U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROLAND RODRIGUEZ and DEPARTMENT OF THE AIR FORCE, KELLY AIR FORCE BASE, San Antonio, Texas

Docket No. 96-1143; Submitted on the Record;
Issued September 14, 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 reduced appellant's compensation for total disability effective September 26, 1995, based on his capacity to perform the duties of a dispatcher for maintenance services.

On August 11, 1987, appellant, a 47-year-old maintenance worker, injured his lower back while removing a propeller shaft. Appellant filed a form CA-1 claim for traumatic injury on September 10, 1987. Appellant underwent a magnetic resonance imaging (MRI) scan on August 16, 1988 which revealed he had sustained a herniated lumbar disc at L4-5, and Dr. Rafael Parra, a Board-certified neurosurgeon, performed a lumbar laminectomy, discectomy and posterior lumbar interbody fusion surgery on appellant on August 19, 1987. Appellant stopped work on the date of injury, and the employing establishment placed him on the periodic rolls at the expiration of continuation of pay. The Office ultimately accepted appellant's claim for herniated nucleus pulposus at L4-5.

In letters dated September 20, 1994, the Office referred appellant for a second opinion examination with Dr. David A. Roberts, a Board-certified orthopedic surgeon, on October 4, 1994. In a medical report dated October 6, 1994, Dr. Roberts characterized appellant as a "healthy 54-year-old male", and stated that his posterior lumbar interbody fusion had healed solidly,[1] although he noted that he continued to experience some left leg pain. Dr. Roberts stated that apparently, the employing establishment considered returning appellant to light-duty status, but that an employing establishment physician recommended that he not return to work.

Dr. Roberts stated that appellant had recently developed a cervical spinal stenosis condition, but he opined that he did not believe that this condition was in any way related to the injury resulting in the herniated nucleus pulposus of the lumbar spine. Dr. Roberts advised that

[1] Dr. Roberts stated that a June 1988 treatment note from Dr. Parra indicated that the L4-5 level was solidly fused.

cervical spondylosis was a degenerative condition related to age, and that because appellant had not worked since 1987, he did not believe appellant's cervical condition was a work-related problem. Dr. Roberts concluded that appellant's pain was primarily interscapular upper back pain, so that therefore he doubted that surgery at the C5-6 level to relieve the stenosis would be beneficial in relieving his interscapular upper back pain. Dr. Roberts advised that he had discussed the issue of surgery with appellant, who concurred with him that the pain was not severe enough to warrant the risks of surgery.

Dr. Roberts also completed a work capacity evaluation form dated October 4, 1994,[2] wherein he found that appellant was capable of working 8 hours per day, with limited bending and lifting, and he imposed restrictions of no lifting above 25 to 30 pounds due to appellant's August 11, 1987 employment injury. An Office status memorandum dated October 24, 1994 indicated that the employing establishment was unable to locate a job for appellant within Dr. Roberts' restrictions, and that he was therefore being referred for vocational rehabilitation for possible placement in the private sector.

On January 9, 1995 the Office referred appellant to a vocational rehabilitation counselor, who was instructed to locate a suitable alternate job based on the restrictions outlined in Dr. Roberts' report and work restriction evaluation.[3]

On April 28, 1995 the vocational rehabilitation counselor issued a report summarizing his efforts to find suitable alternate employment for appellant within Dr. Roberts' restrictions. The vocational rehabilitation counselor stated he had consulted the classified ads from a local newspaper and the state employment commission and had recommended three positions for appellant listed in the Department of Labor's *Dictionary of Occupational Titles*, which, he determined, reasonably reflected appellant's ability to earn wages, including the position of "dispatcher, maintenance services." The vocational rehabilitation counselor stated that he would be forwarding a copy of the enclosed information to the Office.[4]

In a status report dated August 17, 1995, the Office closed appellant's case, stating that placement efforts were not successful because he was not active in the job search and apparently did not believe he was able to work. The Office concluded that the rehabilitation counselor had provided a list of jobs appellant could perform, and that this information had been provided to the claims examiner for a loss of wage-earning capacity determination.

