U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of OLIVER REEVES and DEPARTMENT OF THE NAVY,
NAVAL SHIP RIGEL, New York, NY

Docket No. 00-465; Submitted on the Record;
Issued October 12, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation effective June 3, 1999, based on his capacity to perform the duties of an electronics salesman.

On April 28, 1985 appellant, a 49-year-old seaman, injured his lower back while lifting a ship's line. He filed a claim for benefits on June 21, 1985, which the Office accepted for herniated nucleus pulposus at L4-5 and subluxation at L5. The Office paid appellant compensation for temporary total disability for appropriate periods. On December 6, 1986 appellant experienced a recurrence of disability, which the Office accepted on April 23, 1987. Appellant has not returned to work since December 1986. The Office paid appellant compensation for temporary total disability and placed him on the periodic rolls.

In a work restriction evaluation dated October 1, 1991, Dr. Robert J. Zarzour, a Board-certified orthopedic surgeon and appellant's treating physician, indicated that appellant could work an eight-hour day on light duty. Dr. Zarzour stated that appellant could engage in frequent lifting not exceeding 20 pounds, no lifting greater than 50 pounds for 1 hour per day, intermittent sitting and fine manipulation for 8 hours per day, intermittent standing and walking for 3 hours per day, intermittent kneeling for 25 hours per day, intermittent climbing, bending, twisting and stooping 5 hours per day, intermittent pushing and pulling for 1 hour per day, and intermittent simple grasping and reaching above the shoulder for 2 hours per day.

On May 7, 1998 the Office authorized appellant's referral for vocational rehabilitation.[1]

[1] Appellant had initially commenced a rehabilitation program in 1987 and was retrained as an electronics specialist. The vocational rehabilitation specialist selected a constructed position as an electronic salesman, but closed the file in May 1995 when he determined that appellant chose not to obtain employment in the electronics field.

In a vocational rehabilitation report received by the Office on January 12, 1999, a vocational rehabilitation counselor issued a report summarizing his efforts to find suitable alternate employment for appellant within his indicated restrictions. The vocational counselor recommended a position for appellant listed in the Department of Labor's *Dictionary of Occupational Titles*, which he determined reasonably reflected appellant's ability to earn wages, that of electronics salesman, DOT #271.357-010.[2]

By notice of proposed reduction dated February 17, 1999, the Office advised appellant of its proposal to reduce his compensation because the factual and medical evidence established that he was no longer totally disabled and that he had the capacity to earn wages as a electronic salesman at the weekly rate of $300.00 in accordance with the factors outlined in 5 U.S.C. § 8115.[3] The Office calculated that appellant's compensation rate should be adjusted to $87.89 using the *Shadrick*[4] formula. The Office indicated that appellant's salary on December 6, 1986, the date he began receiving compensation for temporary total disability, was $308.73 per week, that his current, adjusted pay rate for his job on the date of injury was $483.38, and that appellant was currently capable of earning $300.00 per week, the rate of an electronics salesman. The Office therefore determined that appellant had a 62 percent wage-earning capacity, which when multiplied by 3/4 amounted to a compensation rate of $87.99. The Office found that based on the current consumer price index, appellant's current adjusted compensation rate was $127.25. The Office stated that the case had been referred to a vocational rehabilitation counselor, who had located a position as an electronics salesman, which he found to be suitable for appellant given his work restrictions and was available in appellant's commuting area. The Office allowed appellant 30 days in which to submit any contrary evidence.

By letter dated March 16, 1999, appellant contested the proposed reduction of compensation, contending that he was physically unable to perform the selected position. Appellant submitted several medical reports and treatment notes from Dr. Zarzour dating back to 1985 which documented his treatment of appellant's low back condition. Appellant also submitted several rejection letters from prospective employers advising him they would not be hiring him for various positions, although no reason was provided.

By decision dated June 3, 1999, the Office advised appellant that it was reducing his compensation effective on June 3, 1999 finding that the weight of the medical evidence showed that he was no longer totally disabled for work due to effects of his April 28, 1985 employment injury. The Office found that the position of electronics salesman represented his wage-earning capacity.

In a letter received by the Office on July 6, 1999, appellant requested reconsideration. Appellant contended that the position of electronics salesman was not suitable because it required prolonged sitting and standing, and therefore exceeded his physical limitations. In

[2] The job description indicated appellant would be selling merchandise in a store or showroom, explaining the particulars and specifications of various electronic merchandise based on his background and training in electronics.

[3] 5 U.S.C. § 8115.

