U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of WINFORD E. FISHER and DEPARTMENT OF THE NAVY, U.S. MARINE CORPS BASE, Camp Lejune, NC

*Docket No. 98-41; Submitted on the Record;*
*Issued January 13, 2000*

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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 benefits, effective June 21, 1997, based on its determination that the selected position of lot attendant fairly and reasonably represented his wage-earning capacity.

The Board has duly reviewed the case record and concludes that the Office improperly reduced appellant's compensation benefits.

Once the Office accepts a claim, it has the burden of proof to establish that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[1]

On January 31, 1995 appellant, then a 48-year-old painter, injured his left foot and left elbow when he fell from a ladder while in the performance of duty. The Office accepted the claim for a fractured left foot and a dislocated left elbow and appellant received appropriate wage-loss compensation. On June 15, 1995 appellant returned to work in a limited-duty capacity. However, on October 12, 1995, the employment establishment terminated appellant's employment on the basis that it could no longer accommodate his physical limitations. In light of appellant's termination, the Office placed him on the periodic rolls. With the Office's assistance, appellant was able to return to his former job on a full-time, limited-duty basis beginning January 18, 1996. In February 1996, however, appellant's treating physician, Dr. Noel B. Rogers, imposed additional restrictions that limited appellant to working only half days. Subsequently, on April 29, 1996, Dr. Rogers' advised that appellant's work restrictions

[1] *James B. Christenson*, 47 ECAB 775, 778 (1996); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

with respect to climbing and standing were permanent.[2] Shortly thereafter, the employing establishment determined that it could not accommodate appellant's permanent work restrictions. Consequently, appellant was again terminated effective May 10, 1996 and the Office later resumed payments for wage-loss compensation.

Appellant subsequently underwent vocational rehabilitation commencing on September 17, 1996. In a letter dated January 28, 1997, the Office advised appellant that the positions of lot attendant and van driver had been identified as jobs that were compatible with his work limitations and that he would be provided 90 days of placement services in an effort to secure such employment. On April 25, 1997 the Office informed appellant that it proposed to reduce his compensation based on the fact that the specified positions of lot attendant and van driver were suitable both medically and vocationally. The Office explained that these positions represented appellant's wage-earning capacity despite the fact that appellant had not secured such employment. Appellant was advised that in the event he disagreed with the proposed reduction of benefits, he had 30 days within which to submit any additional evidence or argument. In response, the Office received additional medical evidence from appellant's treating physician as well as a letter from a once-prospective employer explaining why appellant had been denied employment as a van driver.[3]

By decision dated May 30, 1997, the Office found that the position of "lot attendant" represented appellant's wage-earning capacity as of June 21, 1997 and consequently, the Office reduced appellant's wage-loss compensation. On June 5, 1997 appellant filed a request for reconsideration accompanied by additional medical evidence from his treating physician. In a merit decision dated September 2, 1997, the Office corrected a miscalculation regarding appellant's cost-of-living increase, but otherwise denied modification.

An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.[4] Under section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably

[2] Dr. Rogers explained that appellant had sustained a significant injury to his left foot and that he would be on permanent light duty. He further explained that appellant would not be able to stand at any one given time for more than about a hour and that appellant complains that he begins to hurt after about 15 to 20 minutes. Additionally, Dr. Rogers noted that appellant would not be able to climb a ladder more than two or three steps and that it would be extremely dangerous for appellant to try and climb ladders of any height.

[3] The majority of the medical evidence submitted in response to the Office's April 25, 1997 prereduction notification pertained to appellant's use of pain medication. During the period when appellant was receiving vocational rehabilitation services, both appellant and his treating physician raised the medical issue of whether appellant should be expected to pursue employment that involved operating a motor vehicle while appellant continued to use the prescription pain medication, Darvocet-N 100. Although aware of appellant's concerns, the Office did not specifically address this issue in its April 25, 1997 notification. Additionally, at least one prospective employer concluded that appellant's use of pain medication was incompatible with the job duties of van driver.

