U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NATHANIEL BUTLER and DEPARTMENT OF THE NAVY, PHILADELPHIA NAVAL SHIPYARD, Philadelphia, Pa.

Docket No. 97-1375; Submitted on the Record;
Issued February 24, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that the position of service dispatcher fairly and reasonably represented appellant's wage-earning capacity as of October 13, 1996; and (2) whether the Office abused its discretion in denying appellant's request for a hearing under 5 U.S.C. § 8124.

On July 5, 1994 appellant, then a 55-year-old sandblaster, filed a claim alleging that he sustained chest pain on June 25, 1994 while he was pulling lines. Appellant had been hospitalized for a myocardial infarction on June 28, 1994 and had received continuation of pay through August 10, 1994. On June 30, 1994 he was referred to a neurologist for problems with his eye. By report dated August 17, 1994, Dr. Jurij R. Bilyk, a Board-certified ophthalmologist, noted that appellant had developed left superior oblique palsy, most likely vasculogenic in nature and related to his preexisting hypertension and diabetes mellitus, which caused him to experience double vision when reading or doing close work. A medical history taken on September 9, 1994 noted that appellant had experienced a focal stroke affecting his left eye vision in 1993 and had recent left-sided headaches. A September 12, 1994 hospital discharge summary noted that appellant had had a cerebrovascular accident in 1993 affecting his left eye vision.

On September 27, 1994 the Office accepted that appellant sustained a myocardial infarction. At this time and continuing, appellant's attending physician continued to opine that appellant was totally disabled and that his disability would continue for 90 days or longer.

By report dated December 3, 1994, Dr. Jack Edward Pickering, a Board-certified cardiologist, selected by the Office as a second opinion examiner, noted that appellant had an opacity in the left eye, and he diagnosed coronary artery disease, noninsulin-dependent diabetes mellitus, hypertension, status post focal cerebrovascular accident and status post two myocardial infarctions. He opined that appellant could perform sedentary work.

Appellant was placed on the periodic rolls effective December 6, 1994.

By letter dated March 15, 1995, the Office referred appellant, together with a statement of accepted facts and the complete case record to Dr. Leonard S. Dreifus, a Board-certified cardiologist of professorial rank, for an impartial medical examination to resolve a conflict that had arisen between appellant's treating physician and a second opinion examiner regarding the nature and extent of appellant's employment-related disability. By report dated April 5, 1995, Dr. Dreifus noted that appellant had sustained a myocardial infarction due to employment-related physical exertion, and he also noted that at the time of the post myocardial infarction coronary artery catheterization it was noted that diplopia had occurred which produced a left superior oblique palsy. Dr. Dreifus concluded that appellant was permanently disabled from his date-of-injury job, and indicated that appellant could perform full-time desk work with limits on lifting or pushing over 30 pounds and with prohibition of climbing or exposure to extreme weather conditions.

Following receipt of Dr. Dreifus' report, an Office rehabilitation specialist opened a vocational rehabilitation effort for appellant and assigned it to a private rehabilitation counselor on August 30, 1995. By reports dated August 30, 1995, the rehabilitation counselor screener noted appellant's diagnosis as myocardial infarction, noted unrelated disabilities to include a cerebrovascular accident which caused his left eye problem, indicated as a medical comment that appellant could drive but had double vision in his left eye, stated that appellant had difficulty reading and might need further surgery for this eye and noted that he had been released to sedentary work. By report dated October 31, 1995, the counselor indicated that he had interviewed appellant on September 28, 1995 to ascertain his educational and vocational background. The counselor noted that appellant had received additional instructions, including half a semester of business-related courses and some public speaking courses, following his graduation from high school. The counselor also noted appellant's vocational history and described the types of duties he had performed, including 18 years as a warehouse manager responsible for keeping the books, processing all merchandise including ticketing, sizing, boxing, packing and shipping merchandise to 120 stores and supervising 120 people, including hiring/firing, performance evaluations, pay increases, scheduling, training and overall warehouse operation. The counselor noted that problems which resulted from the June 25, 1994 heart attack included left eye problems "which make reading difficult, if not impossible." The counselor later restated that appellant had a stroke, which also occurred on June 25, 1994 and has resulted in an eye condition causing double vision. When the counselor met with appellant for vocational testing appellant explained that he was not able to participate in this testing as his left eye was "weak from the stroke at the time of the June 1994 incident." The counselor noted that appellant was shown various testing materials to "insure that he was not able to perform to his capability" and confirmed this by claiming he was unable to read out of his left eye. The counselor noted that appellant was scheduled for left eye surgery. In a January 30, 1996 letter to the Office, the rehabilitation counselor requested waiver of the testing requirements as retraining was not anticipated and as appellant had problems reading, given his recent eye surgery. In a subsequent report dated February 20, 1996, the counselor indicated that appellant had not been able to undergo vocational testing due to his vision problems and provided the results of a vocational analysis he had performed instead. The counselor noted that appellant still had difficulty with reading with his left eye and could look straight ahead but that looking in any direction caused

double vision. In a Claimant Ability Profile, the rehabilitation counselor noted appellant's current ability for near visual acuity as "occasionally," his far acuity as "occasionally," and depth perception, accommodation and field of vision as "never." The counselor concluded that based on appellant's work history and ability profile, there were "a number of occupations which were selected [from the Department of Labor's *Dictionary of Occupational Titles* (DOT)] and found to be appropriate."

