U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES M. FRASHER and DEPARTMENT OF DEFENSE, OFFICE OF THE SECRETARY OF DEFENSE, Washington, D.C.

Docket No. 01-362; Submitted on the Record;
Issued September 25, 2002

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 adjusted appellant's compensation effective August 30, 1999 based on his capacity to earn wages as a dispatcher.

On December 11, 1988 appellant, then a 43-year-old planner and estimator, sustained a cervical strain, a lumbar strain and herniated disc at L4-5 when he hit his head on a low-hanging pipe at work. Appellant underwent lumbar surgeries in 1989, 1991 and 1993 which were authorized by the Office. He stopped work after his injury, returned to work in June 1990 and stopped work again in November 1990. The Office paid appropriate compensation for periods of disability.

By decision dated August 30, 1999, the Office adjusted appellant's compensation based on his capacity to earn wages as a dispatcher. By decision dated May 30, 2000 and finalized June 5, 2000, an Office hearing representative affirmed the Office's August 30, 1999 decision.

The Board finds that the Office properly adjusted appellant's compensation effective August 30, 1999 based on his capacity to earn wages as a dispatcher.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[1] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[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

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[1] *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

[2] *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

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-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] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[4] The job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives.[5]

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by the Office or 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 that employee's capabilities with regard to his 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. 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.[6]

In a report dated September 1, 1998, Dr. Rosario A. Musella, a Board-certified neurosurgeon who served as an Office referral physician, indicated that upon examination appellant did not exhibit loss of strength in his extremities. Dr. Musella diagnosed status postoperative multiple lumbar laminectomies and cervical spondylosis and indicated that appellant did not require active treatment for these conditions.[7] He indicated that appellant could work on a full-time basis with restrictions from lifting no more than 25 pounds (including a restriction from lifting no more than 15 pounds overhead). Dr. Musella noted that appellant could twist, reach above his shoulders and perform repetitive motions with his wrists and elbows, but that he should limit his sitting, walking and standing.[8]

[3] *See Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C § 8115(a).

[4] *Albert L. Poe*, 37 ECAB 684, 690 (1986), *David Smith*, 34 ECAB 409, 411 (1982).

[5] *Id.*

[6] *See Dennis D. Owen*, 44 ECAB 475, 479-80 (1993); *Wilson L. Clow, Jr.*, 44 ECAB 157, 171-75 (1992); *Albert C. Shadrick*, 5 ECAB 376 (1953).

[7] Dr. Musella noted that appellant's subjective complaints outweighed the objective findings. He stated that on examination appellant exhibited almost no range of cervical spine motion. Dr. Musella stated, "I would not trust him to operate a motor vehicle since he will not move his neck," but indicated that appellant did not require cervical surgery.

[8] In a September 14, 1998 work restriction form, Dr. Mussel indicated that appellant could lift 25 pounds and sit, stand, walk and reach for 2 hours per day. He noted that appellant could not operate a motor vehicle.

The Office provided Dr. Muhammad Y. Memon, an attending Board-certified neurosurgeon, with a copy of Dr. Musella's September 1, 1998 report and requested that he provide an opinion on appellant's ability to work. In a report dated November 6, 1998, Dr. Memon detailed the findings of his October 27, 1998 examination and noted that he agreed with Dr. Musella that appellant exhibited almost no range of cervical spine motion. Dr. Memon noted that the continuing degenerative disc disease of appellant's neck caused pain and foraminal stenosis and necessitated surgery at some point. He stated, "It is my opinion that [appellant] cannot return to any type of employment and is totally disabled."[9]

The Office properly determined that there was a conflict in the medical evidence between Drs. Musella and Memon regarding appellant's ability to work and referred appellant to Dr. John R. Little, a Board-certified neurosurgeon for an impartial medical examination and an opinion on the matter.[10]

In a report dated April 6, 1999, Dr. Little discussed appellant's factual and medical history. He noted that upon examination appellant's upper and lower extremities did not exhibit any weakness or atrophy. Dr. Little indicated that straight leg raising was painful to 45 degrees bilaterally when lying supine, but that he was able to raise appellant's legs to 90 degrees painlessly while he was sitting. He noted that appellant exhibited restriction of cervical movements in all directions but did not have posterior cervical muscle spasms upon palpation. Dr. Little stated, "He does not have any findings of cervical mechanical instability or spinal cord/nerve root compression. Frankly, I am having difficulty explaining the cause of his continuing severe neck pain on a physical basis." He noted that appellant did not have a significant neurological deficit, aside from an absent left gastrocnemius jerk. Dr. Little indicated that he suspected an element of amplification in appellant's description of his cervical, back and left lower extremity pain.[11] In a work restrictions form dated April 12, 1999, Dr. Little stated that appellant could work for eight hours per day. He noted that appellant could sit for six hours per day, walk for two hours, stand for two hours, reach for four hours and reach above his shoulder for four hours. Dr. Little indicated that appellant could lift, push or pull 25 pounds and that he could engage in twisting.

