

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LEROY F. RAEL and DEPARTMENT OF AGRICULTURE,
FOREST SERVICE, Taos, NM

*Docket No. 97-2111; Submitted on the Record;
Issued November 8, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in reducing appellant's monetary compensation.

On September 8, 1988 appellant, then a 45-year-old firefighter, filed a notice of occupational disease and claim for compensation alleging that he developed a respiratory condition after prolonged exposure to smoke and cold temperatures in the performance of duty. The Office accepted the claim for pneumonia, pleural effusion and deep vein thrombosis. Appellant has not worked since September 13, 1988.¹

Appellant was initially treated at an outpatient clinic with antibiotics. He was later admitted to a Veterans Administration (VA) hospital from September 27 through October 5, 1988 with double lobe pneumonia and pneumothorax. On October 14, 1988 appellant was readmitted to the hospital complaining of a cough with blood-streaked sputum at which time studies revealed a right pleural effusion. During November 1988, appellant was also admitted to the hospital complaining of a painful and swollen left leg. Vein studies showed the presence of deep vein thrombosis involving the femoral vein. Appellant was followed at his local VA hospital and clinic.

By letter dated November 21, 1989, the Office referred appellant along with a copy of the medical record and a statement of accepted facts to Dr. Michael H. Kaufman, a Board-certified internist, for a second opinion evaluation. In a report dated December 1, 1989, Dr. Kaufman related appellant's employment and medical histories and his symptoms of pain and weakness in

¹ A statement of accepted facts prepared by the Office stated that appellant fought fires from August 29 to September 2, 1988 during which time he hiked four miles back and forth to a fire site and was caught in smoke pockets and dusty trails without a respirator or a smoke mask. The Office also stated that appellant slept in a paper sleeping bag which would become wet from the morning dampness, and that appellant worked under those conditions until September 12, 1988.

the left leg. He noted physical findings. Dr. Kaufman reported that appellant's respiratory condition related to factors of his employment had resolved aside from minimal chronic discomfort with deep breathing in the area of his thoracotomy scar. According to Dr. Kaufman, appellant's venous thrombosis was causally related to prolonged bed rest necessitated by his work-related respiratory condition. He opined that appellant was totally disabled from his work duties.

In a work restriction evaluation form dated December 1, 1989, Dr. Kaufman noted that appellant could not work an eight-hour shift. He also noted that appellant was precluded from lifting more than 10 pounds and that he was unable to sit, stand or walk for more than 1 hour at a time. Dr. Kaufman stated that appellant had "probably" reached maximum medical improvement.

Appellant continued to see Dr. Kaufman on a yearly basis for evaluation of his deep vein condition. In a June 2, 1993 report, he noted that appellant used crutches and complained of pain and swelling in his leg. Physical findings included minimal increased edema, in the left lower extremity as compared to the right. Dr. Kaufman indicated that appellant's disability remained unchanged and noted that it would be impossible for appellant to do any sort of work that required prolonged standing, sitting, walking or bending.

In a June 17, 1994 report, Dr. Kaufman noted that appellant persisted in having severe varicosities and some edema of his left lower extremity, unchanged from his examination the year before. He opined that appellant was unable to perform any gainful employment and concluded that appellant's condition was permanent.

By letter dated March 10, 1995, the Office referred appellant to a counselor for possible vocational rehabilitation program. The Office also requested an updated opinion from Dr. Kaufman as to appellant's capacity for work.

In a report dated August 1, 1995, Dr. Kaufman reported that appellant had long-standing chronic pain in both of his lower extremities, more marked on the left side. He specifically stated that "[appellant] persists in having his post-phlebotic syndrome. It would be a great advantage to him to be able to be gainfully employed and hopefully he can get some vocational [rehabilitation] which would enable him to do this." Dr. Kaufman concluded that appellant was unable to do any work which would require prolonged standing, lifting, bending or use of the lower extremities for a long period of time.

In a work evaluation form dated August 1, 1995, Dr. Kaufman reported that appellant was unable to do walking, lifting, bending, or standing. He also noted that appellant could not perform more than sedentary activity.