[4] 20 C.F.R. § 10.303(a); *see Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

represent the employee's wage-earning capacity, or if the employee has no actual wages, the wage-earning capacity is determined with due 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.[5]

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 the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.[6]

The Office must initially determine appellant's medical condition and work restrictions before selecting an appropriate position that reflects appellant's vocational wage-earning capacity. The Board has stated that the medical evidence upon which the Office relies must provide a detailed description of appellant's condition.[7] Additionally, the Office's procedure manual provides as follows:

> "The [claims examiner] is responsible for determining whether the medical evidence establishes that the 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. (Medical conditions arising subsequent to the work-related injury or disease will not be considered.) If the medical evidence is not clear and unequivocal, the [claims examiner] will seek medical advice from the [district medical adviser], treating physician, or second opinion specialist as appropriate."[8]

In the instant case, the Office initially determined that the positions of lot attendant and van driver were medically suitable based on Dr. Rogers' April 29, 1996 report in which he noted that appellant would not be able to "stand at any one given time for more than about an hour" and that appellant would not be able to "climb a ladder more than two or three steps." The Office also referenced a May 14, 1996 letter from Dr. Rogers in which he indicated that he did not know of any reason why appellant could not "try the job described as motor vehicle operator."[9] Ostensibly, this evidence supports the Office's conclusion that the positions of van

[5] 5 U.S.C. § 8115(a); *see Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

[6] *Albert C. Shadrick*, 5 ECAB 376 (1953).

[7] *Samuel J. Russo*, 28 ECAB 43 (1976).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(d) (December 1995).

[9] Dr. Rogers' May 14, 1996 letter was written in response to an inquiry from the employing establishment

driver and lot attendant fall within the physical limitations imposed by Dr. Rogers inasmuch as both positions entail some degree of driving and neither position requires standing for an extended period of time or climbing a ladder. However, in subsequent reports, Dr. Rogers expressed concern over appellant's ability to safely operate a motor vehicle at work while taking the prescription drug Darvocet-N 100.[10]

Dr. Rogers' treatment notes dated February 18, 1997 specifically indicate that appellant "cannot drive and take Darvocet." He further explained that "if [appellant] has to take [Darvocet] on a regular basis, he may not be able to do any job because so many jobs will require some type of activity where Darvocet is contraindicated." At the time, Dr. Rogers recommended a trial period of 30 days wherein appellant would attempt to take his medication only after work and at the hour of bedtime. The record indicates that appellant's efforts to limit his use of Darvocet were unsuccessful. In his May 5, 1997 treatment notes, Dr. Rogers indicated that appellant was taking his Darvocet "on an around the clock basis" and that he has to take this medication every four hours.

In its May 30, 1997 decision, the Office addressed the issue of appellant's use of Darvocet and concluded that his apparent need for this medication on a regular basis was questionable. The Office arrived at this conclusion by reviewing Dr. Rogers' various treatment records and essentially discrediting the doctor's findings. The Office did not, however, obtain any additional medical evidence demonstrating that appellant was capable of performing the specified duties of either lot attendant or van driver without the use of his prescribed pain medication. Additionally, the Office's stated reasons for questioning appellant's need to use Darvocet on a regular basis are themselves questionable.

The Office found that appellant did not regularly use his Darvocet based in part upon Dr. Rogers' August 26, 1996 treatment notes wherein he noted that "We have not given [appellant] any Rx's [drugs] today because he has medicine left because he has not been taking it regularly." The Office, however, failed to note that Dr. Rogers specifically referred to appellant not having "been taking his Naprosyn regularly…." He did not specifically indicate that appellant had not been taking his Darvocet regularly.

The Office also questioned appellant's need to use Darvocet on a regular basis because of the manner in which it was initially prescribed. The Office noted that Dr. Rogers had routinely

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regarding appellant's possible reemployment as a motor vehicle operator. After expressing his opinion that appellant could "try the job described as motor vehicle operator," he went on to explain that it was his assumption that the position involved only driving a motor vehicle. The employing establishment subsequently determined that there were no positions available that called for only driving a motor vehicle.

