.C. §§ 8101-8193.

actual earnings, his wage-earning capacity is determined with due regard to 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.[3]

After the Office makes a medical determination of partial disability and of special 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 open labor market should be made through contact with the state employment services or other applicable services. 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.[4]

In the present case, the Office referred appellant, together with a statement of accepted facts and a list of questions, to Dr. John McLachlan, a Board-certified orthopedic surgeon, for a second opinion evaluation. The Office specifically requested that Dr. McLachlan discuss whether appellant was disabled due to his employment-related back conditions as well as other nonemployment-related conditions. The Office informed Dr. McLachlan that, in addition to his employment-related back condition, appellant "has a duodenal ulcer, shrapnel in the left shoulder and leg, degenerative disc disease, obesity, an umbilical hernia with repair and rheumatoid arthritis (diagnosed in 1976).

In a report dated November 11, 1996, Dr. McLachlan discussed appellant's 1978 employment injury, reviewed the medical evidence, noted appellant's current activities and listed findings on physical examination. He found that x-rays revealed "lumbar instability at L3-4" and "evidence of a decompressive laminectomy L4 to the sacrum with an intact posterolateral fusion [at] L4 to the sacrum." In response to the Office's questions, Dr. McLachlan stated:

> "I do not feel that there is any evidence that there is residual herniated disc. There is, however, multi-level disc pathology, most notably lumbar instability at L3-4 secondary to increased stress presenting at the level above the fusion. This is disabling.
>
> "There is no objective evidence of residual from the decompression other than [appellant's] complaints of leg symptoms. Relative to the fusion there is objective evidence of instability at the level above the fusion, which I feel is disabling when combined with [appellant's] overall condition.
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> "I feel that [appellant] is disabled from his work as a boiler plant mechanic. The disability is due to the original injury and not a lumbar strain. The current disability is related to the results of his lumbar fusion and decompression. I did not evaluate [him] for duodenal ulcer or shrapnel. There is evidence of

[3] *Samuel J. Chavez*, 44 ECAB 431 (1993).

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

degenerative disc disease throughout the lumbar spine. I do not feel that the obesity is the major disabling factor. I did not check or confirm umbilical hernia or rheumatoid arthritis."

Dr. McLachlan concluded that appellant was "disabled from gainful employment in any fashion because of the reasons cited."

By letter dated December 23, 1996, the Office requested that Dr. McLachlan complete a work restriction evaluation and describe appellant's limitations in view of his description of appellant's daily activities, including housekeeping.

In a work restriction evaluation dated January 7, 1997, Dr. McLachlan opined that appellant could work 8 hours per day with significant restrictions, including no lifting over 10 pounds and alternating sitting and standing.

By letter dated January 30, 1997, the Office requested that Dr. J.L. Fambrough, a Board-certified orthopedic surgeon and appellant's attending physician, review and comment on Dr. McLachlan's work restriction evaluation and report. In a report dated February 25, 1997, Dr. Fambrough stated that appellant "is not totally disabled, in that he is able to get up and walk about and care for himself about the house. I do feel he is functional in a sedentary setting. He is going to be symptomatic regardless of whether his functional activity is at rest or a minimal activity level."

On April 4, 1997 the Office referred appellant to a rehabilitation counselor for vocational rehabilitation.

In a vocational rehabilitation report dated June 17, 1998, the rehabilitation counselor identified the positions of food checker, cashier, collection clerk and receptionist as within appellant's capabilities and reasonably available within his geographical area. The rehabilitation counselor noted that appellant was not cooperating with vocational rehabilitation.

In a report dated August 3, 1998, the rehabilitation counselor discussed the identified position of collection clerk and noted that appellant had previously performed work requiring the same or higher vocational level. She recommended case closure due to appellant's failure to cooperate with rehabilitation.

Appellant submitted a report, dated August 19, 1998, from Dr. Fambrough, who listed findings on examination, noted that appellant's condition had not improved and stated, "I do not think [appellant] is able to be gainfully employed."

The Office properly relied upon the opinion of the rehabilitation counselor in finding that the position of collection clerk was vocationally suitable for appellant and geographically available. The Office, however, further has the responsibility to determine whether the medical evidence establishes that appellant has the ability to perform the selected position. In determining a loss of wage-earning capacity where the residuals of an injury prevent an employee from performing his regular duties, the impairments which preexisted the injury, in addition to the injury-related impairments, must be taken into consideration in the selection of a

job within his/her work tolerance. It is only subsequently acquired impairments unrelated to the injury, which are excluded from consideration in the determination of the employee's work capabilities.[5] In the instant case, the medical evidence is insufficient to show that appellant had the physical capacity to perform the position around the time his compensation was adjusted in September 1998.

The Office requested that Dr. McLachlan discuss whether appellant had any disability due to his preexisting condition of rheumatoid arthritis. The Office further noted other conditions that may have preexisted appellant's employment injury, including a shrapnel wound to his leg, and arms, an ulcer, a hernia and degenerative disc disease.[6] He, however, specifically declined to render findings relevant to appellant's rheumatoid arthritis, shrapnel wounds, ulcer and hernia. The Office thus issued its wage-earning capacity decision without determining whether appellant's preexisting condition of rheumatoid arthritis and any other condition, which preexisted his 1978 employment injury, prevented him from performing the duties of the selected position. The Office, therefore, improperly determined appellant's wage-earning capacity based on his ability to work as a collection clerk.

Further, Dr. McLachlan did not provide any rationale for his finding that appellant could work eight hours per day in view of the fact that in his previous narrative report he had found appellant "disabled from gainful employment in any fashion" and supported his conclusion with medical reasoning. Additionally, prior to the issuance of the Office's wage-earning capacity determination, appellant's attending physician changed his finding that appellant could perform sedentary employment to a finding that he was totally disabled. There is no indication in the record that the Office provided a description of the position of collection clerk to a physician and sought an opinion regarding whether appellant was physically capable of performing the position prior to reducing his compensation benefits. Accordingly, the Board finds that appellant's wage-earning capacity was not determined with due regard to his physical impairment as provided in 5 U.S.C. § 8115(a).

As the Office did not obtain the necessary medical evidence to substantiate that appellant could perform the duties of the selected position, the Office did not meet its burden of proof to reduce his compensation benefits.

[5] *William Ray Fowler*, 31 ECAB 1817, 1822 (1980).

[6] It appears from Office Form CA-800 that appellant received an award from the Department of Veterans Affairs for an ulcer and shrapnel in his left shoulder and leg.

The decisions of the Office of Workers' Compensation Programs dated February 16, 1999 and September 29, 1998 are hereby reversed.

Dated, Washington, D.C.
August 10, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member