In a progress note dated August 21, 1995, which was forwarded to the Office, the vocational rehabilitation counselor stated that he had received information from the Office that it had closed appellant's case because job placement offers had been unsuccessful, and that he had

[2] The date on the form indicates "September 4, 1994", which apparently is a misstatement, as the statement of facts is dated September 12, 1994, and the Office letter of reference is dated September 20, 1994.

[3] An Office status report dated October 31, 1994 indicates that appellant had previously been referred to vocational rehabilitation in 1991, but the case had been closed due to his lack of response.

[4] In a status report dated May 8, 1995 and by letter dated May 10, 1995, the Office noted it had received this information from the vocational rehabilitation counselor.

been requested to do the same. The vocational rehabilitation counselor stated that he agreed with the Office that appellant's case should be closed because of his failure to cooperate with him as well. The vocational rehabilitation counselor advised that appellant had been "extremely uncooperative" with him and that he had no intention of returning to work despite his counseling efforts and job placement assistance.

On August 25, 1995 the Office calculated that appellant's compensation rate should be adjusted to $117.25 using the *Shadrick*[5] formula. The Office indicated that appellant's salary on August 11, 1987, the date of injury, was $303.60 per week, that his current, adjusted pay rate for his job on the date of injury was $396.80, and that appellant was currently capable of earning $220.00 per week, the rate of a dispatcher for maintenance services. The Office therefore determined that appellant had a 55 percent wage-earning capacity, which when multiplied by 66 2/3 amounted to a compensation rate of $91.08. The Office found that based on the current consumer price index, appellant's current adjusted compensation rate was $117.25.

By notice of proposed reduction on August 25, 1995, the Office advised appellant of its proposal to reduce his compensation because the factual and medical evidence established that he was no longer totally disabled and that he had the capacity to earn wages as a dispatcher for maintenance services[6] at the weekly rate of $220.00 in accordance with the factors outlined in 5 U.S.C. § 8115.[7] The Office stated that the vocational rehabilitation counselor had located several positions which she found to be suitable for appellant given Dr. Roberts' restrictions,[8] but that he had been unsuccessful in obtaining employment at the companies to which he applied. The Office further stated that the vocational rehabilitation counselor had advised that the position of dispatcher for maintenance services was available in appellant's commuting area and that entry level pay for this position was $220.00 per week. The Office allotted appellant 30 days in which to submit any contrary evidence. Appellant did not respond to this offer within 30 days.

By letter decision dated September 26, 1995, the Office advised appellant that his compensation would be reduced effective October 15, 1995 because the weight of the medical evidence showed that he was no longer totally disabled for work due to effects of his August 11,

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[5] *Albert C. Shadrick*, 5 ECAB 376 (1953); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.814.2 (April 1995).

[6] The Office noted that the employing establishment had advised that it had no employment which appellant could perform given his current restrictions.

[7] 5 U.S.C. § 8115.

[8] The Office further stated that the most recent medical report it had received from Dr. Parra was dated February 21, 1991. In response to a September 5, 1995 letter from appellant's congressional representative, the Office indicated in a letter dated September 18, 1995 that after Dr. Parra had failed to respond to repeated requests for a current medical opinion updating appellant's current medical condition, it had referred him to Dr. Roberts, who opined he was capable of working an 8-hour day with restrictions and was able to lift up to 30 pounds. The Office stated that, as of the date of its letter, it had not received a current medical report indicating appellant was not capable of working, and that prior to issuing a final decision it would consider any medical reports appellant submitted within the 30-day response period commencing August 25, 1995.

1987 employment injury, and that the evidence of record showed that the position of dispatcher of maintenance services represented his wage-earning capacity.

The Board finds that the Office properly reduced appellant's compensation for total disability effective September 26, 1995, based on his capacity to perform the duties of a dispatcher for maintenance services.

