U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICK B. CAREY and DEPARTMENT OF THE NAVY, NAVAL SHIPYARD, Philadelphia, PA

Docket No. 00-231; Submitted on the Record;
Issued October 25, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM, PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation effective June 21, 1998 on the grounds that the selected position of safety inspector fairly and reasonably represented his wage-earning capacity.

The Office accepted that on January 15, 1992 appellant, then a 37-year-old pipefitter, sustained an aggravation of preexisting degenerative disc disease when he stepped down from the side of a boiler. Appellant stopped work but returned to light duty on March 26, 1992.[1] He filed a claim for recurrence of disability commencing June 9, 1995 when his light-duty position was no longer available.

By report dated November 22, 1995, Dr. Roy L. Gorin, a Board-certified osteopathic orthopedic surgeon, indicated that appellant could work light duty eight hours a day with no heavy lifting or bending. Dr. Gorin reiterated his opinion in reports dated February 8 and 19, 1996.

On February 9, 1996 the Office referred appellant, a statement of accepted facts, questions to be addressed and the relevant case record to Dr. Leonard Klinghoffer, a Board-certified orthopedic surgeon, for a second opinion.

By report dated March 18, 1996 Dr. Klinghoffer reviewed appellant's factual and medical history, identified his current complaints, and provided the results of his physical examination. Dr. Klinghoffer opined that degenerative arthritis in appellant's right hip was his major problem now and that he had some low back complaints but no definite physical abnormality except for "a little bit of degenerative arthritis in his lumbosacral spine." Dr. Klinghoffer noted that his neurologic examination did not reveal any deficit, that straight leg raising was negative, and that appellant's leg pain was secondary to his hip joint condition. He opined that appellant was

[1] Appellant was working light sedentary duty with no heavy lifting or bending.

totally disabled from heavy work, but indicated on a work capacity evaluation that appellant could work eight hours a day with limited bending, kneeling, and walking and lifting up to 50 pounds.

On July 16, 1997 Dr. Gorin completed a work restriction evaluation indicating that appellant could work eight hours a day, with sitting limited to eight hours, walking and standing limited to four hours a day, and restrictions on lifting more than 20 pounds, bending, squatting, climbing, kneeling, and twisting.

As part of his rehabilitation, appellant received a New Jersey State certificate as a plumbing and pipefitting instructor. His associate's degree in education was granted on May 22, 1997.

Following completion of his degree, appellant requested permission to complete a bachelor's degree in social studies, history or sociology but the Office deemed this plan not feasible due to the scarcity of jobs in those fields.

On January 2, 1998 the rehabilitation counselor advised that he was closing appellant's case. In the closure report to the Office, the rehabilitation counselor stated that appellant had refused to complete the process and paperwork to obtain a substitute teacher's position claiming that he wanted to obtain his Bachelor's degree on his chosen major.

The rehabilitation counselor then determined on January 2, 1998 that, based upon appellant's psychological/vocational testing, on-the-job experience, transferable skills, education in completing an Associate's degree, and certification as a vocational trade's teacher, he was qualified for and could perform the job of safety inspector.[2] The counselor indicated that physically the job was light duty with lifting up to 10 pounds, was within the activity parameters articulated by Dr. Klinghoffer, and did not require the candidate to stoop, kneel, crouch or crawl, or climb or balance. The job was also noted as being a "Level 6" requiring 1 to 2 years of vocational preparation. In the *Dictionary of Occupational Titles*, the definition of "Level 6," requiring 1 to 2 years of vocational preparation, was provided, and it defined that such vocational preparation included vocational education, apprenticeship, in-plant training, on-the-job training and essential experience gained on other jobs. The rehabilitation counselor also determined, based upon statistics from the Pennsylvania Department of Labor and Industry, this selected position was being performed in sufficient numbers within appellant's commuting area so as to be considered reasonably available.

