U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RALPH L. PHILLIPS and DEPARTMENT OF THE ARMY, ANNISTON ARMY DEPOT, Anniston, AL

Docket No. 00-2137; Submitted on the Record;
Issued June 13, 2002

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden to reduce appellant's compensation effective July 18, 1999, based on his capacity to perform the duties of a stockman/store clerk; and (2) whether the Office erred in denying appellant's request for merit review.

This is the second appeal before the Board in this case.[1] Previously, the Board reversed a July 19, 1995 decision, determining appellant's loss of wage-earning capacity, finding that it was not readily ascertainable what wage information the Office had relied upon in issuing its loss of wage-earning capacity. The Board, therefore, concluded that the Office failed to meet its burden of proof in reducing appellant's wage-loss compensation. The law and facts of the case as set forth in the Board's prior decision are incorporated by reference.

In a February 13, 1998 letter, Dr. Daniel D. Davis, a second opinion Board-certified dermatologist, stated that appellant was capable of working provided his workplace was free of the contact allergens. Next, Dr. Davis stated:

> "Musculoskeletal disability versus dermatological disability. In the paperwork recently submitted to me for work capacity evaluation, I was given a musculoskeletal condition for disability. Additionally, in the patient's chart to review, he has been previously evaluated (on June 12, 1972) and been found at that time to have some musculoskeletal disability involving the use of his fingers. I am not qualified to estimate [appellant's] musculoskeletal disability, so this should be evaluated in a more appropriate fashion."

On November 1, 1998 the Office referred appellant to a vocational rehabilitation counselor for the development of a vocational rehabilitation program in order to locate a suitable

[1] Docket No. 95-2701 (July 18, 1997).

alternate job, within the restrictions imposed by his employment injury, based on the report of Dr. Davis.

On December 1, 1998 the vocational rehabilitation counselor stated that appellant was able to perform the job of stockman/store clerk and that the job was reasonably available within appellant's commuting area on a part-time basis.

By notice of proposed reduction dated March 10, 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 stockman/store clerk at the weekly rate of $279.60 in accordance with the factors outlined in 5 U.S.C. § 8115.[2] On September 21, 1998 the Office calculated that appellant's compensation rate should be adjusted to $332.50 using the *Albert C. Shadrick*[3] formula. The Office indicated that appellant's salary on June 12, 1972, the date of injury, was $433.60 per week, that his current, adjusted pay rate for his job on the date of injury was $610.00 and that appellant was currently capable of earning $279.60 per week, the rate of a stockman/store clerk. The Office, therefore, determined that appellant had a 46 percent wage-earning capacity, which when multiplied by 3/4 amounted to a compensation rate of $81.69. The Office found that, based on the current consumer price index, appellant's current adjusted compensation rate was $227.25.

The Office stated that the case had been referred to Dr. Davis, whose opinion indicated that appellant was capable of working represented the weight of the medical evidence. The Office stated that the case had been referred to a vocational rehabilitation counselor, who located a position as a stockman/store clerk which she found appellant capable of performing given Dr. Davis' restrictions and was available in appellant's commuting area. The Office allowed appellant 30 days in which to submit any contrary evidence. Appellant did not respond.

In a March 24, 1999 letter, Dr. Thomas R. Corley, an attending physician Board-certified internist, opined that appellant could not perform the duties of a stockman/store clerk due to problems with angina and vertigo.

By decision dated June 30, 1999, the Office found that appellant was capable of performing the duties of stockman/store clerk.

By decision dated June 30, 1999, the Office advised appellant that it was reducing his compensation because the weight of the medical evidence showed that he was no longer totally disabled for work due to effects of his June 12, 1972 employment injury and that the evidence of record showed that the position of stockman/store clerk represented his wage-earning capacity.

On July 1, 1999 the Office issued a loss of wage-earning capacity decision, which reduced appellant's wages based upon his ability to earn wages as a stockman/store clerk.

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[2] 5 U.S.C. § 8115.

[3] 5 ECAB 376 (1953); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.2 (December 1993).

On February 19, 2000 appellant requested reconsideration of the June 30, 1999 decision and submitted legal arguments in support of his request.

By nonmerit decision dated March 13, 2000, the Office denied appellant's reconsideration request. The Office found that appellant had not submitted any new or relevant evidence and that there had been no legal error in the prior decision.

The Board finds that the Office met its burden to reduce appellant's compensation effective July 18, 1999, based on his capacity to perform the duties of a stockman/store clerk.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[4] After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[5]

Section 8115(a) of the Federal Employees' Compensation Act provides that an injured employee who is unable to return to the position held at the time of injury or to earn equivalent wages, but who is not totally disabled for all gainful employment is entitled to compensation based on loss of wage-earning capacity.[6] The wage-earning capacity of an employee is determined by actual earnings if actual earnings fairly and reasonably represent the wage-earning capacity.[7] If an employee has no actual earnings, wage-earning capacity is determined with due regard to the nature of the injury; the degree of physical impairment; usual employment; age; qualifications for other employment; the availability of suitable employment; and other factors or circumstances, which may affect wage-earning capacity in the disabled condition.[8] Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn wages and not on actual wages loss.[9] Further, a condition which develops following an employment injury and which is not a consequence of the employment injury is not to be considered in determining wage-earning capacity.[10]

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by the Office or 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

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[4] *Gloria J. Godfrey*, 52 ECAB __ (Docket No. 00-502, issued August 27, 2001).

