

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JOHN EISCHEN and DEPARTMENT OF AGRICULTURE,  
MEAT POULTRY INSPECTION PROGRAM, Oklahoma City, Okla.

*Docket No. 96-2057; Submitted on the Record;  
Issued May 15, 1998*

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DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,  
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation benefits effective June 23, 1996, based on his capacity to perform the duties of a microbiology technologist.

The Board has duly reviewed the record in the present appeal and finds that the Office properly reduced appellant's compensation benefits effective June 23, 1996, based on his capacity to perform the duties of a microbiology technologist.

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 of benefits.<sup>1</sup>

Under section 8115(a) of the Federal Employees' Compensation Act, wage-earning is determined by the actual wages received by an employee if the earnings fairly and reasonably represent the employee's wage-earning capacity.<sup>2</sup> If the actual earnings do not fairly and reasonably represent the employee's wage-earning capacity, or if the employee has no actual wages, the wage-earning capacity is determined with regard to the nature of the injury, the degree of physical impairment, the employee's usual employment, age, qualifications for other employment, the availability of suitable employment, and other factors and circumstances which may affect his wage-earning capacity in his or her disabled condition.<sup>3</sup>

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<sup>1</sup> *James B. Christenson*, 47 ECAB \_\_\_\_ (Docket No. 95-1106, issued September 5, 1996); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); *David W. Green*, 43 ECAB 883 (1992); *Harold S. McGough*, 36 ECAB 332 (1984).

<sup>2</sup> 5 U.S.C. § 8115(a).

<sup>3</sup> *Id.*; *See Mary J. Calvert*, 45 ECAB 575 (1994); *Samuel J. Chavez*, 44 ECAB 431 (1993); *Keith Hanselman*, 42 ECAB 680 (1991).

The Office's procedures pertaining to vocational rehabilitation services emphasize returning partially disabled employees to suitable employment.<sup>4</sup> If the employment injury prevents the injured worker from returning to the job held at the time of injury, vocational rehabilitation services are provided to assist the employee in placement with the previous employer in a modified position or, if not feasible, developing an alternate plan which may include vocational testing, training and/or placement services.<sup>5</sup>

On March 15, 1992 appellant, then a 59-year-old trained veterinarian who inspected meat, claimed obstructive airways disease due to his 14 years of federal employment. In the first four years of his employment, appellant was exposed to animal hides as well as high levels of fumes from ammonia and other cleaning chemicals, heavy smoking from coworkers, and dust from adjoining cotton seed plants. For the following seven years, appellant continued to be exposed to some of these irritants in his role as a patrolling meat inspector. Beginning in 1989 he was assigned to the kill floors, where he sustained exacerbation of his pulmonary condition due to cold temperatures. The medical evidence submitted by appellant supported his claim for chronic asthma caused in part by his federal employment.<sup>6</sup> Upon an initial denial of appellant's claim, an Office hearing representative accepted appellant's claim on August 3, 1994 for employment-related aggravation of asthma, but directed further development on the extent of the aggravation.<sup>7</sup>

Appellant stopped work on August 19, 1994 and retired effective January 3, 1995. Between the date he stopped work and the date he retired, he underwent an evaluation by Dr. Martin H. Welch, a Board-certified internist and pulmonologist and Office referral physician. Dr. Welch diagnosed bronchial asthma which was permanently aggravated by employment-related exposure to inhaled irritants. He noted that based on a review of the pulmonary function tests over the years, there was little, if any, evidence of significant underlying COPD, and he classified the level of impairment as Class II which correlated to a 20 percent impairment of the

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<sup>4</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813 (December 1993).

<sup>5</sup> Where vocational rehabilitation is unsuccessful, the rehabilitation counselor will prepare a final report which lists two or three jobs which are medically and vocationally suitable for the employee, and proceed with information from a labor market survey to determine the availability and wage rate of the position. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.814.8 (December 1993).

<sup>6</sup> Appellant's general practitioner, Dr. Marcus L. Cox, noted that he treated appellant since 1981 for a diagnosed condition of asthma, chronic allergies, as well as chronic obstructive pulmonary disease (COPD). Dr. Cox referred appellant to the Oklahoma Allergy Clinic in 1986, where he was treated initially by Dr. George Winn, a Board-certified allergist. Dr. Winn performed pulmonary function testing in January 1986 and appellant was seen again in August 1986 and in January 8, 1987. Upon his retirement, appellant was treated by Dr. James H. Wells, a Board-certified allergist, at the clinic. Repeat pulmonary function tests performed in January 1991 showed that appellant's condition had progressed. Dr. Wells reported in 1993 that appellant attributed appellant's condition had progressed since January 1991, and that he attributed the progression to both employment and nonemployment factors.

<sup>7</sup> Prior to the August 3, 1994 decision of the Office hearing representative, appellant submitted additional medical evidence from Dr. William Cook, a Board-certified internist and pulmonologist, who treated him at the allergy clinic. Dr. Cook identified work factors including air pollution, chemicals, and tobacco smoke previously cited by Dr. Cox, as well as additional factors of gas, fumes, dust, mold and animal dander.

lungs. Dr. Welch provided work restrictions of no running, climbing more than one flight of stairs, and a 15-pound lifting restriction. He also restricted exposure to temperature extremes, airborne particles such as dust, etc., and exposure to gases or fumes.

Appellant's attending physician, Dr. Cook, stated that appellant was disabled from meat inspection work in a meat processing plant but that appellant could perform other type of work.

