U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DENNIS IMPERIAL and DEPARTMENT OF DEFENSE, DEFENSE DISTRIBUTION REGION WEST, Stockton, CA

Docket No. 00-2257; Submitted on the Record;
Issued March 4, 2002

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 position of storage facility rental clerk represented appellant's wage-earning capacity.

In the present case, the Office accepted that appellant sustained a low back strain, herniated disc and subsequent back surgeries as causally related to an August 3, 1992 employment injury.[1] By letter dated April 19, 1999, the Office notified appellant that it proposed to reduce his compensation to reflect his wage-earning capacity in the selected position of storage facility rental clerk.

By decision dated May 21, 1999, the Office reduced appellant's compensation to reflect his ability to earn $8.00 per hour as a storage facility rental clerk. In a decision dated March 29, 2000, an Office hearing representative affirmed the prior decision.

The Board finds that the Office properly reduced appellant's compensation in this case.

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.[2]

Under section 8115(a) of the Federal Employees' Compensation Act, 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 if the employee has no actual earnings, his wage-

[1] The claim form indicated that appellant was 43 years old on the date of injury; appellant stated that he was sitting in a chair and as he was pulling away from his work table the chair caught on a rip in the carpet.

[2] *Carla Letcher*, 46 ECAB 452 (1995).

earning capacity is determined with due regard to the nature of his injury, his degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment, and other factors and circumstances which may affect his wage-earning capacity in his disabled condition.[3]

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, *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 employment service or other applicable service.[4] Finally, application of the principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.[5]

The initial question presented is whether the selected position, storage facility rental clerk (*Dictionary of Occupational Titles* No. 295.367-026), was within appellant's physical restrictions. An attending physician, Dr. Daniel Benson, an orthopedic surgeon, indicated in a February 19, 1998 work capacity evaluation (Form OWCP-5c) that appellant could work 8 hours per day, with a 25-pound lifting restriction. Dr. Benson also noted that appellant should limit kneeling, bending and lifting. The selected position in this case is classified as "light" by the Department of Labor, *Dictionary of Occupational Titles*, with occasional lifting of up to 20 pounds. It does not require kneeling or crouching and involves occasional stooping and climbing. The Board finds that the selected position is within the restrictions provided by Dr. Benson. Appellant did not submit any additional medical evidence indicating that he was unable to physically perform the selected position. Accordingly, the Board finds that the Office properly took into consideration the nature of appellant's injury and his degree of physical impairment.

Before the hearing representative, appellant argued that he did not have sufficient educational background for the position, noting that he was a high school dropout. The position of storage facility rental clerk does not, however, have a specific, formal education requirement. The Department of Labor, *Dictionary of Occupational Titles* indicates only that the position has a certain level of language, reasoning and mathematical development.[6] Appellant did not submit any reliable evidence that he did not have sufficient development skills to perform the position. The rehabilitation specialist indicated that appellant had the skills to perform the position and there is no probative contrary evidence.

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

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

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

[6] The general educational development for the position is described as level three for language, reasoning and mathematical development.

The rehabilitation specialist also found that the position was reasonably available in appellant's area, with a wage of $8.00 per hour. The Board finds that the evidence of record supports a finding that the selected position was medically and vocationally appropriate, and was reasonably available. The Office properly considered the relevant factors under section 8115(a) in determining that appellant's wage-earning capacity was represented by the selected position of storage facility rental clerk. The formula for determining loss of wage-earning capacity, developed in the *Albert C. Shadrick* decision,[7] has been codified at 20 C.F.R. § 10.403. In this case, the Office properly reduced appellant's compensation to reflect his ability to earn wages at $8.00 per hour in the selected position on a full-time basis.

On appeal, appellant contends that he is not physically capable of returning to work, specifically noting a May 27, 1999 report of Dr. Benson and a May 4, 1999 report of Dr. Cahill. The Board notes that the May 27, 1999 attending physician's report of Dr. Benson notes only appellant's continuing treatment but does not contain any medical rationale indicating a change in his prior finding that appellant could do full-time limited duty. Dr. Benson made no finding that appellant could not perform the duties of the selected position. Similarly, the May 4, 1999 attending physician's report of Dr. Cahill does not address appellant's ability to perform the duties of the storage facility rental clerk position. These reports are insufficient to support appellant's contention that he is not physically capable of performing the duties of the selected position.

The decision of the Office of Workers' Compensation Programs dated March 29, 2000 is affirmed.

Dated, Washington, DC
March 4, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[7] *Supra* note 5.