U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DARRELL G. SHEETS and DEPARTMENT OF THE NAVY, PHILADELPHIA NAVAL SHIPYARD, Philadelphia, PA

Docket No. 98-1582; Submitted on the Record;
Issued June 20, 2000

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly determined that the constructed position of order clerk represented appellant's wage-earning capacity effective March 1, 1998.

In the present case, the Office accepted that, on October 16, 1989, appellant, then a 53-year-old pipefitter, sustained left shoulder tendinitis and left shoulder impingement syndrome, for which he underwent an ulnar nerve transposition on April 4, 1990 and a left shoulder arthroscopy and release of the coracoacromial ligament on August 30, 1991. He stopped work on April 4, 1990 and did not return.

In a medical report dated January 14, 1993, Dr. Lanny Edelson, a Board-certified neurologist, noted appellant's continuing left shoulder pain and left arm numbness, opined that appellant was clearly disabled and would not be able to return to his prior position, but completed an OWCP-5 work restriction evaluation form report indicating that appellant could begin working four hours per day and work up to eight hours per day sedentary duty with no more than six hours intermittent walking and standing.[1] Preexisting hypertension was also noted.

Appellant was referred for vocational rehabilitation on March 2, 1993 and services were provided from May 10 to July 10, 1993. By report dated September 13, 1993, the rehabilitation counselor noted that appellant would only accept federal employment and that there were no available openings within his physical capabilities and by report dated October 25, 1993, the counselor indicated that appellant felt he was too disabled to work and wished to waive further vocational rehabilitation services.

[1] As appellant never did return to work four hours per day he had no chance to work up to eight hours per day, and therefore the appropriateness of the Office's attempt to secure him an eight-hour per day job during and following the 1993 vocational rehabilitation period was not supported by the medical evidence of record.

The Office referred appellant for a second medical opinion and by letter dated January 24, 1995, Dr. A. Lee Dellon, a Board-certified plastic and reconstructive surgeon, noted that upon the January 24, 1995 examination appellant had limitation of left shoulder motion, left finger numbness and suspected brachial plexus compression in the thoracic inlet. He responded to Office questions as follows:

> "Within a reasonable degree of medical certainty and probability, the injuries [appellant] has in the left shoulder and neck region and the thoracic inlet are related to his work injury of October 16, 1989.
>
> "Enclosed with this was NOT (emphasis in original) Form OWCP-5, [w]ork [r]estriction [e]valuation. With regard to this, [appellant] may not return to work as there is no work that he can presently do.…
>
> "The prognosis for future care – [u]nless someone can come up with a job description for him to use just his right hand and to be sedentary, his condition will most probably not change."

However, in a partially incomplete attached OWCP-5 form Dr. Dellon indicated as activity restrictions only "no use of left arm" and filled in "4" for the number of hours appellant could work. Appellant's ability to perform any other activities, including sitting, standing and walking, was not addressed. Dr. Dellon checked "yes" to the form question of whether appellant had upper extremity motor movement limitations but wrote only "left" as an explanation; he indicated that these restrictions were permanent. No date of maximum medical improvement was noted, and Dr. Dellon noted only "no" to the form question about other medical factors which needed to be considered in the identification of a position for appellant, despite appellant's history of preexisting hypertension and obesity.

Appellant's record was returned to vocational rehabilitation in April 1996 with notation of a "changed" medical condition such that he could work only four hours per day and job placement was authorized from April 15 to July 15, 1996. The new rehabilitation counselor reported on July 12, 1996 that at their June 26, 1996 meeting appellant had informed her that he was not at all interested in participating in a job search, in attending interviews or in ever meeting with her again and that he informed her that if he was required to meet her again he would bring a gun to their next meeting, as he owned two of them. Appellant's rehabilitation file was closed effective August 2, 1996.

Appellant complained to his Congressional representative and denied that he ever threatened the rehabilitation counselor. On August 21, 1996 he was assigned to another counselor, however that counselor resigned from the case and appellant was reassigned to a fourth counselor for the period October 28 to December 31, 1996. He underwent an introduction to computers course from February 6 to 20, 1997 and was provided with job placement services from March 13 to June 3, 1997. By report dated June 24, 1997, the counselor reported that appellant had not successfully returned to work, that he had been marginally active in the job search process and had been passive to the idea of approaching employers other than the federal government. Appellant's rehabilitation case was closed, but a noncompliance letter was inadvertently released on June 26, 1997.

Appellant responded to that letter on July 14, 1997 claiming that he would cooperate with rehabilitation efforts. Therefore, a fifth counselor was assigned to provide development services from October 6 to 30, 1997 and to provide job placement services from October 31, 1997 to January 30, 1998. However, appellant was noncompliant, refusing to apply for jobs listed in a December 23, 1997 letter and claiming that he had many other disabilities which precluded him from working. By report dated January 30, 1998, the counselor indicated that appellant refused to pursue suitable work and that the case was being closed.