On March 29, 1996 the Office issued a notice of proposed reduction of compensation. The Office advised appellant that his future weekly compensation would be reduced based on his capacity to earn wages as a dispatcher. In an accompanying memorandum, the Office noted that appellant had worked with a rehabilitation counselor in securing employment and that the position of dispatcher, for which appellant was qualified, was available in appellant's commuting area at a rate of \$275.00 per week. Relying on the *Dictionary of Occupational Titles*, the Office

determined that the position of dispatcher as described in the *Dictionary of Occupational Titles* fairly and reasonably represented appellant's wage-earning capacity.² The Office also advised appellant that he had 30 days to submit additional evidence or argument.

In a decision dated May 1, 1996, the Office reduced appellant's compensation to zero effective May 26, 1996 on the grounds that the medical and factual evidence of record established that he was no longer totally disabled and that he had the capacity to earn wages as a dispatcher.³

On May 30, 1996 the Office received a letter from appellant requesting reconsideration.

In conjunction with his reconsideration request, appellant submitted an April 17, 1996 report from Dr. Kaufman, which diagnosed persistent thrombophlebitis in the left lower extremity with chronic pain. He noted that appellant walked with crutches, relied on a tens unit and was closely monitored for his medication. Dr. Kaufman stated that appellant appeared "unchanged" and opined that there was "no change in his disability."

In a decision dated July 1, 1996, the Office denied modification after a merit review.

On December 5, 1996 appellant by counsel filed another request for reconsideration along with new evidence.

Appellant submitted a report from Dr. Kaufman dated November 22, 1996, which reported that on physical examination appellant continued to have varicose veins, most markedly behind the left knee, which were tender and painful and unchanged over the years. He specifically opined that appellant would be unable to work full time as a dispatcher/service aid, noting that appellant "certainly cannot do any prolonged standing or sitting without space to elevate his legs." Dr. Kaufman further noted that appellant would have difficulty moving rapidly in emergencies on the job and that he was "unable to do any lifting up to #20." He also related that appellant could not do work-related activities for more than 2 to 3 hours at a time without having to rest and lie down.

Appellant also submitted medical notes and an October 28, 1996 report, from Dr. David Arredondo, a Board-certified vascular surgeon.⁴ Dr. Arredondo noted appellant's

² The Office noted that the position of dispatcher/service aide in the *Dictionary of Occupational Titles* (239.367-022) is described as follows:

"Receives and records reports for emergency road service and automobile club members and dispatches tow truck or service truck to stranded vehicle: answers telephones and obtains records for road service on such information as name of club member, location of disabled vehicle, the nature of vehicle malfunction. Routes cars to dispatch station, or relays information to service station or tow truck and motorists' vicinity, using telephone or two-way radio. May locate stranded vehicle using maps. May maintain file of road service cards."

³ In a May 1, 1996 letter, the Office described the dispatcher position as requiring light strength levels according to the *Dictionary of Occupational Titles* with occasional lifting not to exceed 20 pounds, and frequent lifting not to exceed 10 pounds.

⁴ A venous vascular ultrasound taken on September 20, 1996 reported evidence of chronic, well organized thrombus and venous valvular incompetence in the left lower extremity.

history of injury, symptoms and subjective complaints. He reported that appellant's chronic pain was inconsistent with a diagnosis of deep venous thrombosis. Dr. Arredondo questioned why appellant had been on long term Coumadin therapy but admitted that he did not have appellant's VA hospital treatment records to review. Dr. Arredondo specifically noted that he found no evidence of any arterial circulatory problems in the leg, no evidence of "significant venous problems, and no evidence of reflex sympathetic dystrophy "with respect to the generally expected signs and symptoms of that disease." Dr. Arredondo recommended that appellant resume normal activity but advised him to avoid extreme prolonged sitting or standing.

In a decision dated January 17, 1997, the Office denied modification following a merit review of the case.

By letter dated April 10, 1997, appellant's attorney filed a third request for reconsideration and submitted what he termed a "letter of clarification" from Dr. Kaufman dated April 9, 1997, which stated that the dispatcher job description had never been provided to him and that after a review of the job, he considered it to be beyond appellant's physical capabilities, which was reduced as a result of the August 29, 1988 work injury. According to Dr. Kaufman, his opinion of "no change" in an April 17, 1996 report was misconstrued by the Office. Dr. Kaufman advised that he never stated that appellant had the ability to work full time and opined that appellant remained totally disabled.

