U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EDDIE L. STOOKSBURY and TENNESSEE VALLEY AUTHORITY, KINGSTON FOSSIL PLANT, Kingston, Tenn.

Docket No. 95-438; Submitted on the Record;
Issued May 4, 1998

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly modified appellant's compensation benefits on September 22, 1992 based on his wage-earning capacity as a construction manager.

On August 15, 1984 appellant, then a 36-year-old boilermaker, filed a claim for compensation alleging that on May 23, 1984 he injured his back while in the performance of duty.

The Office accepted his claim for lumbosacral strain superimposed on laminectomy syndrome and permanent aggravation of degenerative disc disease. Appropriate medical and compensation benefits were paid.

In a medical report dated June 17, 1985, Dr. C. Sanford Carlson, Board-certified in orthopedic surgery, stated that he admitted appellant to a hospital that day based on a back injury which appellant alleged occurred at work on May 23, 1984. He stated that a computerized tomography (CT) scan taken on July 11, 1984 revealed a narrowing of the neuroforaminae on the right. Dr. Carlson added that he found "no evidence of surgical problem at this time" and encouraged appellant to seek work. In a work restriction form, he indicated by use of checkmarks that appellant could work up to 8 hours a day with a lifting restriction between 20 to 50 pounds.

On November 5, 1985 appellant notified the Office that he intended to open and operate a craft store as the owner/manager.

Effective March 16, 1986 and continuing the Office reduced appellant's compensation to partial disability based on a loss of wage-earning capacity as a craft shop manager.

On December 16, 1986 the Office notified appellant that it had referred him for a second opinion evaluation to Dr. Edward L. Tauxe, Board-certified in orthopedic surgery, to determine the extent to which he had any residuals as a result of his May 23, 1984 work-related injury.

In a medical report dated January 14, 1987, Dr. Tauxe indicated that he had examined appellant and had read a recent magnetic resonance imaging (MRI) scan. He found that appellant's multiple degenerative changes throughout the lumbar region were causally related to or aggravated by his work-related injury. Dr. Tauxe also submitted a work restriction evaluation form in which he noted that appellant was able to work an 8-hour day with a lifting restriction of 20 to 50 pounds.

In a February 19, 1990 medical report, Dr. Marty P. Gagliardi, appellant's treating physician who is Board-certified in orthopedic surgery, stated that appellant had sustained lumbar spondylitis and in an April 24, 1990 treatment note, recommended that he apply for disability retirement.

On December 12, 1990 an Office medical adviser reviewed appellant's medical records and stated that they did "not provide objective findings indicative of total disability for all employment."

In a March 23, 1991 report, appellant stated that he had worked from January 1987 through October 1989 intermittently as a road construction crew member, truck driver and as an equipment repair technician.

In an undated medical report received by the Office on April 27, 1992, Dr. George M. Stevens, III, to whom appellant was referred by Dr. Gagliardi, stated that appellant was totally disabled from the kind of work for which he was trained.

By letter dated June 30, 1992, the Office referred appellant, along with his medical records and a statement of accepted facts, to Dr. Martin R. Baker, a Board-certified orthopedic surgeon, for a second opinion regarding whether appellant had residuals of his work-related injury of May 23, 1984. Included in the statement of accepted facts were a series of questions for Dr. Baker including one regarding appellant's capacity to function as a light-duty truck driver. A copy of the position description for light-duty truck driver was attached.

In a July 21, 1992 medical report, Dr. Baker stated that, upon physical examination and review of the medical records, appellant had mild space narrowing at the L5, S1 level as a result of his earlier surgeries, and early degenerative changes at the D12, L1 and L2 levels. He stated that appellant was "disabled for the job of boilermaker/welder" but that he did not consider him to be disabled for the job of "truck driver, light" provided he did not engage in any loading and unloading activities.

On August 20, 1992 the Office notified appellant that it proposed to terminate his compensation for wage loss because his earnings as a truck driver were greater than his earnings at the time of his injury.

In a letter dated September 10, 1992, appellant disagreed with the proposed termination notice stating that he had been diagnosed by several doctors as totally disabled.

On September 24, 1992 the Office issued a decision terminating appellant's compensation for wage loss on the grounds that "the weight of the evidence establishes that [appellant] was self-rehabilitated for the job of truck driver and demonstrated a capacity to earn substantially higher wages than the date of his injury job, *** compensation is terminated effective September 20, 1992." In an accompanying memorandum, the Office stated that Dr. Gagliardi's report failed to provide a history of the injury and failed to provide a rationalized medical opinion that appellant could not perform the functions of a truck driver, and that Dr. Stevens failed to provide a rationalized medical opinion establishing that appellant was disabled due to his work-related injury.

By letter dated October 9, 1992, appellant requested an oral hearing. On April 15, 1993 appellant testified at the hearing that between 1986 and 1990 he was employed intermittently in various enterprises such as that of a day-laborer and as a piece-work mechanic. He stated that in 1985 he intermittently worked for "Blalock and Sons," a construction company, as a repair welder using his own welding machine and as a mechanic performing light mechanical work.[1] He noted that other workers were required to help him "do any lifting" on the machinery he was repairing. Appellant eventually was hired to work for a brief time. He also stated that he drove a truck for "Wolf Valley Construction" for "three days at the most, maybe four," and for "Chestnut Ridge Sanitary Company" for "three, four days, afternoons." Appellant stated that, although these jobs provided a modest but irregular income, he was unable to work full time because of pain and discomfort associated with his work-related injury.