By letter dated January 3, 1995, the Office advised appellant that his claim was accepted for permanent aggravation of bronchial asthma, and that he was entitled to a schedule award for his pulmonary impairment but was expected to return to work in a suitable position with the employing establishment. The Office, however, was advised of the lack of available light-duty positions at the employing establishment. Appellant was granted a schedule award which expired in July 1995, at which time he elected to receive wage-loss compensation benefits.

Based on the continued lack of light-duty positions available at the employing establishment, appellant was referred for vocational rehabilitation counseling in September 1995 and was placed on the periodic rolls in October 1995. The vocational rehabilitation counselor obtained a September 6, 1995 report from appellant's allergist, Dr. Wells, who indicated that appellant "would be unable to perform at any job which required more than trivial physical exertion or exposure to dust, pollen, mold, smoke, bad weather, [or] air pollution." Dr. Wells cautioned against the possibility that when "his asthma worsened, he might not be reliably able to be present even when the work conditions were otherwise benign."

The vocational rehabilitation counselor assigned to assist appellant in reemployment efforts, noted that potential problems in reemploying appellant included appellant's age, medical restrictions, transferability of skills, and recent placement on the periodic rolls. The counselor was advised to proceed with a job search based on Dr. Welch's work restrictions. In January 1996 the counselor identified three separate positions which were considered suitable, including microbiology technologist, teacher of adult education and receptionist. The counselor performed market surveys on the availability and wage rates of the selected positions. The Office allotted appellant three months of assistance in obtaining one of the three selected positions.

Between January and April 1996, appellant objected to reemployment in the selected positions, based on his age and anticipated asthma attacks which he felt would interfere with his ability to work. He requested further medical evaluation. In three separate letters between February and April 1996, the Office advised appellant that the medical evidence indicated he could return to work, and advised him of consequences for failing to cooperate with vocational rehabilitation efforts.

Appellant submitted two reports by Dr. Cook who indicated results of his examinations every three months, but did not address the specific jobs appellant was expected to pursue. Appellant also submitted a report from a psychiatrist, who diagnosed a general anxiety disorder and noted appellant's grave concern with his own condition based on his personal experience with someone who had died from chemical exposure.

In a final report dated April 23, 1996 report, the vocational rehabilitation counselor reported that appellant had followed up on only one of the three job leads which he had provided appellant on March 20, 1996 and that appellant felt unable to return to work.

By notice of proposed reduction of compensation dated May 6, 1996, the Office advised appellant that it considered the selected position of microbiology technician medically suitable, including its availability as documented by the market survey performed in January 1996. The Office advised appellant that his wages would be reduced based on the reported wages of a microbiologist in that area. Appellant responded by claiming that the position was not suitable due to exposure to fumes and gases, and that his inability to sleep through the night interfered with his ability to work.<sup>8</sup>

By decision dated June 13, 1996, the Office found that the evidence of record established that the position of microbiology technologist was medically and vocationally suitable, and represented his wage-earning capacity.

The Board finds that the Office properly determined appellant's wage-earning capacity.

The Board notes that while appellant was disabled from his job as a meat inspector, both appellant's physician and Dr. Welch, the Board-certified internist and pulmonologist who examined appellant at the request of the Office, indicated that he could return to some type of work. While appellant later submitted a September 6, 1995 report by Dr. Wells, who noted that appellant could have difficulty in attendance with respect to possible asthma attacks, the fear of reinjury or possible recurrence of disability is not a basis for payment of compensation.<sup>9</sup> Because of the lack of available light-duty assignments at the employing establishment, the vocational rehabilitation counselor properly identified three separate positions consistent with appellant's vocational background and determined the availability of the positions in the local area. Appellant claimed an inability to perform the selected job, but did not submit any medical evidence to support his claim that the position was not medically suitable. While he submitted a report from a psychiatrist and from Dr. Cox, a general practitioner, these physicians primarily addressed his general anxiety disorder which was primarily due to his fear that his asthma would become worse if he went back to work and was exposed to irritants including gases and fumes. As stated above, a fear of reinjury or a fear of a worsening condition is not a basis for compensation. Finally, while appellant claimed that he did not obtain an interview for the position for which he applied, the Board has often held that the lack of obtaining a position does not establish the lack of availability

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<sup>8</sup> By two separate letters in May 1996 appellant stated that he had applied for one of the job leads provided to him, but that he had not been called for an interview. He noted that the employing establishment never offered him a light-duty job, and he maintained that a medical laboratory was not suitable because of the gas fumes and chemicals to which he would be exposed. Appellant cited his continued inability to sleep through the night without using an inhaler in the middle of the night and submitted a report from his attending general practitioner, Dr. Cox, who supported appellant's contention that he suffered from sleep deprivation. Dr. Cox stated that he concurred with the psychiatrist's assessment that appellant was distressed from a physical and mental standpoint.

<sup>9</sup> *Mary A. Geary*, 43 ECAB 300 (1991).

of the position in that area.<sup>10</sup> Accordingly, the Board finds that the Office properly reduced appellant's compensation benefits based on his ability to perform the selected position of microbiology technologist.

The decision of the Office of Workers' Compensation Programs dated June 13, 1996 is hereby affirmed.

Dated, Washington, D.C.  
May 15, 1998

David S. Gerson  
Member

Michael E. Groom  
Alternate Member

Bradley T. Knott  
Alternate Member

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<sup>10</sup> *Carla Letcher*, 46 ECAB 452 (1995); *Samuel J. Chavez*, 44 ECAB 431 (1993); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1993); *Dennis D. Owen*, 44 ECAB 475 (1993); *Harold D. Snyder*, 38 ECAB 763 (1987).