U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL E. GREGORY and TENNESSEE VALLEY AUTHORITY, KINGSTON STEAM PLANT, Kingston, Tenn.

Docket No. 96-185; Submitted on the Record;
Issued April 28, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly reduced appellant's compensation benefits effective August 21, 1994, based on his capacity to perform the duties of Cashier II; and (2) whether the Office properly denied appellant's request for reconsideration under 5 U.S.C. § 8128.

The Board has duly reviewed the case record and finds that the Office properly modified appellant's compensation to reflect his wage-earning capacity.

Once the Office accepts a claim, it has the burden of justifying termination of modification of compensation.[1] If an employee's disability is no longer total, but the employee remains partially disabled, the Office may reduce compensation benefits by determining the employee's wage-earning capacity.[2] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions given 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

[1] *Betty F. Wade*, 37 ECAB 556 (1986).

[2] 20 C.F.R. § 10.303(a).

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

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 instant case, the Office accepted that appellant sustained a contusion of the low back, low back strain, aggravation of L5 spondylosis and aggravation of degenerative lumbar disc disease due to a July 14, 1982 employment injury. The Office further accepted that appellant sustained a temporary aggravation of a somatization disorder ending July 21, 1984.[5]

In 1986 the Office referred appellant for vocational rehabilitation.

In a final report dated January 11, 1989, the rehabilitation counselor, after assisting appellant with an extensive job search, identified occupations which were within his work restrictions, including cashier, security guard and general salesperson. The counselor determined the prevailing wage rate and the availability in the general labor market of these positions.

On May 12, 1989 the Office rehabilitation specialist determined that the position of Cashier II was appropriate for appellant. On February 7, 1990 the Office requested that Dr. J. Bryan Smalley, a Board-certified orthopedic surgeon, review the position description of Cashier II and discuss whether appellant could perform the job requirements.

In a work restriction evaluation (OWCP-5) dated December 4, 1989, Dr. Smalley found that appellant could work for 8 hours per day, with restrictions on lifting under 10 pounds. In a report dated February 22, 1990, Dr. Smalley indicated that appellant could perform the duties of a Cashier II.

The Office provided appellant with a notice of proposed reduction of compensation on July 10, 1990. The Office identified the position of Cashier II as representing appellant's wage-earning capacity.[6]

By letter dated August 21, 1992, the Office requested that Dr. John T. Purvis, a Board-certified neurosurgeon and appellant's attending physician, discuss whether appellant could still work eight hours per day and under what, if any, restrictions.

In a work restriction evaluation accompanying an October 12, 1992 report, Dr. Purvis found that appellant could intermittently perform the following activities per day: sitting for 8 hours, walking and standing for 4 hours, lifting between 10 and 20 pounds for 2 hours, bending for 2 hours, squatting, climbing and kneeling for 1 hour and no twisting. He indicated that appellant could work for eight hours per day.

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

[5] By decision dated January 25, 1984, the Office found that appellant had no further disability after July 21, 1982 causally related to his July 14, 1982 employment injury. By decision dated July 17, 1985, the Office vacated its January 25, 1985 decision, for further development on the issue of whether appellant had continuing orthopedic disability.

[6] The Office did nothing to finalize the proposed termination of compensation.

In an Office memorandum dated March 31, 1994, the Office rehabilitation specialist noted that the position of Cashier II had been reclassified from sedentary to light employment and included a current position description. He further determined the current rate of pay for the position and that based on information from rehabilitation counselors the job was reasonably available within appellant's commuting area.

On May 4, 1994 the Office provided appellant with a notice of proposed reduction of compensation, based on his ability to perform the duties of a Cashier II. The Office advised appellant that if he disagreed with the proposed action, he could submit additional factual or medical evidence relevant to his capacity to earn wages.

In response, appellant submitted a state approval of his application for a handicapped parking permit and previously submitted medical evidence.

By decision dated August 17, 1994, the Office finalized its reduction of appellant's compensation.

In a progress note dated August 23, 1994, received by the Office on September 15, 1994, Dr. Purvis stated that appellant had informed him of his reduction in compensation and that he "told [appellant] that I did [not] think I could say anything further than I have said about him before, that I think he can handle certain types of clerical jobs, as long as he does [not] try to lift."

By decision dated October 13, 1994, the Office denied modification of the prior decision. By decision dated July 26, 1995, the Office denied review of its prior decision on the grounds that the evidence submitted was duplicative and irrelevant.

The Office has stated that in some situations extensive rehabilitation efforts will not succeed. In such circumstances, the Office procedures instruct the vocational rehabilitation counselor to identify positions from the Department of Labor's *Dictionary of Occupational Titles* and proceed with information from the labor market survey to determine the availability and wage rate of the position.[7] The Office does not guarantee that an employee will obtain employment in the selected position, nor is the loss of wage-earning capacity determination erroneous if the employee is unable to secure employment in the selected position.[8]

As the medical evidence established that appellant could perform light work with restrictions and as the Office followed established procedures for determining the vocational suitability and reasonable availability of the position selected, the Board finds that the Office, having given due regard to the factors specified at section 8115(a) of the Federal Employees' Compensation Act, properly reduced appellant's monetary compensation on the grounds that he has the capacity to earn wages as a cashier.

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

[8] *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

The Board further finds that the Office properly denied appellant's request for reconsideration under section 8128.

The Office has issued regulations regarding its review of decisions under section 8128(a) of the Federal Employees' Compensation Act. Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his claim by written request to the Office identifying the decision and the specific issue(s) within the decision which claimant wishes the Office to reconsider and the reasons why the decision should be changed and by:

> "(i) Showing that the Office erroneously applied or interpreted a point of law, or
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> "(ii) Advancing a point of law or fact not previously considered by the Office, or
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> "(iii) Submitting relevant and pertinent evidence not previously considered by the Office."[9]

Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements, listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.[10] Evidence that repeats or duplicates evidence already in the case record has no evidentiary values and does not constitute a basis for reopening a case.[11] Evidence that does not address the particular issue involved, also does not constitute a basis for reopening a case.[12]

In support of his request for reconsideration, appellant submitted Dr. Purvis' August 23, 1994 progress note. As this evidence duplicated evidence already contained in the case record and previously reviewed by the Office, it does not constitute a basis for reopening appellant's case for merit review under 20 C.F.R. § 10.138.[13] The Office, therefore, did not abuse its discretion in refusing to reopen and review appellant's claim on the merits.

[9] 20 C.F.R. § 10.138(b)(1).

[10] *See* 20 C.F.R. § 10.138(b)(2).

[11] *Daniel Deparini*, 44 ECAB 657 (1993).

[12] *Id.*

[13] *Richard L. Ballard*, 44 ECAB 146 (1992).

The decisions of the Office of Workers' Compensation Programs dated January 26, 1995 and October 13, 1994 are hereby affirmed.

Dated, Washington, D.C.
April 28, 1998

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member