U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WARREN BUTLER and NAVAL SEA SYSTEMS COMMAND, NAVAL SHIPYARD, Philadelphia, PA

Docket No. 98-2446; Submitted on the Record;
Issued October 19, 2000

DECISION and ORDER

Before WILLIE T.C. THOMAS, A. PETER KANJORSKI, PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in reducing appellant's compensation based on its determination that the position of a hospital admitting clerk represented appellant's wage-earning capacity.

On January 11, 1988 appellant, then a 35-year-old pipefitter, filed a notice of traumatic injury and claim for compensation alleging that he sustained an injury to his left knee when he "slipped on ice" that day at work in the performance of duty. Appellant sought medical treatment with Dr. Marc S. Zimmerman, a Board-certified orthopedic surgeon, who performed a diagnostic arthroscopy with a lateral retinacular release on January 19, 1988. The Office accepted the claim for a contusion of the left knee with internal derangement and appellant received continuation of pay and compensation for wage loss. He has not worked since January 12, 1988.

In a (Form CA-20) attending physician's report dated March 14, 1988, Dr. Zimmerman noted his findings as contusion of the knee, possible chrondomalacia patella and possible loose body. He diagnosed degenerative joint disease, left knee with lateral patella tracking. The date of injury was listed as January 12, 1988. Dr. Zimmerman check marked a box indicating that the diagnosed condition was related to appellant's work injury.

The record indicates that Dr. Zimmerman was in contact with an Office rehabilitation nurse during 1988 and verbally communicated to her that appellant would be able to return to sedentary work at some point in the future, although he would never be able to work as a pipefitter again. The Office, therefore, assigned appellant to a rehabilitation and job-placement program.

Appellant was approved for an 18-month vocational program for certification as a dental lab technician from October 2, 1989 to February 28, 1991. However, attempts to place appellant were unsuccessful, and the rehabilitation counselor recommended that the case be closed.

Subsequently, the counselor identified several positions for which he found appellant to be medically and vocationally qualified.

A job description of a hospital admitting clerk as found in the Dictionary of Occupational Titles (205.362-018) stated:

> Interviews incoming patient or representative and enters information required for admission into computer. Interviews patient or representative to obtain and record name, address, age, religion, persons to notify in case of emergency, attending physician and individual or insurance company responsible for payment of bills. Explains hospital regulations. Enters patient admitting information into computer. Obtains signed statement from patient to protect hospital's interests. May assign patient to room or ward.

The job requirements were further listed as requiring 3 to 6 months experience, sedentary work with lifting up to 10 pounds, the ability to reach, handle, finger, feel, talk, hear and see.

The Office issued a notice of proposed reduction of compensation on October 4, 1994 based on the wage-earning rating of the position of hospital admitting clerk. Before that notice could become final, however, the Office authorized additional surgery for appellant's left knee. Appellant underwent another arthroscopy and chrondoplasty of the left knee on January 3, 1995. Previously, appellant had sustained a consequential injury to his, right knee and underwent arthroscopy.

By letter dated April 18, 1995, the Office requested that Dr. Zimmerman review the job description and physical requirements of the selected position of a hospital admitting clerk and offer an opinion as to whether appellant could perform the job for eight hours per day.

In a note dated April 26, 1995, Dr. Zimmerman advised that appellant could perform the job of hospital admitting clerk for eight hours per day. Previously, on May 3, 1994, he had completed a work evaluation form indicating that appellant was capable of performing sedentary work full time.

In a report dated February 13, 1997, the rehabilitation counselor verified that the job of hospital admitting clerk at a wage of $337.60 per week, was being performed in sufficient numbers and was reasonably available within appellant's commuting area.

On February 19, 1997 the Office issued a "notice of proposed reduction of compensation" in which it determined that the position of hospital admitting clerk represented appellant's wage-earning capacity. A computation of loss of wage-earning capacity was shown on an attached CA-816. The Office further advised appellant that he had 30 days to submit evidence or argument with relevant respect to his capacity to earn wages.

In a decision dated June 9, 1997, the Office reduced appellant's compensation.

In a report dated July 18, 1997, Dr. Zimmerman acknowledged that he had previously opined that appellant could work eight hours per day. He stated, however, that appellant's

bilateral knee symptoms had progressed and "at this time I would only recommend a four hour a day work week."[1]

In a decision dated May 22, 1998, an Office hearing representative affirmed the Office's June 9, 1997 decision. Once the Office accepts a claim, it has the burden of proving that the disability ceased or lessened in order to justify termination or modification of compensation.[2] If an employee's disability is no longer total, but the employee remains partially disabled, the Office may reduce compensation benefits by determining the employee's wage-earning capacity.[3]

The Board finds that the Office met its burden of proof in reducing appellant's compensation benefits based on its determination that the position of a hospital admitting clerk represented appellant's wage-earning capacity.

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.[4] 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.[5]

In the instant case, the Office accepted that appellant sustained an injury to his left knee on January 11, 1998 and paid compensation benefits. When appellant's treating physician indicated that he was capable of performing sedentary work, the Office properly referred appellant's case to an Office rehabilitation specialist. Although appellant received vocational training as a dental lab technician, he was unable to find a job in that position. Thereafter, the Office rehabilitation specialist identified several positions that were in keeping with appellant's skills and medical restrictions. The Office rehabilitation specialist specifically determined that appellant had the vocational skills to perform the position of a hospital admitting clerk. Through contact with the city workforce development office, the specialist determined the position's

[1] Appellant also submitted treatment notes and physical therapy notes dating from July to December 1997.

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

[3] 20 C.F.R. § 10.303(a).

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

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

prevailing wage rate and found that it was being performed in sufficient numbers so as to make it reasonably available to appellant within his commuting area.

Once it received the report of the rehabilitation specialist identifying the selected position of hospital admitting clerk, the Office contacted appellant's treating physician, Dr. Zimmerman, to ascertain whether he could perform that job. He specifically opined that appellant could perform the job for eight hours per day. Thereafter, the Office properly issued appellant a proposed notice of reduction of compensation on the basis that he was capable of performing the position of hospital admitting clerk and gave him 30 days within which to provide evidence or argument to the contrary. Appellant, however, did not submit any new medical evidence or legal argument to demonstrate that the selected position was unsuitable to his partially disabled condition. Thereafter, the Office finalized its loss of wage-earning capacity determination. Because the Office followed proper procedures in determining appellant's loss of wage-earning capacity, the Board affirms the Office's reduction of appellant's compensation.

The Board further finds that appellant did not submit sufficient medical evidence, following the Office's June 9, 1997 decision, to establish that he was no longer medically capable of performing the job of hospital admitting clerk for eight hours per day.

Once the loss of wage-earning capacity is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous. The burden of proof is on the party attempting to show modification of the award.[6]

Although appellant submitted a July 18, 1997 report from Dr. Zimmerman indicating that he could no longer work an eight-hour shift, he did not provide a reasoned opinion supported by medical rationale as to why appellant should now be considered partially disabled. Dr. Zimmerman did not discuss objective medical tests indicating appellant's inability to work, he only noted that appellant's symptoms had progressed. As symptoms can be subjective, the Board is not persuaded that appellant is only capable of performing a four-hour shift. Consequently, appellant has failed to carry his burden of proof to establish modification of the wage-earning capacity determination.

[6] *James D. Champlain*, 44 ECAB 438 (1986).

The decision of the Office of Workers Compensation Programs dated May 22, 1998 is hereby affirmed.

Dated, Washington, DC
October 19, 2000

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member