A notice of proposed reduction of compensation was issued on February 3, 1998. The Office found that, based upon the medical and factual evidence of record, appellant was no longer totally disabled and had the capacity to earn wages as an order clerk. In the accompanying memorandum, the Office noted that "in a report dated January 24, 1995 [appellant was] released to work at four hours with no usage of the left arm by [his] treating physician, Dr. Dellon.

By decision dated March 16, 1998, the Office reduced appellant's compensation effective March 1, 1998 finding that the selected position of order clerk represented his wage-earning capacity.

The Board has reviewed the record and finds that the wage-earning capacity determination in this case was improper.

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 in such benefits.[2]

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 wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, his degree of physical impairment, his usual employment, his age, his 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.[3]

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, eductaion, age and prior experience. Once this selection is made, a determination of wage rate and availability in the labor market should be made through contact with the state employment service or other applicable service.[4] Finally, application of the

[2] *Carla Letcher*, 46 ECAB 452 (1995).

[3] *See Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); *see also* 5 U.S.C. § 8115(a).

[4] *See Dennis D. Owen*, 44 ECAB 475 (1993).

principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.[5]

The initial question presented in this case, however, is whether the selected position of order clerk was determined with due regard to the nature of appellant's employment injury and the degree of physical impairment. In this regard it is well established that under the Act a wage-earning capacity determination must be based on current medical evidence. For example, in *Ellen G. Trimmer*,[6] the Board found that the Office had improperly relied on a work tolerance limitation report that was almost two years old at the time of the wage-earning capacity determination, noting that the "passage of time had lessened the relevance" of the physician's report. In *Samuel J. Russo*,[7] a wage-earning capacity determination was made in December 1972, with the most recent medical reports regarding appellant's physical limitations for work being made two years earlier in 1970. The Board remanded the case for a current medical evaluation of appellant's physical limitations and an opinion as to whether he was physically capable of performing the duties of the selected position. In *Keith Hanselman*,[8] the Board found that a July 1987 work restriction evaluation that was over a year old, not fully completed and not accompanied by any indication of a concurrent physical examination, was insufficient to provide a basis for a wage-earning capacity determination.

In the present case, the Office relies on a January 24, 1995 letter that was limited to answering the Office's questions and failed to provide any history of injury, comprehensive medical examination findings or testing results or any medical rationale supporting its conclusions. This letter also stated outright that appellant "may not return to work as there was no work he could presently do" and mentioned, by reference only, that a hypothetical sedentary job using just the right hand was the only factor which might change appellant's prognosis. Dr. Dellon did not "release" appellant to work or even state affirmatively that appellant could perform sedentary work using just his right upper extremity for four hours per day. Therefore, this letter is substantively inadequate to establish appellant's work limitations. The Office also relies on an incomplete work restriction evaluation signed by Dr. Dellon dated January 24, 1995, which noted only "no use of left arm" and did not address appellant's ability to perform or restrictions in performing, any other activity which might be required, including sitting, standing, walking, etc. Dr. Dellon entered "4" as the number of hours appellant could work per day with no further explanation provided and merely checked "yes" to the form question regarding appellant's upper extremity motor limitations without any supporting explanation except to annotate the report "left." The Board has held that such a report has little probative value where there is no explanation or rationale supporting the opinion.[9]

[5] 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.303.

[6] 32 ECAB 1878 (1981).

[7] 28 ECAB 43 (1976).

[8] 42 ECAB 680 (1991); *see also Anthony Pestana*, 39 ECAB 980 (1988).

[9] *See Lillian M. Jones*, 34 ECAB 379, 381 (1982.)

Further, both of these documents upon which the Office relied in determining appellant's work tolerance limitations were more than three years old at the time of the wage-earning capacity determination. As there is no more recent medical evaluation of record, it is evident that, at the time of the wage-earning capacity determination in this case, the record did not contain a detailed current description of the employee's work restrictions.[10] Nor was there any indication that a physician reviewed the job duties and offered an opinion that appellant could perform the duties of the selected position.[11]

The Board, therefore, finds that the January 24, 1995 reports are not sufficient to establish appellant's work restrictions in this case, since they were completed more than three years prior to the wage-earning capacity determination, were not complete and comprehensive, and did not unambiguously confirm that appellant could perform specific work activities for four hours per day.

[10] Federal (FECA) Employees' Compensation Act Program Memorandum No. 77, as amended May 9, 1993, provides in pertinent part that, in determining an employee's loss of wage-earning capacity, the Office must "ensure that the record contains a detailed description of the employee's ability to perform work in a disabled condition, including capacity to lift, stand, walk, etc."

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

Accordingly, the decision of the Office of Workers' Compensation Programs dated March 16, 1998 is hereby reversed.

Dated, Washington, D.C.
June 20, 2000

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member