U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EDGAR CARTER and DEPARTMENT OF THE NAVY,
U.S. MARINE CORPS, Camp Lejune, NC

Docket No. 02-1651; Submitted on the Record;
Issued December 13, 2002

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to reduce appellant's compensation benefits based on his capacity to earn wages as a dispatcher.

Appellant, a 33-year-old electrical engineer, filed a notice of traumatic injury on May 12, 1981 alleging that on that date he injured his back in the performance of duty. The Office accepted his claim for lumbosacral strain and herniated disc L3-4 on June 12, 1981. The Office entered appellant on the periodic rolls on March 17, 1982.

Appellant's attending physician, Dr. Noel B. Rogers, a Board-certified orthopedic surgeon, completed a work restriction evaluation and indicated that he was not totally disabled on March 8, 1989. The Office referred appellant for vocational rehabilitation services on March 23, 1989. On November 1, 1989 Dr. Rogers stated that work hardening would not return him to his date-of-injury position.

On February 14, 2001 the Office referred appellant for a second opinion evaluation with Dr. Robert M. Moore, a Board-certified orthopedic surgeon. In his March 8, 2001 report, Dr. Moore noted appellant's history of injury and performed a physical examination. He diagnosed degenerative disc disease and chronic lumbar radiculopathy. Dr. Moore concluded that appellant could perform sedentary work with limited bending and lifting. He specifically stated that appellant could work 8 hours a day pushing, pulling and lifting 15 pounds or less for 4 hours a day. He stated that appellant could not twist, nor climb and that he could squat and kneel for one hour a day.

The Office referred appellant for vocational rehabilitation counseling on April 4, 2001.

Dr. Rogers completed a report on April 18, 2001 and stated that appellant had increasing pain in his back and that he was not a candidate to return to work as appellant had not worked for 20 years and as he was taking regular medication. On June 8, 2001 Dr. Rogers reported

appellant's increasing back pain and diagnosed chronic lumbosacral strain. On September 25, 2001 Dr. Rogers noted that Dr. Moore released appellant to return to sedentary work with limited lifting and merely opined that the Office could not develop a position that complied with those restrictions.

The vocational rehabilitation counselor began placement efforts in the positions of dispatcher and cashier/check cashier on September 6, 2001. The position of dispatcher is sedentary and requires occasional lifting of 10 pounds, no climbing, no crawling and occasional stooping and kneeling of up to one third of the eight-hour day. The description includes receiving telephone and written orders from plant departments or customers for maintenance services such as repair work, machine adjustments or installations to other plant property and relaying requests to appropriate maintenance division. Appellant would also keep records of requests and services rendered as well as requisitioning supplies for maintenance and other workers. The counselor noted that appellant had functional academic abilities and knowledge of this type of job and that he had the ability to learn new job tasks. He stated that employers would offer short-term training and orientation and that appellant could get along well with others and use the telephone for business purposes. The vocational rehabilitation counselor determined that the position was reasonably available by contacting the state employment service representative and that the job was available full time with a weekly wage of $250.00.

By letter dated October 10, 2001, the Office informed appellant that he would receive 90 days of assistance to find a position as a dispatcher or cashier and that at the end of this period, his compensation would be reduced based on the wage-earning capacity of $13,000.00 a year.

By letter dated February 21, 2001, the Office proposed to reduce appellant's compensation benefits based on his capacity to earn wages as a dispatcher. He responded and stated that he wished to return to a civil service position comparable to the position and grade he previously held. In a decision dated April 25, 2002, the Office reduced appellant's compensation benefits based on his ability to earn wages as a dispatcher.

The Board finds that the Office failed to meet its burden of proof to reduce appellant's compensation benefits based on his capacity to earn wages as a dispatcher.

Section 8115 of the Federal Employees' Compensation Act[1] provides that 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 his injury, the degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect his wage-earning capacity in his disabled condition.[2]

[1] 5 U.S.C. §§ 8101-8193, 8115.

[2] *Id.*

When the Office makes a medical determination of disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by the Office 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 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 *Albert C. Shadrick*[3] will result in the percentage of the employee's loss of wage-earning capacity. The basis range of compensation paid under the Act is 66 2/3 percent of the injured employee's monthly pay.[4]

In the present case, appellant's attending physician, Dr. Rogers, a Board-certified orthopedic surgeon, continued to support appellant's claim for disability for work due to chronic lumbosacral strain. The Office second opinion physician, Dr. Moore, a Board-certified orthopedic surgeon, opined that appellant could perform sedentary work 8 hours a day with a limit on pushing, pulling and lifting of 15 pounds. He further limited appellant's squatting and kneeling to one hour a day.

The position of dispatcher as described by the Office required that appellant have the ability to kneel occasionally, which was defined as: "Activity or condition exist up to 1/3 of the time." One third of an 8-hour day is 2.67 hours. This requirement exceeds the physical limitations provided by Dr. Moore, which limited appellant to only one hour of kneeling a day. As there is no medical evidence supporting appellant's ability to abide by the physical requirements of the position of dispatcher and kneel more than one hour a day, the Office failed to meet its burden of proof in establishing that this position fit appellant's physical limitations and, therefore, improperly reduced appellant's compensation benefits based on his capacity to earn the wages of a dispatcher.

[3] 5 ECAB 376 (1953).

[4] *Karen L. Lonon-Jones*, 50 ECAB 293, 297 (1999).

The April 25, 2002 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, DC
December 13, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member