U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN E. INSLEY and DEPARTMENT OF THE NAVY, NAVAL RESEARCH LABORATORY, Washington, DC

Docket No. 02-179; Submitted on the Record;
Issued July 23, 2002

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 to reflect his wage-earning capacity in the selected position of taxicab starter/dispatcher.

The Office accepted that appellant sustained lumbar strain, herniated nucleus pulposus L4-5, and L5 nerve root damage, causally related to lifting at work on July 11, 1989. Appellant, a 43-year-old sheet metal worker at the time of injury, returned to a light-duty position and then stopped working following a reduction-in-force in 1990. He continued to receive compensation for temporary total disability. According to the record, appellant also filed an occupational claim in 1990 that was accepted for carpal tunnel syndrome.

In a letter dated December 27, 1999, the Office notified appellant that it proposed to reduce his compensation. The Office stated that the evidence established that appellant had the capacity to earn wages as a taxicab starter/dispatcher at $7.27 per hour. Appellant was further advised that he had 30 days to submit relevant evidence or argument with respect to his wage-earning capacity.

By decision dated November 22, 2000, the Office reduced appellant's compensation. In a decision dated June 21, 2001, the Office denied modification of the prior decision.

The Board finds that the Office properly reduced appellant's compensation in this case.

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 in such benefits.[1]

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[1] *Carla Letcher*, 46 ECAB 452 (1995).

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.[2]

When the Office makes a medical determination of partial disability and of specific 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's *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 labor market should be made through contact with the state employment service or other applicable service.[3] Finally, application of the principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.[4]

In this case, the Office found a conflict in the medical evidence with respect to the extent of appellant's employment-related disability. An attending orthopedic surgeon, Dr. Daniel Ignacio, reported that appellant continued to be totally disabled for work due to his back condition. A second opinion referral orthopedic surgeon, Dr. Edward Quinn, III, opined in a November 18, 1997 report that appellant was capable of working full time with a 25-pound lifting restriction.

To resolve the conflict, the Office referred appellant to Dr. Andrew Gelman, an osteopath Board-certified in orthopedic surgery. In a report dated May 25, 1999, Dr. Gelman provided a history and results on examination. He diagnosed degenerative lumbar disc disease with intermittent radiculopathy, and bilateral carpal tunnel syndrome by history. He opined that appellant was capable of working with restrictions. Dr. Gelman completed a work restriction evaluation (Form OWCP-5c) indicating that appellant could work 8 hours per day, with a 20-pound lifting restriction and no bending, squatting, climbing, kneeling or twisting.

In a letter dated March 3, 2000, the Office noted that appellant had an accepted bilateral carpal tunnel syndrome, and requested a supplemental report from Dr. Gelman. In a report dated March 31, 2000, Dr. Gelman indicated that he was aware of the carpal tunnel diagnosis and he discussed treatment of the condition. In a report dated June 12, 2000, Dr. Gelman reviewed an electromyogram (EMG) report dated February 2, 2000 of the upper extremities. Dr. Gelman stated that his prior comments and opinions remained unchanged, noting appellant's lack of interest in pursuing treatment for a carpal tunnel condition.

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[2] *See Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); *see also* 5 U.S.C. § 8115(a).

[3] *See Dennis D. Owen*, 44 ECAB 475 (1993).

[4] 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.403.

The Board finds that Dr. Gelman's report represents the weight of the medical evidence. It is well established that when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[5] Dr. Gelman offered a reasoned medical opinion that appellant could work with a 20-pound lifting restriction and limitations on certain activities.

Appellant submitted additional medical evidence after the November 22, 2000 decision. In reports dated August 2, October 27 and December 7, 2000, the attending physician, Dr. Ignacio, continued to opine that appellant was totally disabled. Additional reports from a physician on one side of the conflict that is properly resolved by an impartial specialist are generally insufficient to overcome the weight accorded the impartial specialist's report or create a new conflict.[6] Appellant also submitted a March 27, 2001 report from Dr. Hampton Jackson, an orthopedic surgeon. Dr. Jackson stated that appellant had significant standing, walking and sitting intolerance, but he does not discuss the issue of whether appellant could perform the selected position as of November 22, 2000.

The selected position of taxicab starter/dispatcher is considered a sedentary position with occasional lifting of up to 10 pounds; there is no climbing, kneeling or stooping. Based on the weight of the medical evidence as represented by Dr. Gelman, appellant was able to perform the selected position.

The rehabilitation specialist indicated that appellant had the vocational background for the position, and that the position was reasonably available in appellant's commuting area. The Board finds that the evidence of record indicates that the selected position was medically and vocationally suitable in this case. The Office therefore may properly reduce appellant's compensation by application of the formula provided at 20 C.F.R. § 10.403.

[5] *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

[6] *Id.*; *see also Dorothy Sidwell*, 41 ECAB 857 (1990).

The decisions of the Office of Workers' Compensation Programs dated June 21, 2001 and November 22, 2000 are affirmed.

Dated, Washington, DC
July 23, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member