U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LUIS R. FLORES and DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANGEMENT, Vale, OR

Docket No. 01-1148; Oral Argument Held October 2, 2002; Issued December 18, 2002

Appearances: *Luis R. Flores, pro se*; *Thomas G. Giblin, Esq.*, for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON, A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly reduced appellant's compensation to zero to reflect his wage-earning capacity in the selected position of a customer care representative; and (2) whether the Office properly determined that appellant abandoned his hearing request.

On August 21, 1996 appellant, then a 35-year-old firefighter, filed a claim for a traumatic injury occurring on that date in the performance of duty. The Office accepted the claim for a lumbar strain. The Office placed appellant on the periodic rolls effective November 1, 1997.

On August 13, 1997 the Office referred appellant to Dr. Randolph E. Peterson, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated August 27, 1997, Dr. Peterson diagnosed a myofascial strain with preexisting degenerative disc disease and degenerative arthropathy of the lumbar spine. He found that appellant could return to work with restrictions on "twisting and turning activities, stooping and bending or lifting any[thing] greater than 25 [pounds]." In an accompanying form report, Dr. Peterson opined that appellant could perform light work with no lifting over 7 to 10 pounds or bending, stooping or prolonged sitting. In a form report dated September 15, 1997, Dr. Peterson found that appellant could not lift, carry, push or pull over 10 pounds.

On November 25, 1997 the Office referred appellant to a rehabilitation counselor for vocational rehabilitation. The Office indicated that he lacked fluency in English and that it had chosen the rehabilitation counselor because of his Spanish-speaking skills. In an initial report dated May 11, 1998, the rehabilitation counselor noted that appellant was within two months of receiving his college degree in Mexico in accounting. She found, however, that he did not have any transferable skills due to his physical limitations, history of unskilled labor and language restrictions.

Based on the recommendation of the rehabilitation counselor, the Office approved a training program in accounting for appellant at a local community college.

On November 25, 1998 Dr. Peterson diagnosed chronic low back pain and referred appellant for an opinion regarding whether he needed surgery. In a report dated January 27, 1999, Dr. Joseph M. Verska, a Board-certified orthopedic surgeon, reviewed the results of objective tests and diagnosed a lumbosacral strain. He found "no reason why [appellant] cannot go to work" and listed work restrictions of no lifting over 30 pounds occasionally and 20 pounds repetitively.

In a report dated May 31, 1999, the rehabilitation counselor requested additional vocational services for appellant. She stated that because appellant was Spanish speaking, his case required more time than usual. The rehabilitation counselor indicated that as he "becomes more fluent, it is anticipated that there will be less time need[ed] on a monthly basis to intercede for him." The Office approved the rehabilitation counselor's request for additional funds for vocational rehabilitation.

In a report dated July 29, 1999, the rehabilitation counselor requested that the Office approve an intensive English-language training program for appellant. She noted that appellant had difficulty with English "in a formal academic environment." The Office approved the request; however, appellant stopped attending classes after one week.

In a closing report dated November 15, 1999, the rehabilitation counselor noted that the Office had ceased vocational rehabilitation efforts due to appellant's failure to cooperate. The rehabilitation counselor indicated that on November 11, 1999 she had called appellant and requested that he sign a behavioral agreement. She stated that he "[u]nderstands that I will translate this into Spanish for him so there is no misunderstanding as to what it says." The rehabilitation counselor identified the positions of customer care representative, wire transfer clerk and desk clerk as within appellant's work restrictions and suitable given his "training, functional limitations and level of English."

In a supplemental closing report dated January 31, 2000, the rehabilitation counselor provided job classifications for the position of customer care representative as follows: "Spanish/English speaking. Works with cable television services in Boise responding to customer calls. Access customer needs resolving billing and services issues."

On May 4, 2000 the Office issued a notice of proposed reduction of compensation to zero on the grounds that appellant had the wage-earning capacity to perform the position of customer care representative. By decision dated June 20, 2000, the Office finalized its reduction of appellant's compensation.

By letter date June 30, 2000, appellant requested a hearing before an Office hearing representative. In a 2001 decision, the Office determined that appellant had abandoned his request for a hearing.[1]

[1] The month and day that the Office issued its 2001 decision finding that appellant had abandoned his hearing request are illegible.