By letter dated January 22, 1998 the Office proposed to reduce appellant's compensation to reflect his ability to earn the wages of a safety inspector. The Office noted that, based on the results of vocational testing, his transferable skills and his field of study, appellant was qualified for the position of safety inspector, and that such positions were currently being performed in

[2] The rehabilitation counselor also selected and evaluated the appropriateness of the position of "Estimator" as a possible position suitable to appellant's partially disabled condition, and had earlier determined that the position of "Vocational Instructor" was suitable to his condition, but he refused to complete the necessary paperwork to obtain such a position. The Rehabilitation counselor had already determined that the position of "Planning and Estimator – Plumbing and Pipefitting" was within appellant's physical and vocational limitations.

appellant's commuting area in sufficient numbers to make such a position reasonably available. The Office determined that the position of safety inspector was vocationally suitable for appellant as the one to two years of vocational preparation was fulfilled by his completion of an Associate's degree in education from Gloucester County Community College, and his certification by the State of New Jersey as a plumbing and pipefitting instructor.[3] The Office advised appellant that the selected position of safety inspector was suitable, both medically and vocationally, to appellant's partially disabled condition and therefore represented his wage-earning capacity. Thereafter the Office computed appellant's loss in wage-earning capacity based upon his ability to perform the position of safety inspector.

Appellant submitted a January 29, 1998 letter contending that he was not vocationally qualified for the position of safety inspector. Appellant claimed that the position of safety inspector required crawling, climbing, kneeling, walking and squatting, which he was restricted from doing, but noted that if the Office would secure him a safety inspector job within his physical restrictions, he would gladly accept it. He also claimed that the position of substitute teacher was not suitable employment.

By decision dated June 12, 1998, the Office finalized the proposed reduction of compensation effective June 21, 1998 on the grounds that the position of safety inspector reasonably represented appellant's wage-earning capacity.

Appellant requested an oral hearing, which was held on January 4, 1999. Appellant claimed that the position of safety inspector required "two years of either vocational education, apprenticeship, in-plant training, on-the-job training and essential experience," which he claimed he lacked. He claimed that a safety inspector job required bending, stooping, crawling, settling claims, estimating risks, and determining qualifications, all of which he could not do. Appellant claimed that on the Internet there were no safety inspector positions in the Philadelphia commuting area and only four safety inspector positions in the country. He claimed that his diploma was in education only and that he was qualified to be a substitute teacher, and in support he submitted multiple pages of information from the internet regarding available safety inspector positions nationwide and their required duties.

In a July 13, 1998 report, Dr. Gorin noted that appellant was seen for exacerbation of lumbar spine pain radiating to the back and right leg due to a part-time job he attempted for two days. Dr. Gorin opined that appellant was unstable with regard to his lumbosacral spine region associated with degenerative arthritis and radiculopathy, and concluded that he should avoid climbing, bending, or stooping. He essentially restated his earlier reports and did not address appellant's ability to perform the job of safety inspector.

[3] The job description is as follows: "Inspects machines and equipment for accident prevention devices. Observes workers to determine use of prescribed safety equipment such as glasses, helmets, goggles, respirators and clothing. Inspects specified areas for fire-prevention and other safety and first-aid supplies. Tests working areas for noise, toxic and other hazards, using decibel meter, gas detector and light meter. Prepares report of findings with recommendations for corrective action. Investigates accidents to ascertain causes for use in recommending preventive safety measures and developing safety programs."

