U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN WISNIEWSKI and DEPARTMENT OF THE NAVY, PHILADELPHIA NAVAL SHIPYARD, Philadelphia, PA

Docket No. 98-353; Submitted on the Record;
Issued September 15, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant could perform the duties of a cashier and therefore had a 65 percent loss of wage-earning capacity.

On May 27, 1988 appellant, then a 29-year-old welder, was working with another welder when a piece of metal swung free, hitting the other welder and knocking him into appellant. The Office accepted appellant's claims for lumbosacral sprain and bulging discs at L4-5 and L5-S1. Appellant received continuation of pay for the period June 15 through July 29, 1988 and temporary total disability compensation for the period August 1, 1988 through his return to work on October 24, 1988. The Office subsequently paid compensation for intermittent periods of disability. The employing establishment eliminated appellant's light-duty position effective September 30, 1992. Appellant then began receiving temporary total disability compensation. In an October 14, 1997 decision, the Office found that appellant could perform the duties of a Cashier II and therefore had a 65 percent loss of wage-earning capacity.

The Board finds that the Office properly determined that appellant had a 65 percent loss of wage-earning capacity.

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 compensation benefits. Once the medical evidence suggests that a claimant is no longer totally disabled but rather is partially disabled, the issue of wage-earning capacity arises.[1] 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

[1] *Garry Don Young,* 45 ECAB 621 (1994).

and vocational qualifications, and the availability of suitable employment.[2] Accordingly, the evidence must establish that appellant can perform the duties of the job selected by the Office and 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.[3]

In a July 29, 1988 form report, Dr. William Green, an internist, diagnosed lumbosacral strain with radiculitis. In an August 1, 1988 report, Dr. Gary Muller, an orthopedic surgeon, diagnosed lumbar radiculopathy. A computerized tomography (CT) scan was essentially normal with mild bulging of the annuli at L3-4 and L4-5 with no impact on the nerve roots or subarachnoid space. An electromyogram (EMG) was normal. In a September 20, 1989 report, Dr. Muller reported that a myelogram was normal.

In a March 12, 1994 work restriction evaluation, Dr. Muller indicated that appellant could sit intermittently five to six hours a day, and walk, lift or stand intermittently for one to two hours a day. He reported appellant could lift up to 20 pounds. Dr. Muller concluded appellant could work eight hours a day with the limitations he had set. In a September 12, 1994 report, Dr. Muller indicated that appellant could stand, twist, sit and bend one to two hours each. He indicated that appellant could lift up to 10 pounds. Dr. Muller concluded appellant could work four hours a day. In an office note of the same date, he related that appellant was still having problems with his neck and shoulder with no relief of symptoms by conservative treatment. Dr. Muller indicated appellant could work on a limited basis in the future with restrictions. In an October 24, 1994 work restriction evaluation form, he indicted that appellant could sit intermittently for four hours a day, walk intermittently for three hours a day and lift intermittently for two hours a day. Dr. Muller reported that appellant could not work while standing. He noted that appellant could lift up to 20 pounds. Dr. Muller concluded that appellant could work four to five hours a day. In a March 13, 1995 letter, the Office asked Dr. Muller to explain the discrepancies in his reports. In a March 22, 1995 response, Dr. Muller indicated that he would return appellant to a light-duty job for four hours a day because he was having a fair amount of symptoms and had almost no endurance. He commented that if the Office had some alternate means of employment, appellant should be able to do that. Dr. Muller suggested a work hardening program could get appellant up to eight hours a day. He indicated that four hours a day was not a permanent restriction. Dr. Muller stated that appellant had been unemployed for so long that his endurance was down but commented that it could be built up again. He recommended that appellant undergo a functional capacity evaluation.

In a December 19, 1996 report, Dr. Manuel Rosenberg, a Board-certified internist, stated that the functional capacity evaluation showed appellant could perform light-duty work. Dr. Rosenberg noted that appellant had difficulty sitting or standing for long periods of time. He indicated that appellant, therefore, had to change positions often but commented that this could be worked out depending on the employment options available. In a January 20, 1997 form,

[2] *See generally*, 5 U.S.C. § 8115(a); A. Larson *The Law of Workers' Compensation* § 57.22 (1989).

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

Dr. Muller indicated that appellant could work eight hours a day. He indicated that appellant could perform functions such as standing, sitting and walking from 30 to 60 percent of the day as shown by the functional capacity evaluation and could lift up to 25 pounds.

The Office concluded that appellant could perform the duties of a cashier II.[4] The Office indicated that the position was a light position, requiring the ability to lift up to 20 pounds occasionally and 10 pounds frequently. A state employment representative indicated that the job was being performed in sufficient numbers so as to be reasonably available to appellant on a full-time basis within his commuting area. In a March 31, 1997 letter, the Office notified appellant of the proposal to reduce his compensation.

In an April 14, 1997 report, Dr. Muller stated that appellant probably could do the job of cashier II but should be started in the job at four hours a day, progressing to six and then eight hours a day. He indicated that appellant was capable of working but commented that his return to work would depend on the job and what availability existed.

The Office referred appellant, together with the statement of accepted facts and the case record, to Dr. Erwin R. Schmidt, a Board-certified orthopedic surgeon, for an examination and second opinion. In a June 28, 1997 report, Dr. Schmidt stated that appellant had a normal physical examination. He noted appellant had subjective complaints of discomfort in his low back and occasionally in the left buttock. Dr. Schmidt concluded appellant could be employed within the limitations of the functional capacity evaluation. He recommended an active physical therapy program to develop his capacity for work.

Drs. Schmidt, Rosenberg and Muller each indicated that appellant was capable of returning to work within the restrictions of the functional capacity examination as described by Dr. Muller with some therapy to enable him to work full time. The position of cashier II was described as a light-duty position with a lifting requirement of up to 20 pounds. Dr. Muller reported that appellant could lift up to 25 pounds. Drs. Schmidt and Muller referred to the functional capacity evaluation to show that appellant could sit, stand and walk while working. The medical evidence of record therefore shows that appellant was capable of performing the duties of a cashier II on a full-time basis. The Office therefore has met its burden of proof in reducing appellant's compensation.

[4] Department of Labor, *Dictionary of Occupational Titles*, DOT No. 211.462-010 (4th ed., 1981).

The decision of the Office of Workers' Compensation Programs dated October 14, 1997 is hereby affirmed.

Dated, Washington, D.C.
September 15, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

Michael E. Groom
Alternate Member