U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GARY L. PETERSEN and DEPARTMENT OF THE NAVY, PUGET SOUND NAVAL SHIPYARD, Bremerton, WA

Docket No. 00-1075; Submitted on the Record;
Issued March 8, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation for wage loss based on his capacity to earn wages in the constructed position of security guard.

On February 10, 1999 the Office issued a notice of proposed reduction of compensation. The Office explained that the October 10, 1994 report of Dr. Loy E. Cramer, an orthopedist, and the May 23, 1996 report of Dr. Linda D. Swartz, appellant's treating neurologist, had found appellant to be only partially disabled. Dr. Swartz's report outlined appellant's medical restrictions. On June 16, 1998 vocational rehabilitation services found that appellant was capable of working in the constructed position of security guard. The Office advised appellant that this position fairly and reasonably represented his wage-earning capacity and that it proposed to reduce his compensation based on his capacity to wages in such a position.

The Office finalized its decision on April 9, 1999.

In a decision dated December 1, 1999, an Office hearing representative found that the Office had properly reduced appellant's compensation for wage loss. She noted that the position of security guard was within the restrictions provided by appellant's treating physician, Dr. Swartz, as outlined in the physical capacity evaluation of April 1996.

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[1] The Board finds that the Office has not met its burden of proof in this case to reduce appellant's compensation.

[1] *Harold S. McGough*, 36 ECAB 332 (1984).

The Office must base its wage-earning capacity determination on a reasonably current medical evaluation.[2]

In *Anthony Pestana*,[3] the Office made its wage-earning capacity determination almost five years after the claimant's most recent thorough physical examination and evaluation. The Board found that the Office failed to meet its burden of proof to justify a reduction in the claimant's compensation benefits by failing to demonstrate that the selected position fairly and reasonably represented his wage-earning capacity consistent with his current work tolerance limitations.

In *Ellen G. Trimmer*,[4] the Board found that the Office did not meet its burden of justifying the reduction of the employee's temporary total disability compensation. The Office had based its determination on an August 4, 1975 work tolerance limitations report by the employee's attending physician. By the time the Office determined in July 1977 that the employee was no longer disabled, this report was almost two years old and the passage of time had lessened the relevance of the work tolerance limitations report.

In the present case, the Office reduced appellant's compensation on April 9, 1999 based on the restrictions outlined by Dr. Swartz in a May 23, 1996 report, which drew from the physical evaluation of April 1996. As these reports were nearly three years old when the Office made its wage-earning capacity determination, the medical evidence of record is insufficient to support that the constructed position of security guard fairly and reasonably represented appellant's wage-earning capacity consistent with his current work tolerance limitations.

The Board has carefully reviewed the medical evidence submitted subsequent to Dr. Swartz's May 23, 1996 report to determine if a more current thorough physical examination and evaluation of appellant's functional capacity would support the Office's finding.

Dr. Swartz completed a report of physical limitation form indicating that appellant's limitations were permanent. The report itself is undated but was date-stamped and faxed in July 1996. This report is not current to the April 9, 1999 reduction of compensation, and there is no indication that the report followed a more current physical examination and evaluation of appellant's functional capacity.

Following appellant's work-hardening program, Dr. Swartz's office indicated on September 26, 1996 that appellant's lifting restriction was modified from 70 pounds to 45.

On September 8, 1997 Dr. Swartz completed another report of physical limitation form, this one specifying a number of restricted activities not appearing on the preprinted form. The employing establishment requested that Dr. Swartz clarify the reason appellant's limitations had increased. On October 20, 1997 Dr. Swartz reported that there was some misunderstanding. She explained that she had not changed appellant's permanent job restrictions; the restrictions were

[2] *Carl C. Green, Jr.*, 47 ECAB 737, 746 (1996).

[3] 39 ECAB 980, 987 (1988).

[4] 32 ECAB 1878, 1882 (1981).

the ones he had had all along. Dr. Swartz felt the need to reiterate them in an attempt to clarify appellant's restrictions because he was transferred to a rigging job that was not within his capabilities. She gave no indication that the restrictions appearing on her September 8, 1997 report of physical limitation were the result of a more current physical examination and evaluation of appellant's functional capacity. The record shows that she saw appellant several weeks earlier on August 15, 1997. Appellant related how he had lost his job, the one he could physically do, and was put back to work as a rigger, after which he steadily declined. Dr. Swartz assessed a gradual increase in appellant's symptoms since he was no longer working within his restrictions, which she noted were supposed to be permanent.

The record contains other treatment notes from Dr. Swartz, but they are also brief and do not set forth a more current physical examination or reevaluation of appellant's functional capacity.

The Office relied on medical evidence that was approximately three years old. The only other medical evidence that can arguably support a fresher picture of appellant's work restrictions is the September 8, 1997 report of physical limitation, in which Dr. Swartz reiterated appellant's existing limitations in a more forceful manner. Even so, this report was still a year and seven months old when the Office reduced appellant's compensation on April 9, 1999, and the record gives no indication that Dr. Swartz physically examined appellant or reevaluated his functional capacity at or about that time. Because the Office failed to base its determination of wage-earning capacity on a reasonably current medical evaluation, it did not meet its burden of proof to justify the reduction of appellant's compensation for wage loss.

The December 1 and April 9, 1999 decisions of the Office of Workers' Compensation Programs are reversed.

Dated, Washington, DC
March 8, 2002

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member