By decision dated February 10, 1999, the Office hearing representative affirmed the June 12, 1998 Office decision, finding that the position of safety inspector was physically and vocationally suitable and that it was being performed in reasonable numbers within appellant's commuting area so as to establish that it was reasonably available.[4] The hearing representative found that the *Dictionary of Occupational Titles'* description of the position's duties was in conformance with appellant's work restrictions as determined by Dr. Klinghoffer, and that reliable employment data from the Department of Labor Database demonstrated that the position of safety inspector was reasonably available within appellant's commuting area. The hearing representative further found that appellant was vocationally qualified for the position as his own educational efforts in obtaining his A.A. degree met the criteria for one to two years of vocational preparation. The hearing representative noted that appellant had refused to comply with the rehabilitation counselor's efforts to find him employment as a substitute vocational/technical teacher, and therefore the Office determined that a loss in wage-earning capacity determination should be accomplished. The hearing representative further found that the Office properly employed the principles enumerated in *Shadrick* in its calculation of appellant's loss of wage-earning capacity

By letter dated April 8, 1999, appellant, through his representative, requested reconsideration of the February 10, 1999 decision. He contended that safety inspector was not an entry-level position, but rather was skilled work which required training and specific vocational preparation. Appellant also argued that the position was not sedentary but required prolonged standing to inspect machines, which made it unsuitable for appellant's partially disabled condition.

Appellant also submitted a January 6, 1999 report from Dr. Gorin, who described physical findings upon examination, diagnosed degenerative joint disease of the right hip and right radiculopathy, and recommended Motrin and Darvon for pain.

By decision dated June 11, 1999, the Office denied modification of the February 10, 1999 decision.

The Board finds that the position of safety inspector fairly and reasonably represents appellant's wage-earning capacity as of June 21, 1998.

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 of benefits.[5]

When the Office makes a medical determination of partial disability, it may refer the employee's case to a vocational rehabilitation counselor authorized by the Office or to an Office wage-earning specialist for selection of a position listed in the Department of Labor's *Dictionary*

[4] The hearing representative found that appellant's vocational background, which included experience gained on the job, and his years spent obtaining his Associate's degree, satisfied the vocational preparation requirement.

[5] *Daniel J. Boesen*, 38 ECAB 556 (1987); *Harold S. McGough*, 36 ECAB 332 (1984) (the burden of proof is on the party attempting to show modification of the award).

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.[6] 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.

In this case, the Office properly found that appellant was no longer totally disabled for work due to the effects of his January 15, 1992 back injury. Appellant's attending physician, Dr. Gorin, reported as early as November 22, 1995 that appellant could work light duty eight hours a day with restrictions on heavy lifting or bending. This determination was supported by the Office's second opinion specialist, Dr. Klinghoffer who, on March 18, 1996, agreed that appellant could work eight hours per day with limited bending, kneeling, and walking, and with limited lifting up to 50 pounds. There is no contrary evidence of record supporting that appellant remained totally disabled.

A rehabilitation counselor was assigned to assist appellant in placement efforts in the vocational field as a substitute teacher, after he completed his degree program in May 1997. However, rehabilitation efforts proved unsuccessful.

When rehabilitation efforts prove unsuccessful, Office procedures instruct the rehabilitation counselor to submit a closure report with relevant information regarding the suitability and availability of selected positions.[7] The rehabilitation counselor properly submitted a final report on January 2, 1998 indicating that placement efforts had been unsuccessful. The counselor provided a position description, the availability of the positions within appellant's commuting area, and pay ranges within the geographical area, as confirmed by State employment officials.

The Office then proceeded to determine appellant's wage-earning capacity.

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. It 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.[8]

Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[9] Given the nature of the employee's injuries and the degree of physical impairment, his or her usual employment, the employee's age and

[6] *See Thomas Taylor*, 49 ECAB 127 (1997); *Raymond Alexander*, 48 ECAB 432 (1997).

[7] *Samuel J. Chavez*, 44 ECAB 431 (1993).

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

[9] *Albert L. Poe*, 39 ECAB 684 (1988); *David Smith*, 34 ECAB 409 (1982).

vocational qualifications, and the availability of suitable employment.[10] Accordingly, the evidence must establish that jobs in the position selected for determining wage-earning capacity are reasonably available in the general labor market in the commuting area in which the employee lives. In determining an employee's wage-earning capacity, the Office may not select a makeshift or odd lot position or one not reasonably available on the open labor market.[11]

The Office identified the position of safety inspector which it found was consistent with appellant's background and physical limitations.[12] It used the information provided by the rehabilitation counselor in determining the prevailing wage rate.