[5] *Lynda J. Olson*, 52 ECAB __ (Docket No. 00-2085, issued July 11, 2001); *Albert C. Shadrick*, *supra* note 3; *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment*: *Determining Wage-Earning Capacity*, Chapter 2.814.2 (April 1995).

[6] 5 U.S.C. § 8115(a); *see* 20 C.F.R. § 10.403.

[7] *Id.*

[8] *Mary Jo Colvert*, 45 ECAB 575 (1994).

[9] *Billy R. Beasley*, 45 ECAB 244 (1993).

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

labor 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.[11] 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.[12] The basic rate of compensation paid under the Act is 66 2/3 percent of the injured employee's monthly pay.

In the present case, the medical evidence establishes that appellant is physically capable of performing the work of stockman/store clerk. In his February 13, 1998 report, Dr. Davis concluded that appellant was capable of working provided that the environment was free of contact allergens. On the basis of his report, the Office referred appellant to vocational rehabilitation services to locate a suitable alternate job for appellant within his restrictions. The rehabilitation counselor determined that the position of stockman/store clerk was within appellant's physical limitations and was available in suitable numbers to make it reasonably available to appellant in his commuting area. The Office reviewed the position description and appellant's limitations as noted by Dr. Davis and determined that based on the employment injury alone appellant was capable of performing the duties of the position.

Appellant disagreed with the Office's conclusion that he was capable of performing the position of stockman/store clerk and submitted a March 24, 1999 report by Dr. Corley which stated that he was totally disabled and could not perform the duties of the selected position. Dr. Corley's report is insufficient to establish that appellant was medically incapable of performing the position of stockman/store clerk. He concluded that appellant was incapable of performing the offered position due to angina and vertigo problems. A review of the record indicates that there is no evidence supporting that appellant's angina and vertigo preexisted his accepted contact dermatitis and exposure to carbon monoxide. The Office is not required to consider medical conditions arising subsequent to the work-related injury or disease in determining whether a position constitutes an employee's wage-earning capacity.[13] Thus, Dr. Corley's opinion does not support a determination that appellant could not perform the duties of the stockman/store clerk position from the standpoint of his accepted employment injury or any preexisting disabilities.

In his February 13, 1998 report, Dr. Davis noted that appellant had been diagnosed with a musculoskeletal disability involving his fingers in a June 12, 1972 evaluation. A review of the record, however, reveals no evidence supporting that appellant had any musculoskeletal condition at the time of his accepted contact dermatitis and exposure to carbon monoxide. As noted by Dr. Davis, a musculoskeletal disability involving the fingers was first diagnosed in a June 12, 1972 evaluation. The Office is not required to consider medical conditions arising subsequent to the work-related injury or disease in determining whether a position constitutes an

[11] *Raymond Alexander*, 48 ECAB 432 (1997); *Dorothy Lams*, 47 ECAB 584 (1996).

[12] *Dorothy Lams*, *supra* note 11; *Albert C. Shadrick*, *supra* note 3; *see also* 20 C.F.R. § 10.303.

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(b) (December 1995).

employee's wage-earning capacity.[14] The Board finds that the Office properly did not consider appellant's musculoskeletal disability involving appellant's fingers in its determination of whether appellant could perform the duties of the stockman/clerk position as this disability was not preexisting the accepted employment injury.

Therefore, the Office met its burden of proof in reducing appellant's compensation based on his wage-earning capacity as a stockman/store clerk.

The Board also finds that the Office properly denied appellant's request for a merit review.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[15] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.[16] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must also file his or her application for review within one year of the date of that decision.[17] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[18]

In this case, the Office denied appellant's claim on March 13, 2000 without conducting a merit review on the grounds that the evidence submitted was immaterial, repetitious and cumulative. In support of his February 19, 2000 request for reconsideration, appellant submitted evidence already of record, an October 17, 1997 report by Dr. Davis. This report is immaterial in that it states appellant is totally disabled for the position of automobile mechanist when the issue of the prior decision was whether appellant was disabled from performing the position of stockman/store clerk. Appellant further submitted a copy of the Board's July 18, 1997 decision and a May 16, 1972 report from Anniston Army depot stating he was totally disabled from working due to his accepted employment condition. This evidence is also insufficient as it fails to provide any new or relevant argument pertaining to the issue in this case, which is whether appellant is disabled from the position stockman/store clerk.

In addition, appellant in his February 19, 2000 letter requesting reconsideration of the Office's June 30, 2000 decision, which reduced his compensation, appellant contended that the Office did not use section 8106. The Office correctly used section 8115 as it was issuing a loss of wage-earning capacity determination and invoking the penalty provision under section 8106

[14] Federal (FECA) Procedure Manual, Part 2 -- Claim, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(b) (December 1995).

[15] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[16] 20 C.F.R. § 10.606(b)(2).

[17] 20 C.F.R. § 10.607(a).

[18] 20 C.F.R. § 10.608(b).

for refusal of an offer of suitable work. Thus, appellant did not raise any substantive legal questions and failed to submit any new, relevant and pertinent evidence not previously reviewed by the Office.

Appellant neither showed that the Office erroneously applied or interpreted a point of law or advanced a point of law not previously considered by the Office, nor did he submit relevant and pertinent evidence not previously considered by the Office. The Board, therefore, finds that the Office properly denied appellant's application for reconsideration of his claim.

The decisions of the Office of Workers' Compensation Programs dated March 13, 2000, July 1 and June 30, 1999 are hereby affirmed.

Dated, Washington, DC
June 13, 2002

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member