U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANTHONY ORTON and DEPARTMENT OF THE NAVY, NAVAL AVIATION DEPOT, Norfolk, VA

Docket No. 01-504; Submitted on the Record;
Issued June 19, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that the position of computer operator fairly and reasonably represented appellant's wage-earning capacity, effective July 16, 2000, the date it reduced his compensation benefits.

On March 17, 1997 appellant, then a 35-year-old computer assistant, filed an occupational disease claim, alleging that the work environment in a shop setting with various exposures aggravated his sinusitis. He stopped work on June 10, 1996.[1] By letter dated July 17, 1997, the Office accepted that appellant sustained an aggravation of chronic sinusitis secondary to exposure to noxious fumes and gases and he was placed on the periodic rolls. Following referrals by the Office in 1997 and 1999 appellant underwent an extensive rehabilitation effort.[2]

The medical evidence includes a number of reports from appellant's treating physician, Dr. Eric J. Freeman who is Board-certified in internal medicine and pulmonary disease. In a work capacity evaluation dated December 3, 1997, Dr. Freeman advised that appellant could work 8 hours per day with a lifting restriction of 20 pounds and no intensive climbing. He further advised that appellant should not work in an environment with fumes, dust exposure or allergens. In a report dated November 1, 1999, Dr. Freeman again advised that appellant should avoid fumes, dust and exertional activity.[3] He was provided with the job description for a

[1] The record indicates that appellant initially sustained an employment injury on March 4, 1985 and had two accepted claims for aggravation of sinusitis that were adjudicated by the Office under file numbers A25-290009 and A25-5003273, the latter for exposure to a propane leak that occurred on June 6, 1996. The Office adjudicated the instant claim under file number A25-503920.

[2] The Office initially proposed to reduce appellant's compensation on October 13, 1998, based on his ability to earn wages as a driver/chauffeur. In May 1999, the Office determined the job was not suitable.

[3] He specifically stated that appellant should not be exposed to dust, gasoline or oil, combustible exhaust, miscellaneous cleaning fluids, carpet cleaner, floor wax, paint and painting materials, copiers and printers and deodorants and perfumes.

computer operator and, by report dated January 4, 2000, advised that appellant could work at the position for eight hours per day.

The record indicates that beginning in December 1999, extensive rehabilitative efforts were undertaken in an effort to return appellant to work. In a December 28, 1999 report, Susan Crigler Castle, a rehabilitation counselor, completed a labor market survey and determined that the position of computer operator, based on the Department of Labor's *Dictionary of Occupational Titles*, fit appellant's capabilities. Attempts were made to enroll appellant in a course to update his skills. He, however, failed to cooperate and by letter dated January 12, 2000, the Office advised appellant that, pursuant to section 8113(b) of the Federal Employees' Compensation Act,[4] his compensation would be reduced to zero based on his failure to participate in vocational rehabilitation. The Office noted that the medical evidence of record indicated that he was able to perform some work and that the scheduled training had been cancelled because he failed to cooperate. The Office directed appellant to make a good faith effort to participate in vocational rehabilitation. The Office informed him that it was assumed that vocational rehabilitation would have resulted in a return to work with no loss of wage-earning capacity and, accordingly, compensation would be reduced to zero. He was given 30 days in which to respond. Appellant continued to be uncooperative, By letter dated February 4, 2000, the Office informed him that any further lack of cooperation would result in the sanctions noted above. In a report dated May 15, 2000, Ms. Castle outlined appellant's total lack of compliance in the rehabilitative effort and closed the account.

By letter dated June 9, 2000, the Office advised appellant that it proposed to reduce his compensation, based on his ability to earn wages as a computer operator. The Office noted his lack of compliance in the rehabilitative effort and that the medical evidence of record demonstrated that he could perform the computer operator position. The Office advised that if appellant disagreed with its proposed action, he should submit contrary evidence or argument within 30 days. Appellant, through his attorney, responded that he was not vocationally capable of performing the position because he did not have the requisite skills for which he needed further training. By decision dated July 13, 2000, the Office finalized the reduction of appellant's compensation, effective July 16, 2000, based on his capacity to earn wages as a computer operator. The Office determined that the position fairly and reasonably represented appellant's wage-earning capacity and found that it was available in his commuting area.

On July 20, 2000 appellant requested reconsideration and submitted medical evidence. On November 15, 2000 he filed an appeal with the Board.[5] By decision dated April 13, 2001, the Office denied appellant's reconsideration request.

Initially the Board notes that the Office and the Board may not have simultaneous jurisdiction over the same issue in the same case. Following the docketing of an appeal with the

[4] 5 U.S.C. § 8113(b).

[5] Appellant initially submitted an appeal to the Board on November 15, 2000. By order dated March 28, 2001, the Board dismissed the appeal because appellant did not respond to a request by the Board that he submit a completed application for review form. By order dated August 22, 2001, the Board reinstated the appeal, noting that the previous decision had been issued inadvertently.

Board, which in the instant case was on November 15, 2000, the Office does not retain jurisdiction to render a further decision regarding a case on appeal until after the Board relinquishes its jurisdiction unless it is a different issue before the Board. Any decision, such as the April 13, 2001 Office decision in the instant case, rendered by the Office on the same issues for which an appeal is filed is null and void.[6] Appellant's request for reconsideration with the Office is, therefore, is still outstanding.[7]

The Board further finds that the Office properly reduced appellant's compensation benefits.

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.[8] Under section 8115(a) of the Act,[9] wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity or if the employee has no actual earnings, wage-earning capacity is determined with due regard to the nature of injury, degree of physical impairment, usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect the employee's wage-earning capacity in his or her disabled condition.[10]

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 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.[11] Finally, by applying the principles set forth in *Albert C. Shadrick*, the employee's loss of wage-earning capacity can be ascertained.[12]

Once loss of wage-earning capacity is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related

[6] *Noe L. Flores*, 49 ECAB 344 (1998).

[7] The Board notes that the medical evidence submitted with appellant's reconsideration request contains a July 12, 2000 report in which Dr. James E. Newby, II. noted findings of bilateral wrist pain and advised that he suspected carpal tunnel syndrome. The Board cannot consider this evidence, however, as its review of the case is limited to the evidence of record which was before the Office at the time of the July 13, 2000 Office decision. 20 C.F.R. § 501.2(c).

[8] *Garry Don Young*, 45 ECAB 621 (1994).

[9] 5 U.S.C. §§ 8101-8193.

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

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

[12] 5 ECAB 376 (1953); *see* 20 C.F.R. § 10.303.

condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was, in fact, erroneous. The burden of proof is on the party attempting to show modification of the award.[13]

In this case, at the time the Office rendered the July 13, 2000 decision, there was no indication that the selected position of computer operator was outside the restrictions set forth by Dr. Freeman. The Board, therefore, finds that the Office properly assessed appellant's physical impairment in determining that the position of computer operator reasonably represented his wage-earning capacity. As noted above, the selected position must not only be medically suitable but must also be available in appellant's commuting area. The rehabilitation counselor in this case indicated that the recommended position was reasonably available and that the position paid $452.40 per week in the open market. Appellant's compensation was accordingly reduced to reflect such wage-earning capacity under the principles set forth in *Shadrick*.[14]

The decision of the Office of Workers' Compensation Programs dated July 13, 2000 is hereby affirmed.

Dated, Washington, DC
June 19, 2002

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[13] *See Don J. Mazurek*, 46 ECAB 447 (1995).

[14] *Supra* note 12.