On February 19, 1996 appellant signed an individual placement plan that had been prepared by the counselor, in which he agreed to participate in "full-time job search activities." However, by report dated May 21, 1996, the counselor indicated that appellant was not cooperating in his vocational rehabilitation effort and was not following up on job leads for several vocationally and physically suitable positions. The counselor noted that appellant advised that his left eye had become worse since the surgery, that he continued to have no peripheral vision on the left side and continued having difficulty reading small print. The counselor noted that one position found to be commensurate with appellant's vocational history and physical abilities was that of microfilm inspector and it gave him the information and expected him to apply for the position. The counselor did not explain how he concluded that an employee with double vision, no peripheral vision, and the inability to see small print could perform microfilm inspection, or how someone rated as having the ability only for occasional near visual acuity would be suitable for such a position.

During this period, the Office received a May 8, 1996 note from Dr. Harry A. Frankel, appellant's treating Board-certified family practitioner, which stated that appellant was totally disabled from all work.

A July 5, 1996 report from Dr. Leonard B. Nelson, a Board-certified ophthalmologist, noted as follows:

> "[Appellant] has had eye muscle surgery by me on October 27, 1995 for a significant vertical deviation of his eyes. He had a previous injury to his left eye and totally damaged his left inferior oblique muscle. He is not able to depress his left eye and, therefore, has constant double vision when attempting to read. It is impossible for [appellant] to perform any type of visual tasks at near, because of his double vision. This is a permanent disability."

On July 26, 1996 the counselor submitted a report suggesting that the Office close appellant's vocational rehabilitation effort due to his continued lack of cooperation in his job search. The counselor noted that his job development activities demonstrated that "employment opportunities do exist within the local labor market, which meet [appellant's] vocational and medical qualifications" and that, therefore, he was recommending that the Office proceed to determine appellant's current wage-earning capacity based upon his ability to perform the duties of either a "Dispatcher, Service" DOT No. 959.167.010, or a "Cashier II," DOT No. 211.462.010. The DOT Occupational Demands form for the position of service dispatcher indicated that, among other activities, a service dispatcher was expected to review work orders and complaints, record type of service to be performed, keep records of repairs, installations, etc. and use a computer terminal. An Office job classification form completed for the position of service dispatcher noted that it was sedentary, required negligible lifting, required the ability to

reach, handle, finger, talk and hear, and required near visual acuity and accommodation. Another classification form completed for the position of cashier II also indicated that near visual acuity was required. The counselor noted that appellant advised the rehabilitation office that he felt he was not qualified for the positions forwarded to him because he was limited to the use of his right eye, but the counselor assured appellant that the positions were within his capability. The counselor noted that when appellant was contacted with respect to his job search he related that he still had double vision and could not read small print, and that, consequently, his son had to come over to review the want ads in the newspaper for him. The counselor, however, in his report to the Office insisted that "essentially all the jobs forwarded to [appellant]" did not require near visual acuity, and that appellant was preoccupied with the vision issue as a reason for not applying for the recommended positions. The counselor subsequently submitted CA-66 forms dated August 13, 1996, for these two positions, in which he noted that he had confirmed the reasonable availability of the positions in appellant's commuting area with a state employment service representative and listed their weekly wages as reported by the "Economic Research Institute."

Following the receipt of this evidence the rehabilitation specialist closed appellant's vocational rehabilitation effort and referred this matter to the Office claims examiner for a wage-earning capacity determination. On October 23, 1996 the claims examiner requested that the Office medical adviser provide an opinion regarding appellant's physical ability to perform the duties of the service dispatcher position. By reply dated October 23, 1996, the Office medical adviser concluded that this position was within the work restrictions set out by Dr. Dreifus.

On August 23, 1996 the Office issued a notice of proposed reduction of compensation, in which it informed appellant that it intended to reduce his continuing compensation, based upon its determination that the factual and medical evidence of record established that the position of service dispatcher represented his current wage-earning capacity. In an accompanying memorandum, the Office noted that the rehabilitation counselor had concluded that the service dispatcher position was available in appellant's commuting area and was within his abilities. The Office noted that the Office medical adviser had indicated that the position of service dispatcher was within the work restrictions outlined by Dr. Dreifus, who it noted constituted the weight of the medical evidence of record. Appellant did not respond to this notice within the allotted time period.[1]

On September 25, 1996 the Office issued a letter decision, in which it determined that appellant's wage-earning capacity was fairly and reasonably represented by the sedentary position of service dispatcher, and it reduced his compensation to reflect his employment-related loss of wage-earning capacity, effective October 13, 1996.