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.[9]

In the present case, the Office properly found in its August 25, 1995 proposed reduction of compensation that appellant was no longer totally disabled for work due to the effects of his August 11, 1987 employment injury. The Board notes that Dr. Roberts, a Board-certified orthopedic surgeon, opined in a October 6, 1994 report and work restriction evaluation dated October 4, 1994, that appellant could perform an 8-hour workday of light work, with limitations on lifting over 30 pounds. The Board further notes that the Office indicated it had repeatedly asked Dr. Parra and appellant for progress reports from Dr. Parra updating appellant's current medical condition, but that neither Dr. Parra nor appellant had responded to these requests.[10]

The rehabilitation counselor assigned to assist appellant in placement efforts identified three positions listed in the Department of Labor's *Dictionary of Occupational Titles*, appropriate for appellant based on the most recent work restriction evaluation obtained by both the Office and the rehabilitation counselor, Dr. Roberts' October 4, 1994 report. Based on these restrictions, the Office selected a position as a dispatcher of maintenance services which it found suitable for appellant.

The Office has stated that in some situations extensive rehabilitation efforts will not succeed. In such circumstances, the Office procedures instruct the rehabilitation officer to submit a final report summarizing that placement efforts were not successful and submitting relevant information to the Office.[11]

In the instant case, the rehabilitation counselor properly submitted a final report on August 21, 1995, indicating that placement efforts had been unsuccessful because appellant had

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[9] *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

[10] Dr. Parra stated in his February 21, 1991 report that he had most recently examined appellant on June 21, 1990, at which time he continued to have muscle spasms, limitation of movement of the back in the forward lateral position, with normal neurological examination and that he had undergone physical therapy for conservative management of his pain. Dr. Parra advised that, at that time, due to his continued symptomatology, he felt that it was unwise for him to return to work because he was at high risk for reinjury to his low back. Dr. Parra noted that appellant had an appointment scheduled for August 14, 1990, which he failed to keep, and had scheduled no further appointments with him. Dr. Parra concluded that in order to update the Office and to evaluate appellant for work status, he needed to reassess him in his office prior to making any changes in his work status.

[11] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.814.8 (April 1995).

been "extremely uncooperative" with him. The counselor provided required information concerning the position descriptions, the availability of the positions within appellant's commuting area and pay ranges within the geographical area, as confirmed by state officials.

The Office then properly followed established procedures for determining appellant's employment-related loss of wage-earning capacity.

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.[12] Accordingly, the evidence must establish that jobs in the position selected for determining wage-earning capacity are reasonably available in the general labor market in the commuting area in which the employee lives. In determining an employee's wage-earning capacity, the Office may not select a makeshift or odd lot position or one not reasonably available on the open labor market.[13]

In the instant case, the Office identified one of the three positions listed by the rehabilitation counselor which was most consistent with appellant's background. The Office used the information provided by the rehabilitation counselor of the prevailing wage rate in the area of a dispatcher for maintenance services. Finally, the Office properly applied the principles set forth in the *Shadrick*[14] decision to determine appellant's loss of wage-earning capacity.

The Office properly found that appellant was no longer totally disabled as a result of his August 11, 1987 employment injury and it followed established procedures for determining appellant's employment-related loss of wage-earning capacity. The Board therefore finds that the Office has met its burden of justifying a reduction in appellant's compensation for total disability.

[12] *Samuel J. Chavez,* 44 ECAB 431 (1993); *Hattie Drummond*, 39 ECAB 904 (1988); *see* 5 U.S.C. § 8115(a); A. Larson, *The Law of Workmen's Compensation* § 57.22 (1989).

[13] *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

[14] *Shadrick, supra* note 5.

The decision of the Office of Workers' Compensation Programs dated September 26, 1995 is hereby affirmed.[15]

Dated, Washington, D.C.
September 14, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[15] Subsequent to the Office's September 26, 1995 decision, appellant submitted a medical report dated September 21, 1995, from Dr. Parra. In addition, on appeal, appellant submitted a report by Dr. Parra dated February 7, 1997. These reports were not before the Office at the time it issued its September 26, 1995 decision. Pursuant to section 501.2(c) of the Board's Rules of Procedure (20 C.F.R.§ 501.2(c)), the Board is precluded from reviewing evidence which was not before the Office at the time it issued its final decision. Therefore, the Board has no jurisdiction to review the September 21, 1995 and February 7, 1997 reports by Dr. Parra.