U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CLYDE JAMES and DEPARTMENT OF THE NAVY, NAVAL AVIATION DEPOT, Alameda, Calif.

Docket No. 95-2741; Submitted on the Record;
Issued April 3, 1998

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs properly reduced appellant's wage-loss compensation based on the proposed position of security guard; and (2) whether the Office properly denied appellant's request for an oral hearing.

The Office accepted that on March 8, 1979 appellant then a 24-year-old-aircraft engine mechanic helper, sustained a right acromioclavicular separation with long thoracic nerve injury causing right serratus anterior paralysis, and a low back strain.[1] As of March 8, 1979, appellant was a WG5, Step 3, paid $7.84 per hour. He received compensation on the daily and periodic rolls, and a March 8, 1979 schedule award for a 27 percent permanent impairment of the right upper extremity. He underwent October 17, 1979 surgical reconstruction of the right shoulder. Appellant received vocational rehabilitation services in 1987 and from April 1990 through November 1991, including training in heavy equipment operation.

Appellant submitted periodic reports from August 1979 through 1991 from Dr. David Wren Jr., an attending Board-certified orthopedic surgeon, noting right shoulder and low back pain, arthritic changes in the lumbar region and right shoulder, and a "paralyzed right long thoracic nerve resulting in scapular winging."

In an August 9, 1990 report, Dr. Wren opined that appellant was medically able to perform the position of backhoe operator. In a November 1991 report, a vocational rehabilitation counselor found the position of backhoe operator to be within appellant's physical limitations and vocational abilities.

[1] The Office previously accepted a September 13, 1978 acromioclavicular separation of the right shoulder, after which appellant was off work until November 27, 1978.

By June 3, 1992 notice,[2] finalized July 6, 1992, the Office reduced appellant's compensation benefits on the grounds that the medical evidence showed he was no longer totally disabled for work due to residuals of the March 8, 1979 injury, as Dr. Wren opined on August 9, 1990 that he could perform the duties of a backhoe operator. The Office found that the proposed position of heavy equipment operator fairly and reasonably represented his wage-earning capacity.

Appellant requested a hearing by August 18, 1992 letter, which was denied by a decision dated October 23, 1992, on the grounds that it was untimely filed.[3] Appellant disagreed with this decision, and by an April 23, 1993 letter requested reconsideration, enclosing additional reports from Dr. Wren.

In a May 14, 1992 report, Dr. Wren diagnosed acromioclavicular joint instability with arthritic changes and fragmentation of implanted wires, and "scapular winging directly related to a long thoracic nerve paralysis" from the March 8, 1979 injury, and lumbosacral degenerative disc disease. He stated that appellant could not "function as a heavy equipment operator" without a hydraulic lift seat support, and was "limited in lifting and carrying very heavy objects, especially over his shoulder and head." Dr. Wren prescribed additional restrictions in a September 4, 1992 report, limiting "overhead or over the shoulder reaching or pulling and working in a sustained manner," lifting and carrying over 30 to 35 pounds," pulling and pushing heavy objects, "especially with the right arm," and sitting for longer than 90 minutes at a time. Dr. Wren "recommended against operating heavy equipment with a clutch apparatus … repetitive bending and twisting at the waist," and repetitive climbing."

By decision dated May 11, 1993, the Office denied modification, finding that Dr. Wren's restrictions did not apply to the backhoe operator position, classified by the Department of Labor's *Dictionary of Occupational Titles* (hereinafter "DOT") as sedentary, with lifting up to 10 pounds, and no reaching above the shoulder.

In an April 26, 1994 letter, appellant, through his elected representative, asserted that the July 6, 1992 and May 11, 1993 decisions were in error. Appellant asserted that the May 11, 1993 decision was erroneous as the standards used were from an outdated version of the DOT. Appellant contended that the physical demands of the Equipment Operator (Backhoe) position were medium, and that there were no sedentary positions under either DOT code 850.683-030 – Backhoe Operator, or code 859.683-010 – Operating Engineer.[4] He submitted new reports from

[2] In a June 23, 1992 letter, appellant disagreed with the proposed reduction of compensation, asserting that he was not vocationally qualified or medically able to perform the duties of a heavy equipment operator.

[3] Appellant requested an election of benefits from the Office of Personnel Management to Federal Employees' Compensation Act, to be effective November 15, 1992 and continuing.

[4] Appellant submitted excerpts from the *Dictionary of Occupational Titles*, Vol. II (4th ed., rev. 1991), showing that the backhoe operator position was medium work requiring lifting 20 to 50 pounds occasionally and 10 to 25 pounds frequently. Heavy work required lifting 50 to 100 pounds occasionally and 25 to 50 pounds frequently.

