U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHARLIE H. CARRUTH and DEPARTMENT OF THE NAVY, NAVAL SHIPYARD, Charleston, SC

Docket No. 00-1523; Submitted on the Record;
Issued April 9, 2001

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 effective June 20, 1999 based on his capacity to earn wages as a motor vehicle dispatcher.

The Board finds that the Office improperly reduced appellant's compensation effective June 20, 1999 based on his capacity to earn wages as a motor vehicle dispatcher.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[1] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[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] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment

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[1] *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

[2] *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

[3] *See Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

conditions.[4] The job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives.[5]

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by the Office or 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 that employee's capabilities with regard to his 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] In determining wage-earning capacity based on a constructed position, consideration is given to the residuals of the employment injury and the effects of conditions which preexisted the employment injury.[7]

On August 20, 1993 appellant, then a 43-year-old welder, sustained an employment-related cervical strain and cervicalgia. He returned to work, but later stopped work due to increased symptoms. Appellant was terminated from the employing establishment in April 1995 and received Office compensation for total disability. In 1997 he began to participate in vocational rehabilitation efforts, but these efforts did not result in him obtaining employment. By decision dated June 9, 1999, the Office reduced appellant's compensation effective June 20, 1999 based on his capacity to earn wages as a motor vehicle dispatcher. By decision dated and finalized December 23, 1999, an Office hearing representative affirmed the Office's June 9, 1999 decision.

In the present case, the Office determined that he was able to work as a motor vehicle dispatcher effective June 20, 1999. The Board notes, however, that the Office did not meet its burden of proof to establish that appellant was physically capable of performing the motor vehicle dispatcher position effective June 20, 1999, the date that it adjusted his compensation.

The record does not contain any medical report from around the time of the adjustment of appellant's compensation which outlines appellant's work restrictions or otherwise shows that appellant was physically capable of performing the motor vehicle dispatcher position.[8] In a report dated March 26, 1996, Dr. Bong Lee, a Board-certified orthopedic surgeon who served as

[4] *Albert L. Poe*, 37 ECAB 684, 690 (1986), *David Smith*, 34 ECAB 409, 411 (1982).

[5] *Id.*

[6] *See Dennis D. Owen*, 44 ECAB 475, 479-80 (1993); *Wilson L. Clow, Jr.*, 44 ECAB 157, 171-75 (1992); *Albert C. Shadrick*, 5 ECAB 376 (1953).

[7] *See Jess D. Todd*, 34 ECAB 798, 804 (1983).

[8] *See Keith Hanselman*, 42 ECAB 680, 687 (1991).

an impartial medical examiner, indicated that appellant could perform limited-duty work which involved limited reaching and lifting of no more than 10 pounds for 3 to 4 hours per day.[9] However, this report from early 1996 would not be sufficient to provide an assessment of appellant's physical ability around the time his compensation was adjusted effective June 20, 1999.[10]

In addition, the description of the motor vehicle dispatcher position indicates that the position requires six months of training. The Office did not adequately determine how appellant, who had previously worked as a welder, would be able to perform the motor vehicle dispatcher position without such training. Therefore, it is unclear whether appellant is vocationally capable of performing the motor vehicle dispatcher position.

Consequently, the Office did not properly consider all the relevant factors, including appellant's physical limitations and vocational capability, in basing his wage-earning capacity on the motor vehicle dispatcher position and the Office improperly adjusted appellant's compensation effective June 20, 1999.

[9] In a report dated March 16, 1994, Dr. Noubar Didizian, a Board-certified orthopedic surgeon to whom the Office referred appellant for a second opinion, indicated that appellant did not have any employment-related disability and could return to his regular work at the employing establishment. In contrast, appellant's attending physicians indicated that appellant could only perform limited-duty work. The Office properly referred appellant to an impartial medical examiner. Section 8123(a) of the Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." *William C. Bush*, 40 ECAB 1064, 1975 (1989); 5 U.S.C. 8123(a).

[10] Moreover, the motor vehicle dispatcher position required "frequent" reaching and Dr. Lee's opinion provided that reaching should be limited.

The decisions of the Office of Workers' Compensation Programs dated and finalized December 23, 1999 and dated June 9, 1999 are reversed.[11]

Dated, Washington, DC
April 9, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

[11] The record also contains a May 19, 2000 decision regarding an overpayment of compensation, but this matter is not currently on appeal before the Board.