By letter dated January 7, 1997, appellant's representative requested an oral hearing before an Office hearing representative. However, by decision dated February 4, 1997, the Office denied the representative's request finding that it was untimely made. The Office also considered whether to grant appellant a discretionary hearing and declined to do so since the

[1] On September 25, 1996 the Office received a late response in which appellant questioned the preparation of the August 23, 1996 notice.

issue in dispute could be equally well addressed through the submission of new evidence in conjunction with a request for reconsideration.

The Board finds that the reduction in compensation based upon appellant's wage-earning capacity as a service dispatcher must be reversed.

Pursuant to 5 U.S.C. § 8115(a), if the employee has no actual earnings upon which to base a wage-earning capacity, his wage-earning capacity is determined with due regard to the nature of his injury, his degree of physical impairment, his 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 disabled condition.[2] The Office procedure manual further delineates factors to be considered in determining wage-earning capacity on a constructed position, which includes the nature of the injury, the degree of physical impairment *(including impairments resulting from both injury-related and preexisting conditions)*, the usual employment, the claimant's age, and qualifications for other employment (including education, previous employment, and training as well as *work limitations imposed by the injury-related and preexisting impairments).*[3]

Further, in accordance with the procedure manual subsection (d) on medical suitability the procedures make clear that the claims examiner must determine whether a claimant is able to perform the job, taking into consideration medical conditions due to the accepted work-related injury or disease *and any preexisting medical conditions.*[4]

In the instant case, the medical evidence clearly supports that appellant had a 1993 cerebrovascular accident (stroke), which resulted in left superior oblique palsy causing double vision, loss of peripheral vision and inability to read small print or perform tasks requiring near visual acuity. This condition and disability decidedly preexisted appellant's 1994 myocardial infarction and, therefore, must be considered when making a wage-earning capacity determination. Even if this condition and disability had occurred concomitantly with appellant's 1994 myocardial infarction arising out of the same occupational stress-induced vascular occlusive/obstructive activity, as both Dr. Dreifus and the rehabilitation counselor erroneously noted it did, it would still have to be considered in determining appellant's wage-earning capacity.[5] However, neither the rehabilitation counselor nor the claims examiner took this preexisting disability into consideration.

The rehabilitation counselor noted that appellant had eye problems, which made reading difficult if not impossible, with loss of peripheral vision, double vision, and the inability to read small print, he certified that appellant's current ability for near visual acuity was only

[2] *See Pope D. Cox*, 39 ECAB 143 (1987).

[3] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(a)(1-5) (December 1993).

[4] *Id.* at (d).

[5] *See supra* note 4 (only medical conditions arising subsequent to the work-related injury or disease will not be considered).

"occasional" and his ability for visual accommodation was "never," and he sought waiver of vocational testing requirements in part due to appellant's difficulty with reading, yet he initially inexplicably opined that the position of microfilm inspector was suitable, which undoubtedly required virtually constant near visual acuity, and ultimately determined that the positions of service dispatcher, which required not only near visual acuity but also visual accommodation, and cashier II, which also required near visual acuity, were suitable. As additional error the rehabilitation counselor continued to insist to appellant and formally reported to the Office that essentially all the jobs forwarded to appellant did not require near visual acuity.

Thereafter, the claims examiner relied on the Office medical adviser's August 23, 1996 single sentence to the effect that the position of service dispatcher "was within the work restrictions set out by Dr. Dreifus." The Board notes that there is no evidence that the Office medical adviser ever considered the July 5, 1996 report from Dr. Nelson regarding appellant's visual disability, and further notes that, although the Office states that Dr. Dreifus represents the weight of the medical evidence of record, Dr. Dreifus was a cardiologist asked to give his opinion on appellant's residual disability due to his 1994 myocardial infarction, and is not an ophthalmologist considering appellant's existing disability due to visual impairment, such that Dr. Dreifus is only the weight of the medical evidence on the narrow issue of cardiac impairment.

The Board notes that the claims examiner further erred by failing to consider the job description physical requirements specified on the Office job classification form, which clearly indicated that the position of service dispatcher required both near visual acuity and visual accommodation, and which the rehabilitation counselor had previously indicated appellant could only perform "occasionally" for near visual acuity and "never" for accommodation, and failed to consider Dr. Nelson's report, in which he indicated that near visual acuity was impossible for appellant to perform, but also failed to recognize that the tasks of a service dispatcher as detailed in the DOT included multiple repetitive duties requiring near visual acuity, including reviewing work orders and complaints, recording types of service performed, keeping records and using a computer terminal.

The Office erred by failing to consider appellant's preexisting visual impairment when it issued both its notice of proposed reduction of compensation and its letter decision making that proposed reduction final, considering only the medical evidence related to appellant's cardiac disability, in contravention of both its own procedure manual and the Federal Employees' Compensation Act.

As the Board is making this finding regarding the Office's September 25, 1996 decision, the issue of the February 4, 1994 decision becomes moot.

Accordingly, the decision of the Office of Workers' Compensation Programs dated September 25, 1996, is hereby reversed.

Dated, Washington, D.C.
February 24, 1999

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member