Dr. Wren opining he was medically unable to perform the duties of a backhoe or heavy equipment operator.[5]

In a July 27, 1993 report, Dr. Wren noted reviewing job descriptions for heavy equipment operation. Dr. Wren opined that "[g]iven appellant's chronic back and right shoulder problem and unstable right shoulder due to the permanent paralysis of the long thoracic nerve producing scapular wining with subsequent development of osteoarthritis in the right shoulder joint and acromioclavicular joint, [appellant was] unable to handle the very heavy attachments" such as buckets, pile drivers, and wrecking balls needed in operating such equipment, but was "able to perform lighter work.[6]

By decision dated September 14, 1994, the Office found that it had erred in its July 6, 1992 decision, and modified that decision to find that appellant had the capacity to perform the position of Security Guard. The Office noted that, therefore, an Office rehabilitation specialist "identified two occupations within appellant's work restrictions which were being performed in sufficient numbers to be considered reasonably available … security guard, and Truckload Checker." The Office provided a description of the Security Guard position as guarding "industrial or commercial property against fire, theft, vandalism and illegal entry. Patrols periodically, watches for and reports irregularities." The Office noted that the position was classified as light work, with maximum lifting up to 20 pounds, frequent reaching and handling, vision, and the ability to work indoors and outdoors. The Office noted that Dr. Wren's July 27, 1993 report supported that appellant "could not handle very heavy attachments needed to operate heavy equipment, but he was able to perform lighter work." The Office computed appellant's new level of compensation to reflect the $4.25 per hour entry-level wage as a security guard,[7] and adjusted his continuing and retroactive compensation benefits.

In a September 29, 1994 letter, appellant, through his elected representative, requested a review of the Office's September 14, 1994 decision modifying the July 6, 1992 wage-earning capacity determination. Appellant contended that the Office did not provide him with due process in accordance with its established procedures, as he was not provided with a prereduction notice with the September 14, 1994 decision after the heavy equipment operator position had been found unsuitable. Appellant asserted that his compensation for temporary total disability should be reinstated effective July 6, 1992.

[5] In a June 4, 1993 report, Dr. Wren noted that operating a backhoe required changing "very heavy metal buckets and … other heavy duties which his residual disability and impairment would not permit."

[6] In a November 8, 1993 report, Dr. Wren noted that appellant's disability status was unchanged. In a February 18, 1994 report, Dr. Wren found "[f]ragmentation of the stainless steel wire causing further aggravation of the acromioclavicular joint in the rotator cuff," and a possible rotator cuff injury. In an August 23, 1994 report, Dr. Wren stated that appellant's right shoulder and back symptoms were aggravated by cold weather, use of the arms, especially the right shoulder, reaching, pulling and pushing.

[7] The Office calculated that appellant was entitled to $294.00 in compensation per week, reflecting a 32 percent wage-earning capacity. The Office noted that the current pay rate for job and step when injured was $526.40, and appellant was capable of earning $170.00 per week.

In a November 12, 1994 report, Dr. Wren noted decreased range of right shoulder motion with increased instability of the joint, and recommended surgery "to remove the fragmented wires and some of the osteophytes … demonstrated on x-rays … [of] February 18, 1994." In a December 1, 1994 report, Dr. Wren noted work restrictions against bending, pulling, sitting, climbing, reaching, pushing and lifting over 20 pounds.

By decision dated approximately March 20, 1995,[8] the Office denied appellant's hearing request on the grounds that he had already requested and received reconsideration on the same issue. "[T]he issue is a medical issue and a[n] oral hearing would serve no useful purpose. If you have additional medical evidence you may again request reconsideration…."

The Board finds that the Office improperly reduced appellant's compensation based on the selected position of security guard.

Once the Office accepts a claim, it had the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[9]

Office procedures in effect at the time of the September 14, 1994 decision provide that a claimant will be given 30 days "prereduction notice" of the wage-earning capacity determination before a compensation reduction. These procedures provide that such notice, in a loss of wage-earning capacity situation, should contain the title description, and requirements of the selected position, and the computation of the proposed reduction of compensation.[10] In this case, the Office did not provide appellant such advanced notice.

The September 14, 1994 decision is a final wage-earning capacity determination, based on the selected position of security guard. Although appellant was provided with a prereduction notice on June 3, 1992 prior to the Office's July 6, 1992 reduction of his compensation based on the selected position of backhoe operator, this notice pertained only to the heavy equipment and backhoe operator positions, not the security guard position. Thus, appellant was not afforded the 30 days which the Office's procedures provide in which to submit evidence and argument as to why his compensation should not be reduced based on his inability to perform the security guard position.

The security guard position has different physical requirements than the backhoe operator position previously selected. The Board notes that appellant's attending Board-certified orthopedic surgeon, Dr. Wren, provided work restrictions in July 27, 1993 and August 23, 1994 reports regarding reaching and other uses of the right arm, and the security guard position description contained in the September 14, 1994 decision involved frequent reaching and handling. As the Office did not provide appellant with the required prereduction notice

[8] From the decision's placement in the record, it would have to have been dated no earlier than March 20, 1995, as the preceding document was date punched March 20, 1995. Documents which follow the decision in the record are dated either in April or May 1995.

[9] *David W. Green*, 43 ECAB 883 (1992); *Bettye F. Wade*, 37 ECAB 556 (1986).

[10] Federal (FECA) Procedure Manual, Part 2 -- *Claims*, Ch. 2.1400: *Disallowances* (July 1993).

regarding the security guard position, appellant and his physician were deprived of the opportunity to respond on the crucial issue of whether appellant would be capable of performing the security guard position. Consequently, the Office's determination that the position of security guard was a suitable position for appellant is erroneous, and must be reversed.

The decision of the Office of Workers' Compensation Programs dated September 14, 1994 is hereby reversed.[11]

Dated, Washington, D.C.
April 3, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[11] As the September 14, 1994 decision is reversed, the second issue regarding the denial of appellant's hearing request is moot.