U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PAUL M. COLOSI and DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF INVESTIGATION, New York, NY

Docket No. 00-2334; Submitted on the Record;
Issued May 6, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation effective June 5, 2000 based on his capacity to earn wages as a retail store manager.

This is the second appeal in the present case. In the prior appeal, the Board issued a decision and order[1] on July 23, 1998 in which it reversed the August 11, 1995 decision of the Office on the grounds that the Office improperly terminated appellant's compensation because he refused an offer of suitable work.[2] The Board determined that the Office failed to establish that the modified special agent position offered to appellant by the employing establishment was suitable. In particular, the Board found that the medical evidence did not show that appellant was physically capable of commuting from his home to the worksite for the offered job in New York City.[3] The facts and circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

---

[1] Docket No. 96-778.

[2] On December 29, 1987 appellant, then a 30-year-old special agent, sustained employment-related subluxations at C3-4, T10-11 and L4-5, and cervical, thoracic and lumbar strains. On May 21, 1991 he sustained employment-related sciatica, myalgia, myositis, and thoracic and lumbar sprains. By decision dated April 7, 1995, the Office terminated appellant's compensation on the grounds that he refused an offer of suitable work and, by decision dated and finalized August 11, 1995, an Office hearing representative affirmed the Office's April 7, 1995 decision.

[3] The record reveals that, at the time of the original injuries, appellant lived in Lawrenceville, New Jersey, about a 50-mile commute to his workplace in New York City. He later moved six miles to Newtown, Pennsylvania and his commute to New York City was comparable to his commute from Lawrenceville. The Board found that appellant's commute of 50 miles constituted a part of his previous employment and the subsequently offered limited-duty job. The Board further found that the record was devoid of any evidence establishing that appellant could use a different mode of transportation to reach the worksite of the offered job.

The Board finds that the Office improperly reduced appellant's compensation effective June 5, 2000 based on his capacity to earn wages as a retail store manager.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[4] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[5]

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.[6] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[7] The job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives.[8]

After the Board's July 23, 1998 decision, the Office referred appellant's file to an Office rehabilitation specialist. In February 2000, the Office rehabilitation specialist made a determination that appellant was capable of earning wages as a retail store manager. He indicated that appellant was capable of earning the high end of the wage scale ($25.00 per hour) because he had at least two years of experience as a corporate officer of an Athlete's Foot shoe store.[9] The Office rehabilitation specialist determined that the position of retail store manager was reasonably available in appellant's commuting area. The position required frequent lifting of up to 20 pounds, frequent handling and occasional reaching. By decision dated June 5, 2000, the Office reduced appellant's compensation effective June 5, 2000 based on his capacity to earn wages as a retail store manager.

The Board finds that the Office did not establish that appellant was physically capable of performing the retail store manager position. The Office suggested that a February 16, 1994 work restriction form completed by Dr. Leon Costa, an attending Board-certified orthopedic surgeon, showed that appellant could perform the retail store manager position as of

[4] *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

[5] *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

[6] *See Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

[7] *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

[8] *Id.*

[9] The position required two to four years of specific vocational preparation. The record reveals that, in connection with his operation of an Athlete's Foot shoe store, appellant earned $19,000.00 in 1997 and $14,000.00 in 1998. He did not draw a salary in 1999 and the Office considered him to be a passive investor in the business at that point.

June 5, 2000.[10] However, Dr. Costa's report was produced more than six years prior to the time that appellant's compensation was adjusted effective June 5, 2000. As noted above, the retail store manager position required frequent lifting of up to 20 pounds, frequent handling and occasional reaching. The Office did not present any other medical evidence in support of its determination that appellant could perform such duties and the record does not contain sufficient medical evidence to show that appellant was physically capable of performing them as of June 5, 2000.[11]

Therefore, the Office did not adequately consider all the proper factors, including appellant's physical limitations, in determining that the position of retail store manager represented appellant's wage-earning capacity.[12] For these reasons, the Office improperly reduced appellant's compensation effective June 5, 2000 based on his capacity to earn wages as a retail store manager.

The decision of the Office of Workers' Compensation Programs dated June 5, 2000 is reversed.

Dated, Washington, DC
May 6, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[10] In his February 16, 1998 report, Dr. Costa detailed various work restrictions and indicated that appellant must avoid prolonged driving and commutes. Dr. Costa repeated his prohibition against prolonged commutes in his July 19 and August 1, 1995 reports.

[11] In particular, there is no evidence to show that appellant could drive to such a job from his home in Newtown, Pennsylvania. The record does not indicate that appellant would have been able to take alternate transportation.

[12] *See Clayton Varner*, 37 ECAB 248, 256 (1985).