[4] *Albert C. Shadrick*, 5 ECAB 376 (1953); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.814.2 (April 1995).

support of his request, appellant submitted a January 26, 1999 physical capacities evaluation and clinical assessment of pain from Dr. Zarzour which reiterated his previous findings and conclusions. Appellant also submitted an order from a Social Security Administration administrative law judge which found that there were "no jobs existing in significant number" which appellant was capable of performing.

By decision dated July 12, 1999, the Office denied modification of the June 3, 1999 decision.

The Board finds that the Office properly reduced appellant's compensation effective June 3, 1999, based on his capacity to perform the duties of an electronics salesman.

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]

In the present case, the Office properly found in its June 3, 1999 reduction of compensation that appellant was no longer totally disabled for work due to the effects of his April 28, 1985 employment injury. The Board notes that Dr. Zarzour, a Board-certified orthopedic surgeon and appellant's treating physician, indicated that appellant could perform an eight-hour workday. Dr. Zarzour reiterated his opinion on appellant's partial capacity in a January 26, 1999 report. He noted appellant could sit, stand and walk for intermittent periods and lift up to 50 pounds on an occasional basis.

In a report received by the Office on January 12, 1999, the vocational counselor issued a report summarizing his efforts to find suitable alternate employment for appellant in which he indicated that appellant could work as an electronics salesman. In a memorandum dated July 30, 1999, the Office stated that appellant's case had been closed as nonrehabilitated and that the vocational counselor's job availability report indicated that two positions were reasonably available for appellant in his local labor market and reasonably represented his wage-earning capacity.

The Office properly followed established procedures for determining appellant's employment-related loss of 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.[6] 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

[5] *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

[6] *Samuel J. Chavez*, 44 ECAB 431 (1993); *Hattie Drummond*, 39 ECAB 904 (1988); *see* 5 U.S.C. § 8115(a); A. Larson, The Law of Workers' Compensation § 57.22 (1989).

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.[7]

In the instant case, the rehabilitation counselor identified two positions listed in the Department of Labor's *Dictionary of Occupational Titles*, appropriate for appellant based on the work restriction evaluation specified by Dr. Zarzour. Based on these restrictions, the Office selected a position as an electronics salesman which it found suitable for appellant based on his background. The Office used the information provided by the rehabilitation counselor of the prevailing wage rate in the area for an electronics salesman, and established that jobs in the position selected for determining wage-earning capacity were reasonably available in the general labor market in the geographical commuting area in which the employee lived, as confirmed by state officials. Finally, the Office properly applied the principles set forth in the *Shadrick*[8] decision to determine appellant's loss of wage-earning capacity.

The Office properly found that appellant was no longer totally disabled as a result of his April 28, 1985 employment injury and it followed established procedures for determining appellant's employment-related loss of wage-earning capacity. The Board therefore finds that the Office has met its burden of justifying a reduction in appellant's compensation for total disability.

Following the Office's termination of compensation, the burden to establish entitlement to compensation shifted to appellant. Causal relationship must be established by rationalized medical opinion evidence. The medical evidence appellant submitted following the Office's June 3, 1999 decision reducing his compensation to zero was not sufficient to meet this burden. The January 26, 1999 report submitted by Dr. Zarzour does not establish that appellant is totally disabled or that his medical condition precludes him from performing the duties of the selected position. Dr. Zarzour's reports merely restate his findings and conclusions in previous reports, and contain the same work restrictions on which the Office relied in selecting the electronics salesman position. Finally, although appellant contended in his July 6, 1999 letter that the electronics salesman position was not suitable because it required prolonged sitting and standing, the job description does not contain any explicit requirement to engage in sitting or standing for extended periods. The job description indicates that appellant would be engaged in activities that would allow for intermittent sitting, standing, and walking in accordance with Dr. Zarzour's work restrictions.[9] The Board therefore affirms the July 12, 1999 Office decision affirming the June 3, 1999 decision reducing appellant's compensation to zero.

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

[8] *Albert C. Shadrick, supra* note 4.

[9] The job description states that the applicant "[s]ells merchandise to individuals in store or showroom, utilizing knowledge of products sold: Greets customer on sales floor and ascertains make, type and quality of merchandise desired.... Prepare sales slip or sales contract. Receives payment or obtains credit authorization. Places new merchandise on display."

The decisions of the Office of Workers' Compensation Programs dated July 12, 1999 and June 3, 1999 are hereby affirmed.

Dated, Washington, DC
October 12, 2001

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member