U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TONY L. MARTINEZ and DEPARTMENT OF ENERGY, OPERATIONS OFFICE, Albuquerque, NM

Docket No. 98-2582; Submitted on the Record;
Issued July 12, 2000

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation based on its determination that the position of offset duplicating machine operator represented his wage-earning capacity.

On September 24, 1984 appellant, then a 44-year-old printer, sustained an injury to his back when he fell off a broken chair at work. The Office accepted appellant's traumatic injury claim for lumbar strain and aggravation of preexisting degenerative disc disease. Appellant stopped working on September 25, 1984. He was removed from his position effective November 11, 1984 due to a reduction-in-force.[1]

Appellant was initially treated by Dr. Ronald W. Racca, a Board-certified orthopedic surgeon, for pain, spasms, and decreased motion in the lower back and neck. Dr. Racca prescribed anti-inflammatory medication and physical therapy. He subsequently ordered a cervical and lumbosacral magnetic resonance imaging (MRI) on November 22, 1985, which revealed that appellant had spondylolisthesis at C5-6 and a herniated disc at L4-5. Dr. Racca assigned appellant a 35 percent permanent impairment.

On a Form OWCP-5 dated October 6, 1988, Dr. Racca indicated that appellant could not work 8 hours a day and that he was only able to sit intermittently for 4 hours, walk for 2 hours and stand for 2 hours per day. He placed appellant on a 10- to 20-pound lifting restriction.

In a March 16, 1990 report, Dr. Racca diagnosed spondylolysis and a herniated disc. He noted that appellant's back problems including pain and spasms started after his work injury. Dr. Racca opined that appellant could only stand, sit or walk for 30 minutes at a time.

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[1] In a statement of accepted facts, the Office noted that appellant's position as a printer required prolonged standing, bending, reaching, walking, carrying and the stocking of cases of paper weighing up to 65 pounds. The record indicates that appellant injured his neck in a car accident on July 20, 1981.

In a report dated February 11, 1994, Dr. Edward I. Feil, a Board-certified orthopedic surgeon, indicated that he was treating appellant due to Dr. Racca's retirement. Dr. Feil noted that appellant suffered from cervical spondylolisthesis at C5-6. He reported that a January 21, 1991 discogram, followed by a computerized tomography (CT) scan, showed no disc protrusion in the lumbar spine. Dr. Feil noted physical finding and stated:

> "I think this patient is probably disabled and unable to work at this point in time, unless he [is] retrained to do quite a sedentary type job, where he could sit the majority of the time, but get up and walk around for ten minutes at a time, after sitting for about 15 minutes to an hour."

Dr. Feil placed appellant on a 10 pound lifting restriction and noted that he was unable to bend, twist, or crawl.

In order to facilitate appellant's return to the workforce, the Office referred appellant for rehabilitation. In a status report dated September 19, 1997, a rehabilitation specialist indicated that appellant had undergone a vocational assessment and that he had transferable skills, which qualified him for employment as an offset duplicating operator under the *Dictionary of Occupational Titles* (DOT). The job was classified as DOT (651.682-014) and set forth physical demands such as light duty with a 20-pound lifting restriction, occasional stooping, and frequent reaching.[2] The Office rehabilitation specialist indicated that appellant had over five years of experience as an offset duplicating operator and that the DOT was within his medical restrictions. She further indicated that job availability was confirmed by telephone contact with the state employment service and that a wage survey revealed that position would pay $400.00 per week.

In a report dated April 9, 1998, Charles J. Lehman, a labor economist supervisor with the State of New Mexico Department of Labor, stated that the Albuquerque office had no employer job listings for offset duplicating machine operator (DOT 651.682-014) during most of the calendar quarter. He advised that long-term job projections (1993-2005) show ten annual average job openings for printing press operators, which included the position of offset duplicating machine operator (DOT 651.682-014). Mr. Lehman further noted that his office did not project specific occupations within that group separately.

In a January 24, 1997 report, Dr. David Neidhart, a Board-certified physician in the field of occupational medicine, noted that he was seeing appellant on a periodic basis for evaluations regarding appellant's neck and back condition. Dr. Neidhart noted appellant's history of injury, subjective complaints and physical findings. He diagnosed chronic neck and back pain with degenerative disc disease. Dr. Neidhart recommended a functional capacity evaluation in order to ascertain appellant's work limitations.

Appellant underwent a functional capacity assessment with Teresa Guerin, a physical therapist, on April 3, 1997 at the request of Dr. Neidhart and the Office rehabilitation specialist. Ms. Guerin reported that appellant was capable of lifting and carrying 20 to 50 pounds on a

[2] Frequently was defined on the form: "activity or condition exist from 1/3 to 2/3 of the time."

frequent basis and 51 to 75 pounds on an occasional basis. She also noted that appellant could reach below the shoulders on a frequent basis and above the shoulders on an occasional basis. A mild "sitting tolerance" was further indicated.

On May 10, 1997 an MRI report dated May 10, 1997 of the lumbar spine revealed a moderate bilateral foraminal stenosis at L5-S1 with a moderate L5-S1 HNP. A cervical MRI report dated May 10, 1997 further revealed moderate spinal stenosis at C5-6 as a result of spondylolisthesis, a central disc bulge and facet hypertrophy.