The Board finds that the Office improperly determined that appellant's wage-earning capacity was represented by the position of customer care representative.

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.[2] Under section 8115(a) of the Federal Employees' Compensation Act,[3] 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 the employee has no actual earnings, his wage-earning capacity is determined with due regard to 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]

After the Office makes a medical determination of partial disability and of special 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, *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 of wage rate and availability in the open labor market should be made through contact with the state employment services or other applicable services. 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.[5]

In this case, the medical evidence of record supports a finding that appellant was not totally disabled. In a report dated January 27, 1999, Dr. Verska, a Board-certified orthopedic surgeon, found "no reason why [appellant] cannot go to work" with restrictions of no lifting over 30 pounds occasionally and 20 pounds repetitively. As the position of customer care representative was a sedentary position requiring only occasional lifting of under 10 pounds, it was within appellant's physical capability.

As discussed above, however, in assessing the claimant's ability to perform the selected position, the Office must consider not only physical limitations but also take into account his work experience, age, mental capacity and educational background. In this case, the rehabilitation counselor found that appellant had the skills necessary to perform the position of customer care representative. An Office rehabilitation specialist agreed that the position of customer care representative was within appellant's work restrictions and reasonably available in his geographical area. While the Office generally relies upon its wage-earning capacity specialist for selection of an appropriate position, the Board has held that it is the responsibility of the Office to obtain confirmation, not simply an indication, of the specific requirements of the

[2] *David W. Green*, 43 ECAB 883 (1992); *Harold S. McGough*, 36 ECAB 332 (1984).

[3] 5 U.S.C. §§ 8101-8193; 5 U.S.C. § 8115(a).

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

[5] *Albert C. Shadrick*, 5 ECAB 376 (1953).

position and that appellant has the necessary vocational skills to perform the requirements of the position.[6]

The job of customer care representative or customer service representative, as set forth in the Department of Labor, *Dictionary of Occupational Titles*, requires a level three language ability,[7] described as follows:

> "Read a variety of novels, magazines, atlases and encyclopedias. Read safety rules, instructions in the use and maintenance of shop tools and equipment and methods and procedures in mechanical drawing and layout work. Write reports and essays with proper format, punctuation, spelling and grammar, using all parts of speech. Speak[s] before an audience with poise, voice control and confidence, using correct English and well-modulated voice.[8]

In this case, it is unclear from the record whether appellant has the language skills necessary to perform the position of customer care representative. In a report dated May 31, 1999, the rehabilitation counselor requested additional time and expenses from the Office due to problems which arose because of appellant's lack of fluency in English. In July 1999, the rehabilitation counselor recommended that appellant take an intensive English course to assist him in his studies; however, appellant did not complete the program. In a report dated September 20, 1999, the rehabilitation counselor noted that appellant complained about his inability to understand English in some of his classes.[9] In her closing report dated November 15, 1999, the rehabilitation counselor indicated that she was translating a behavioral agreement from the Office into Spanish to ensure appellant's understanding. While some of the current openings for customer care representatives reviewed by the rehabilitation counselor indicated that the ability to speak Spanish was a benefit, the positions also required that an applicant be able to speak English. In this case, it is not clear from the record whether appellant has the ability to perform the position of customer care representative, which requires the use of correct English, due to his lack of fluency in the language.[10] Consequently, the Office did not meet its burden of proof to establish that appellant could perform the requirements of the selected position.[11]

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[6] *Garlon L. Campbell*, 40 ECAB 381 (1988); *see also Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

[7] Department of Labor, *Dictionary of Occupational Titles*, DOT No. 239.362.014.

[8] *Id*. at 1011.

[9] The Board notes, however, that the rehabilitation counselor indicated, in a report dated October 31, 1999, that Joy Bloch, who works for the local community college, related no difficulty conversing with appellant in English.

[10] *See Francisco Bermudez*, 51 ECAB 506 (2000).

[11] In view of the Board's disposition of the merits, the issue of whether appellant abandoned his request for a hearing is moot.

The decision of the Office of Workers' Compensation Programs dated June 20, 2000 is reversed.

Dated, Washington, DC
December 18, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member