[10] The *Physicians' Desk Reference* describes Darvocet-N 100 as a mild narcotic analgesic structurally related to methadone. This drug is indicated for the relief of mild to moderate pain. The "usual dosage is 100 mg [milligram] … every 4 hours as needed for pain," with a maximum recommended dose of 600 mg per day. The most frequently reported side effects from the use of Darvocet-N were "dizziness, sedation, nausea, and vomiting." Additionally, one of the noted contraindications for usage of Darvocet-N in ambulatory patients is that it "may impair the mental and/or physical abilities required for the performance of potentially hazardous tasks, such as driving a car or operating machinery." *Physicians' Desk Reference*, 1567 (53d ed. 1999).

prescribed appellant's medication on a "p.r.n." basis or as required. The Office inferred from this that appellant did not have to take his pain medication on a regular basis every four hours. Additionally, the Office found that Dr. Rogers' February 18, 1997 recommendation that appellant attempt to use his Darvocet only after work and at the hour of bedtime was somewhat incongruous with his decision to "simultaneously" increase appellant's medication to every four hours. Contrary to the Office's assertion, Dr. Rogers did not change appellant's prescription on February 18, 1997, but continued to prescribe the medication on a "p.r.n." basis as indicated in his treatment notes of that date. Thus, Dr. Rogers did not contradict himself as the Office asserted.

The Office also attempted to dismiss appellant's complaints of pain as being merely subjective in nature. Dr. Rogers' April 29, 1996 report clearly indicated that appellant "begins to hurt after about 15 to 20 minutes" of standing. While the Office initially relied upon this report as evidence of appellant's physical limitations, it subsequently questioned whether appellant has any continuing pain associated with his accepted employment injury. In light of the nature of appellant's accepted injury, it seems somewhat myopic for the Office to suggest that appellant's history of pain lacks any objective pathology.

On reconsideration, appellant submitted a June 3, 1997 letter from Dr. Rogers in which he explained that it was customary to prescribe pain medication on an as needed basis or "PRN." He further explained that it was unreasonable to assume that because the prescription was written on a "PRN" basis that this means that the patient does not necessarily need the medication. Additionally, Dr. Rogers indicated that appellant was taking his medication every four hours because he needed it and that was why he subsequently began writing appellant's prescriptions for "every four hours." Finally, he explained that appellant's subjective complaints of pain are supported by objective pathology, specifically chronic arthritis as demonstrated by x-rays. In its September 2, 1997 decision, the Office explained that Dr. Rogers' most recent report did not adequately explain why appellant was required to take Darvocet every four hours and why appellant cannot work and take this medication at the same time. The Office concluded that appellant failed to present sufficient evidence to demonstrate that he cannot perform the physical activities required of a lot attendant.

While the Office is not bound to accept what it perceives as an inadequately rationalized medical opinion, the Office cannot meet its burden to justify termination or modification of benefits by simply rejecting such evidence. It is not appellant's burden to demonstrate that he is unable to perform the duties of the specified position. The Office must affirmatively establish that the specified position is medically suitable. Dr. Rogers' various reports may arguably lack adequate rationale, but nonetheless, this evidence is uncontradicted. He has clearly stated that appellant "cannot drive and take Darvocet," and the Office has not identified any medical evidence to the contrary.

Not only has the Office failed to carry its burden of proof, but also it has failed to adhere to its own procedures. As previously noted, the Office's procedural manual provides that "If the medical evidence is not clear and unequivocal, the [claims examiner] will seek medical advice from the [district medical adviser], treating physician, or second opinion specialist as

appropriate."[11] In view of the Office's obvious concerns regarding Dr. Rogers' findings, it should have sought further medical advice in accordance with its stated procedures. Accordingly, the Board finds that the Office has not met its burden in justifying a reduction in appellant's compensation benefits.

The decisions of the Office of Workers' Compensation Programs dated September 2 and May 30, 1997 are hereby reversed.

Dated, Washington, D.C.
January 13, 2000

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

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