In a May 23, 1997 report, Dr. Neidhart opined that appellant had a "lifting limit of 20 pounds and carrying limit of 20 pounds on an occasional basis. Continuous sitting, standing and walking limited to 1 to 2 hours accumulative sitting, standing, and walking during the 6-hour days are limited to 6 hours each." Dr. Neidhart also stated that appellant was only able to bend, crawl, climb or reach on an occasional basis.

In a June 25, 1997 report, Dr. Ben Glover, a Board-certified neurologist, advised that he had examined appellant at the request of Dr. Feil. Dr. Glover discussed appellant's September 24, 1984 work injury, his physical findings and reviewed an MRI scan showing degenerative changes at C5-6 and C6-7. He opined that appellant could possibly do light duty. Dr. Glover noted, however, that, since appellant would probably miss so much work due to his back condition, appellant should be considered disabled.

In an August 22, 1997 report, Dr. Glover noted that he had reviewed the results of appellant's functional capacity test but reiterated his opinion that appellant was disabled from work based on pain caused by his degenerative back condition.

Dr. Feil, in a report dated October 8, 1997, subsequently stated:

> "[Appellant] has foraminal stenosis at L5-S1 and disc protrusion at L5-S1. He also has cervical disc disease as stated by [Dr. Glover]. Because of these two problems, this gentleman is unable to do any work where he has to do significant bending, lifting or twisting. He can[no]t sit for extended periods of time. If he worked and I do n[o]t think he is capable of working, it would have to be a job where he would change positions frequently and it would have to be extremely light duty. I think basically because of education and limitations that both his neck and his back put on him, he is 100 [percent] disabled."

In a final report dated January 31, 1998, the Office rehabilitation counselor reported that there appeared to be a reasonable possibility that appellant would be hired by General Service Administration (GSA) printing plant in the late spring. She specifically noted that outside the GSA there did not appear to be any additional prospects of employment, although she felt that appellant was capable of pursuing his employment independently.

In a notice of proposed reduction of compensation dated March 20, 1998, the Office advised appellant that the medical and factual evidence of record established that he was only partially disabled and that he had the capacity to earn wages as an offset duplicating machine operator at the rate of $400.00 per week.

In a decision dated June 18, 1998, the Office issued a final reduction of compensation based on the selected position of offset duplicating machine operator.

By letter dated July 29, 1998, appellant, by counsel, requested reconsideration and submitted a July 10, 1998 supplemental statement from Mr. Lehman regarding the availability of jobs for printing press operators. Mr. Lehman stated that there was on average 10 statewide job openings annually, while less than 10 job openings annually in the Albuquerque area. Mr. Lehman further noted that, during the fiscal year July 1997 to June 1998, there were no job orders for that position, although employers could pursue other means of advertising job openings.

In an August 11, 1998 decision, the Office denied appellant's request for reconsideration on the grounds that the evidence and argument presented by appellant was of a repetitious nature and insufficient to warrant a merit review.

The Board finds that the Office erred in reducing appellant's compensation based on its determination that the position of offset duplicating operator represented appellant's wage-earning capacity.

Once the Office accepts a claim, it has the burden of proving that the disability ceased or lessened in order to justify termination or reduction of compensation.[3] If an employee's disability is no longer totally disabled, but the employee remains partially disabled, the Office may reduce compensation benefits by determining the employee's wage-earning capacity.[4]

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.[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 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 or wage rate and availability in the open market should be made through contact with the state employment service or other applicable services. Finally, application of the principles set forth in the *Alfred C. Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.[6]

[3] *Gary R. Sieber*, 46 ECAB 215 (1994).

[4] 20 C.F.R. § 10.303(a).

[5] *See James R. Verhine*, 47 ECAB 460 (1996); 5 U.S.C. § 8115(a).

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

The Board has previously found that the Office must initially determine an employee's medical condition and work restrictions before the Office can select an appropriate position that reflects an employee's vocational wage-earning capacity. The Board has stated that the medical evidence on which the Office relies must provide a detailed description of the employee's condition.[7]

In the instant case, Dr. Neidhart, one of appellant's treating physicians, specifically stated that appellant had a 20-pound lifting restriction and was unable to perform more than occasional lifting as a result of his accepted work-related back condition. As there was no jobs available with the employing establishment, the Office properly referred appellant to an Office rehabilitation specialist to ascertain whether appellant could obtain employment in the private sector. Based on appellant's work experience, the Office rehabilitation specialist determined that appellant was qualified for a job as an offset duplicating operator according to the DOT. The Office relied on the rehabilitation specialist's August 29, 1997 report, finding that appellant was physically capable of performing that position and that it was reasonably available in appellant's work area. The Board, however, finds that the work requirements described in the DOT with respect to the position of offset duplicating operator are not in compliance with Dr. Neidhart's work restrictions since the physician opined that appellant could only reach on an occasional basis while the DOT description indicates that appellant would be required to perform frequent reaching activities.[8] Because the Office improperly assessed Dr. Neidhart's medical restrictions in concluding that appellant was capable of performing the job of offset duplicating machine operator, the Board finds that the Office has failed to carry its burden of proof in reducing appellant's compensation.

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

[8] The functional capacity test made a distinction between above and below the shoulder reaching, indicating that appellant could perform frequent reaching below the shoulder. Dr. Neidhart's May 23, 1997 report, however, states only that appellant was restricted to occasional reaching. The DOT description does not distinguish between above and below the shoulder reaching.

The decisions of the Office of Workers' Compensation Programs dated August 11 and June 18, 1998 are hereby reversed.

Dated, Washington, D.C.
July 12, 2000

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member