U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROGER B. YOUNG and DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, Brooklyn, NY

Docket No. 01-2185; Submitted on the Record;
Issued May 9, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation effective August 31, 2000 based on his capacity to earn wages as a title searcher.

The Board finds that the Office improperly reduced appellant's compensation effective August 31, 2000 based on his capacity to earn wages as a title searcher.

On August 24, 1996 appellant, then a 49-year-old park ranger, sustained an employment-related left thumb dislocation. On August 28, 1996 appellant underwent a closed reduction of his left thumb and on January 21, 1997 he underwent a repair of the radial collateral ligament at the metacarpalphalangeal joint of his left thumb; both procedures were authorized by the Office.[1] By decision dated August 30, 2000, the Office reduced appellant's compensation effective August 31, 2000 based on his capacity to earn wages as a title searcher. By decision dated July 6, 2001, the Office affirmed its August 30, 2000 decision.[2]

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.[3] The

[1] Appellant had previously sustained a left thumb dislocation at work on April 28, 1994. He also had a preexisting nonwork-related condition of post-traumatic stress disorder, which was related to his military service in Vietnam.

[2] In its decision, the Office suggested that it was denying appellant's request for merit review. However, a complete reading of the decision shows that the Office weighed the evidence submitted by appellant and in fact performed a merit review of his claim.

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

Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[4]

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.[5] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[6] 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.[7]

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 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. Finally, application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.[8]

The Board finds that the Office did not show that appellant is medically capable of performing the title searcher position selected by his vocational rehabilitation counselor. Therefore, the Office did not adequately consider all the factors and circumstances which might affect appellant's wage-earning capacity.

The title searcher position involves searching public records and examining titles to determine the legal condition of property titles.[9] The position requires the examining of records, summarizing recorded documents and preparing reports outlining restrictions and actions required to clear titles. The position requires occasional lifting (meaning up to one third of the workday), of up to 10 pounds and occasional reaching, handling and fingering.

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

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

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

[7] *Id.*

[8] *See Dennis D. Owen*, 44 ECAB 475, 479-80 (1993); *Wilson L. Clow, Jr.*, 44 ECAB 157, 171-75 (1992); *Albert C. Shadrick*, 5 ECAB 376 (1953).

[9] These documents would include map and plat books.

In a report dated July 22, 1998, Dr. Norman M. Heyman, a Board-certified orthopedic surgeon, indicated that appellant exhibited recurrent radial laxity, decreased range of motion and decreased grasp in his left thumb. He recommended that appellant undergo another left thumb reduction and ligament reconstruction or, if the metacarpalphalangeal joint is arthritic, a fusion of the joint. Dr. Heyman further stated:

> "The objective findings that indicate that [appellant] is still having problems, are his flexion contracture of the laxity and I think volar subluxation. He is not able to work as a federal park ranger because he cannot use his left hand. [Appellant] can work one handed and using the left hand as a post. I am unable at present to state if or when [appellant] can be expected to resume his regular job duties and perform tasks of his regular employment. In my opinion, full recovery is not possible even with a second surgery because of the nature of the injury and the fact that he has two injuries, both of which contribute to his current disability."

Dr. Heyman indicated that appellant could work eight hours a day. He noted that appellant could engage in reaching above his shoulders and repetitive motions with his right upper extremity only, but that he could not engage in pushing, pulling and lifting.

In a report dated August 25, 1998, Dr. Leonard Edelstein, an attending Board-certified orthopedic surgeon, indicated that appellant exhibited radial instability and volar subluxation of the metacarpalphalangeal joint of his left thumb and had significant loss of strength in his left upper extremity. Dr. Edelstein noted that appellant refused his recommendation that the joint be fused and, therefore, his thumb condition had reached maximum medical improvement. He stated that appellant was totally disabled from his park ranger jobs. Dr. Edelstein indicated that appellant could work eight hours a day and could reach above his shoulder with his right upper extremity. He noted that appellant could not engage in lifting, pushing or pulling.

Both Dr. Heyman and Dr. Edelstein indicated that appellant could not engage in any lifting, but the title searcher position requires occasional lifting of up to 10 pounds. Moreover, the position requires occasional reaching, handling and fingering (presumably related to searching and handling documents) and it is uncertain whether appellant would be able to perform these duties given the limitations imposed by his left thumb condition. It remains unclear the extent to which appellant would have to use his left hand to perform these duties. Dr. Heyman indicated that appellant could only use his left hand "as a post" and that he could not engage in repetitive motion with his left hand. Dr. Edelstein noted that appellant had significant loss of strength in his left upper extremity.[10]

Moreover, it remains unclear whether appellant's preexisting post-traumatic stress syndrome condition would prevent him from performing the title searcher position. In determining wage-earning capacity based on a constructed position, consideration is given to the residuals of the employment injury and the effects of conditions which preexisted the

[10] In addition, the reports of Drs. Heyman and Edelstein were produced more than two years prior to the adjustment of appellant's compensation effective August 31, 2000 and the precise nature of appellant's medical condition at that time has not been detailed.

employment injury.[11] In a report dated July 8, 1999, Dr. Herbert H. Stein, an attending Board-certified psychiatrist, stated that appellant had been an outpatient in the post-traumatic stress disorder treatment program since 1994. He indicated that, when appellant sustained the employment injury to his left hand, he began to feel vulnerable as he did during his military service. Dr. Stein indicated that appellant was unable to control the flood of memories, nightmares, depression and anxiety. He noted that appellant enrolled in a support group and took medication but achieved minimal relief. Dr. Stein stated, "Based on his present status, he is not employable, nor would he be a candidate for a vocational rehabilitation. His prognosis remains guarded."[12]

For these reasons, the Office improperly reduced appellant's compensation effective August 31, 2000 based on his capacity to earn wages as a title searcher.

The July 6, 2001 decision of the Office of Workers' Compensation Programs is reversed.

Dated, Washington, DC
May 9, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

[11] *See Jess D. Todd*, 34 ECAB 798, 804 (1983).

[12] The record contains a similar report of Dr. Stein dated March 13, 2001. It remains unclear whether the Office attempted to further develop this aspect of the medical evidence.