Appellant contends that he lacks the physical ability to perform the duties of the position, which he states requires crawling, climbing, kneeling, walking and squatting, all of which he was restricted from doing by his treating physicians.[13] The Board notes, however, that in the *Dictionary of Occupational Titles* the duties of a safety inspector are listed as follows: "Inspects machines and equipment for accident prevention devices. Observes workers to determine use of prescribed safety equipment such as glasses, helmets, goggles, respirators and clothing. Inspects specified areas for fire-prevention and other safety and first-aid supplies. Tests working areas for noise, toxic and other hazards, using decibel meter, gas detector and light meter. Prepares report of findings with recommendations for corrective action. Investigates accidents to ascertain causes for use in recommending preventive safety measures and developing safety programs." The *Dictionary of Occupational Titles* (DOT) does not require crawling, crouching, climbing, stooping, kneeling, or squatting. The text of the DOT indicates that an alternate title for the position is "safety technician," which is considered to be light duty, and the duties are limited to inspecting safety devices and equipment, inspecting fire-prevention equipment and first aid supplies, observing workers using safety equipment, testing areas for noise, toxic chemicals, and other hazards, investigating accidents and preparing paperwork. Again, there is no requirement for crawling, crouching, climbing or squatting. The Board notes that various Internet pages submitted by appellant address different kinds of safety inspectors in other industries, rather than the Navy position contemplated by and enumerated in the DOT. Appellant has not demonstrated that he remains totally disabled or that he is unable to perform the duties of the selected position.

Appellant contends that he was not vocationally qualified for the position of safety inspector, as one to two years of vocational preparation are required. Appellant argues that his work years at the employing establishment and completion of a two-year degree program do not provide adequate vocational preparation. The rehabilitation counselor made the determination that appellant's work background and academic performances and by his standardized testing

[10] *See generally*, 5 U.S.C. § 8115(a); A. Larson *The Law of Workers' Compensation* § 57.22 (1989); *see also Betty F. Wade, supra* note 3.

[11] *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

[12] There was no disagreement between or among physicians of record as to appellant's physical ability to perform the position as both Dr. Gorin and Dr. Klinghoffer agreed that appellant could perform light duty eight hours per day with virtually the same activity restrictions and with minor lifting limits.

[13] This information was apparently derived from the Internet from various publications and web sites.

results, fulfilled the one to two years vocational preparation requirement for the position of safety inspector. The Board finds that both appellant's work experience by which he became the pipe fitter work leader and the two-year Associate's degree program constitute adequate vocational preparation for the selected position.

In this case, the rehabilitation counselor found that appellant was physically and vocationally able to perform the position of safety inspector for eight hours a day, five days a week, and that such position was available in sufficient numbers so as to make it reasonably available in sufficient numbers within appellant's commuting area. Based on this report, the Office properly applied the principles set forth in *Albert C. Shadrick*,[14] to calculate appellant's wage-earning capacity.[15]

The Board finds that the Office properly considered all of the relevant factors such as availability of suitable employment and appellant's physical limitations, his usual employment, his age and employment qualifications, in determining that the position of safety inspector represented appellant's wage-earning capacity. The weight of the evidence of record establishes that appellant has the requisite physical ability, skill, training and experience to perform the position of safety inspector, and that such a position was reasonably available within the general labor market of appellant's commuting area. The Office properly determined that the position of safety inspector reflected appellant's wage-earning capacity effective June 21, 1998.

The decisions of the Office of Workers' Compensation Programs dated February 10, and June 11, 1999 are hereby affirmed.

Dated, Washington, DC
October 25, 2001

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member

[14] 5 ECAB 376 (1953).

[15] *See Dorothy Lams*, 47 ECAB 584 (1996).