In a decision dated April 15, 1997, the Office denied modification after a merit review of the case.

The Board finds that the Office failed to meet its burden of proof in reducing appellant's monetary compensation.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation.⁵

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.⁶ When the Office makes a medical determination of partial disability and of specific 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 labor 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 service or other applicable service. Finally, application of the principles set forth in

⁵ *Haywood V. Buffaloe*, 31 ECAB 1442 (1980).

⁶ See generally, 5 U.S.C. § 8115(a); A. Larson, *The Law of Workers' Compensation* § 57.22 (1989); see also *Betty F. Wade*, 37 ECAB 556 (1986).

the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.⁷

In the instant case, the record does not support the Office's determination that appellant could perform the duties of a dispatcher. Contrary to the Office's analysis of the evidence of record, in his August 1, 1995 report, although Dr. Kaufman stated that it would be "a great advantage to appellant to be gainfully employed," he specifically opined that appellant was precluded from any work that would require prolonged standing, lifting, bending or use of the lower extremities for an extended period of time. In a duty status report (OWCP-5 form) dated August 1, 1995, Dr. Kaufman noted that appellant could only perform sedentary work.

The position description provided by the Office appears to be at odds with restrictions provided by Dr. Kaufman. The position of dispatcher as described by the Office's job classification Form CA-66 notes that the demands of the job, according to the *Dictionary of Occupational Titles*, require light levels of strength and not just sedentary work as recommended by Dr. Kaufman.

The Board further notes that the Office referenced the term "light strength level" according to the *Dictionary of Occupational Titles* as consisting of occasional lifting not to exceed 20 pounds and frequent lifting not to exceed 10 pounds. The record contains an earlier OWCP-5 form prepared by Dr. Kaufman on December 1, 1989 which specifically reported that appellant was incapable of lifting over 10 pounds. In light of the discrepancies between the lifting requirements approved by Dr. Kaufman and the lifting demands of the dispatcher position, the Office's finding that appellant is capable of performing the dispatcher position is in error.

Moreover, in an April 7, 1997 report, Dr. Kaufman clarified his opinion with respect to appellant's work capacity. He noted that he had not been previously provided a copy of the job description for the dispatcher position. Dr. Kaufman also stated that Office misconstrued his notation of "no change" in the April 17, 1996 report issued a year earlier as meaning that appellant was able to work. According to Dr. Kaufman, after reviewing the job description, it was his opinion that the duties of the position were beyond appellant's physical capabilities. He specifically noted that appellant certainly could not do prolonged standing or sitting without space to elevate his leg and that appellant would have difficulty moving rapidly in emergencies and could not sustain the lifting requirements.

Because the Office misconstrued Dr. Kaufman's opinion and has not properly considered Dr. Kaufman's work restrictions and his April 17, 1996 report in conjunction with the physical requirements of the dispatcher position, the Office has failed to carry its burden of proof in reducing appellant's compensation.⁸ The Board further notes that the Office improperly assigned probative weight to Dr. Arrendondo's opinion over Dr. Kaufman's opinion since

⁷ See *Hattie Drummond*, 39 ECAB 904 (1988); *Albert C. Shadrick*, 5 ECAB 376 (1953).

⁸ The work evaluation form provided to Dr. Kaufman for completion on August 1, 1995 did not inquire as to the number of hours that appellant was able to work and was therefore limited in scope in comparison to the form he was provided for completion on December 1, 1989. In the earlier form, Dr. Kaufman indicated that appellant was totally disabled and check marked that he could not work an eight-hour shift.

Dr. Arrendondo acknowledged that he had not reviewed appellant's hospitalization and treatment records. Inasmuch as Dr. Arrendondo was not provided a complete medical record, his opinion that appellant can return to normal activity is not well reasoned.

Consequently, the Board finds that the Office erred in its determination that appellant has a wage-earning capacity equivalent to the position of a dispatcher. The Office, therefore, erred in reducing appellant's monetary compensation.

The decision of the Office of Workers' Compensation Programs dated April 15, 1997 is hereby reversed.

Dated, Washington, D.C.
November 8, 1999

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member