In September 1998, appellant was referred for participation in a vocational rehabilitation program. In July 1999, appellant's vocational rehabilitation counselor determined that he was able to perform the position of dispatcher[12] and that the state employment service showed the

[9] He further noted, "I agree with Dr. Musella that [appellant's] cervical limitations prevent him from driving a motor vehicle."

[10] Section 8123(a) of the Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." 5 U.S.C. § 8123(a). When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence. *William C. Bush*, 40 ECAB 1064, 1975 (1989).

[11] Dr. Little stated that active treatment would not be beneficial and that no further cervical surgery was recommended.

[12] The position of dispatcher involves the dispatching of appropriate personnel in response to orders for repair work and requires occasional lifting of 10 pounds. The position does not require driving.

position was available in sufficient numbers so as to make it reasonably available within appellant's commuting area.[13]

The weight of the medical evidence of record shows that appellant is physically capable of performing the dispatcher position. As noted above, the Office properly determined that there was a conflict in the medical evidence regarding appellant's ability to work and referred appellant to Dr. Little, the impartial medical specialist, for resolution of that conflict. In situations where there exist 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 upon a proper factual background, must be given special weight.[14] The Board finds that the well-rationalized opinion of Dr. Little shows that appellant was able to perform the dispatcher position. The position is essentially sedentary in nature and requires lifting of 10 pounds. Dr. Little explained that appellant showed limited objective findings of his cervical, back and left lower extremity complaints. He noted that appellant could lift 25 pounds, engage in twisting, sit for six hours per day, walk for two hours, stand for two hours, reach for four hours and reach above his shoulder or four hours. The physical requirements of the dispatcher position are well within the work restrictions recommended by Dr. Little.[15]

Appellant alleged that the dispatcher position was inappropriate in that he was unable to drive. The dispatcher position does not contain any duties which would require appellant to drive. While the commuting area of a constructed position is to be determined by the employee's ability to get to and from the work site,[16] there is no clear evidence that appellant was not able to get to and from the work site of the constructed position. The weight of the medical evidence, as represented by the opinion of Dr. Little, shows that appellant is able to drive. He acknowledged appellant's reported cervical pain and limitation of motion, but noted that there was no objective evidence of cervical mechanical instability or spinal cord/nerve root compression. Dr. Little stated that there were no objective findings to account for appellant's cervical pain complaints and indicated that he suspected an element of amplification in appellant's description of his cervical, back and left lower extremity pain. Moreover, he indicated that appellant could sit for six hours, reach for four hours and engage in twisting.

The Office considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment, age and employment qualifications, in

[13] Appellant claimed that his vocational rehabilitation counselor failed to contact a state employment service or other applicable service in making his determination that the dispatcher position was reasonably available in his commuting area. However, the fact that the counselor analyzed surveys from the state employment service would be sufficient to meet this requirement; *see Dennis D. Owen*, 44 ECAB 475, 479 (1993). Appellant asserted that the information from the state employment service that his vocational rehabilitation counselor analyzed was out of date. However, a review of the record reveals that the information reviewed by his counselor contained actual and estimated data which covered the period from 1995 to 2005.

[14] *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

[15] Appellant alleged that his cervical condition was not adequately considered, but a review of Dr. Little's opinion reveals that appellant's cervical condition was in fact considered.

[16] *See Glen L. Sinclair*, 36 ECAB 664, 669 (1985).

determining that the position of dispatcher represented appellant's wage-earning capacity.[17] The Office properly relied on the opinion of the rehabilitation counselor that appellant was vocationally capable of performing the dispatcher position and the medical evidence shows that appellant is physically capable of performing the position. The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of dispatcher and that such a position was reasonably available within the general labor market of appellant's commuting area. For these reasons, the Office properly adjusted appellant's compensation effective August 30, 1999 based on his capacity to earn wages as a dispatcher.

The decision of the Office of Workers' Compensation Programs dated May 30, 2000 and finalized June 5, 2000 is affirmed.

Dated, Washington, DC
September 25, 2002

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[17] *See Clayton Varner*, 37 ECAB 248, 256 (1985).