In a memorandum dated July 6, 1993, the Branch of Hearings and Review determined, based on information from the Division of Employment Security in Tennessee, that appellant was capable of working as a truck driver and construction manager/superintendent, and that such jobs were reasonably available in appellant's area.

In a decision issued on July 12 and finalized on July 14, 1993 the hearing representative modified the decision of the Office and directed that compensation be reinstated to accommodate appellant's loss of wage-earning capacity based on the difference in pay rate as a construction manager and his pay rate at the time of the injury.[2]

On September 20, 1993 appellant filed a request for reconsideration stating that the hearing representative was in error when he found that appellant was capable of earning wages as a construction manager.

[1] Appellant testified that he perfumed such duties as changing hoses and other "light stuff."

[2] The hearing representative found that appellant was capable of performing the function of a construction manager. He noted that the Branch of Medical Standards and Rehabilitation, Office of Workers' Compensation Programs, verified that the position of general contractor had the same traits or skill requirements as a construction manager, "which, in turn, has the same job duties as that listed in the Department of Transportation, under Superintendent, Construction." He then noted that the Tennessee employment security office certified that construction managers positions were paid an average of $537.00 per week.

In support of his request, appellant submitted a September 30, 1993 vocational analysis report from Dr. Julian M. Nadolsky, Ed. D., Vocational Consultant. He noted a familiarity with appellant's employment and medical histories, stated that appellant's last job as a repair welder was a light occupation since it required frequent lifting 10 pounds and an occasional lifting of 20 pounds, and that he therefore could not return to the job for which he had had training because it was a medium occupation requiring lifting of 25 pounds and occasional lifting of 50 pounds. Dr. Nadolsky also stated that Dr. Baker found that appellant could work as a truck driver with restrictions against lifting which would confine him to light-occupational positions. He noted that appellant's skills as a welder were not consistent with his physical limitations as noted by appellant's medical doctors, and that therefore appellant would be limited to entry level or unskilled sedentary or light positions. Dr. Nadolsky concluded that "in the types of jobs [appellant] remains capable of performing, he can expect to earn between $4.50 and $6.00 an hour in the local market.

The Office referred appellant to Vanderbilt University Medical Center for a comprehensive medical evaluation and physical ability assessment.

In a March 7, 1994 medical report, Dr. Dan M. Spengler, Board-certified in orthopedic surgery and professor and chairman of the Department of Orthopedics at Vanderbilt University Medical Center, reported that he had reviewed the statement of accepted facts, the job description for boilermaker/welder, reviewed appellant's videotape[3] and performed a physical examination on appellant. In a comprehensive report, Dr. Spengler determined that appellant could perform at a medium level of work. He reported that appellant could work as a heavy-truck driver, light-truck driver, industrial-truck operator, combination welder (medium) and general inspector (light)."

On August 12, 1994 the Office issued a merit decision denying appellant's request for reconsideration on the grounds that the vocational analysis report submitted by Dr. Julian M. Nadolsy was insufficient to establish that appellant could not perform the functions of a construction manager or general contractor. The Office concluded that Dr. Spengler's comprehensive medical report was rationalized, was more indicative of appellant's physical ability and constituted the weight of the medical evidence.

The Board finds that the Office met its burden of proof in modify appellant's loss of wage-earning capacity to reflect his capacity to earn wages as a construction manager.

Once the wage-earning capacity of an injured employee is properly determined, it remains undisturbed regardless of actual earnings or lack of earnings. A modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was in fact erroneous.[4] This burden is on the Office to establish that there has been a change so as to affect the employee's capacity to earn wages in the job

[3] Appellant was videotaped performing tasks that seemed to go beyond his medical restrictions.

[4] *Ronald M. Yakota*, 33 ECAB 1629 (1982); *see also Lawrence M. Nelson*, 39 ECAB 788 (1988).

determined to represent his earning capacity. Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn and not on actual wages lost.

In the present case, the Office initially found that appellant had been vocationally rehabilitated and reduced his monetary compensation to zero on the grounds that appellant had no further loss of wage-earning capacity based on his ability to earn wages as a truck driver, light. The Office arrived at this conclusion based on the premise that appellant had actually performed this position over a number of years and had earned $25.00 and more per hour.

On appeal the Office hearing representative concluded that appellant's work activities over a number of years was more consistent with the position of general contractor or construction manager. The hearing representative concluded that appellant had self-rehabilitated himself to earn wages as a general contractor or construction manager. He modified the Office's decision and directed it to reinstate compensation to reflect a loss of wage-earning capacity of a construction manager.

The Board finds that a review of the evidence of record, including the most recent comprehensive medical evaluation by Dr. Spengler, that appellant has self-rehabilitated himself to perform the position of general contractor or construction manager. The Board also finds that the opinion of Dr. Spengler is more indicative of appellant's actual current physical ability and capacity to earn wages as opposed to the minimum wage of $4.50 to $6.00 per hour predicted by the vocational consultant, Dr. Julian M. Nadolsky.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated August 12, 1994 and July 12, 1993 are hereby affirmed.

Dated, Washington, D.C.
May 4, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member