U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RALPH D. FLANAGAN and DEPARTMENT OF THE NAVY, SEA SYSTEMS COMMAND, Vallejo, CA

Docket No. 02-1517; Submitted on the Record;
Issued October 10, 2002

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether the constructed position of protective signal operator represents appellant's wage-earning capacity.

The Office of Workers' Compensation Programs accepted that on December 20, 1989 appellant, then a 45-year-old hazardous waste handler, sustained a ruptured right biceps tendon as he was moving heavy trash and debris bags. He underwent an arthroscopy and acromioplasty of the right shoulder on September 14, 1993. Appellant received appropriate compensation benefits and a total schedule award for a 35 percent impairment of his right arm for the period October 10, 1990 through November 13, 1992. The Office also accepted that on April 2, 1990 appellant sustained neck and upper back strain and a temporary aggravation of a herniated nucleus pulposus at C4-5 while lifting a bag of sand.[1]

On October 1, 1996 the Office reduced appellant's compensation based on his ability to perform the job of security guard.[2] However, by decision dated March 20, 2000, that decision was set aside by an Office hearing representative who found that, due to his right arm limitations, appellant was not a good candidate for a security job requiring "physical defensiveness" or the task of "apprehending or expelling miscreants." The hearing representative also found that the Office did not determine that this job was being performed in sufficient numbers so as to make it reasonably available to appellant within his commuting area, as the record contained no evidence of availability at the time of compensation reduction. Lastly the hearing representative found

[1] Appellant argued that his degenerative disc disease, first diagnosed in 1990, preexisted the 1989 injury and, therefore, should be considered in determining whether he could perform light duty. The Board notes, however, that the Office previously found that appellant had no continuing disability as a result of his April 2, 1990 neck and upper back injury. This injury was assigned case No. A13-917822.

[2] Appellant had returned to light duty from 1990 through October 19, 1992 and thereafter was referred for vocational rehabilitation. On August 27, 1996 the Office rehabilitation specialist closed appellant's case due to lack of cooperation.

that there was a conflict in medical evidence concerning the extent of appellant's continued work restrictions, which required resolution.

Upon remand the Office referred appellant, together with a statement of accepted facts, questions to be addressed, the job description of security guard and the relevant case record, to Dr. Robert R. McIvor, a Board-certified orthopedist.

By report dated May 31, 2000, Dr. McIvor reviewed appellant's factual and medical history, noted his present complaints, noted the history of an additional April 2, 1990 injury involving his neck and upper back and described his clinical finding upon examination. Dr. McIvor concluded that appellant had sustained injury as follows:

> "This appears to have been an acute rupture of the distal biceps tendon…. Objectively, there is limited motion about the shoulder. There is the abnormal appearance of the biceps muscle belly. There is weakness of grip on the right. Precluded would be work involving repetitive heavy lifting, strong pushing or pulling actions or sustained overhead use of the right arm. It seems to be directly the result of the specific injury of December 20, 1989. I was not asked to comment on the injury of April 2, 1990, so I will not expand on any neck or upper back problems. His condition is stationary and ratable. I do not think he could return to work as a materials handler since presumably heavy lifting is an integral part of that work assignment. Apparently he is inquiring about work as a security guard and there is certainly no reason he could not do this quite adequately."
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> "It should be mentioned that there were massive numbers of reports having to do with administrative-type problems and these were reviewed as well…. I had a great deal of trouble finding any specific records having to do with upper arm injury, although there was an abundance of records pertaining to the injury of April 2, 1990."

Dr. McIvor subsequently completed a work tolerance limitation form on which he indicated that appellant could work for eight hours a day within certain restrictions[3] as well as a supplemental note dated July 10, 2000, which stated as follows:

> "[The] job description of a security guard has also been forwarded and reviewed. I believe [appellant] is capable of working as a security guard eight hours a day. There is absolutely nothing wrong with his lower extremities that I am aware of and with this injury to his arm this should not curtail him from working a full schedule. So I really see no evidence that he has a condition which would preclude working eight hours a day on his feet and doing the duties described of a security guard."

[3] Dr. McIvor limited appellant's reaching and reaching above his shoulder and put a 2-hour limit on pushing, pulling and lifting, with breaks every 2 hours for 15 minutes.

A labor market survey was conducted on July 26, 2000 by the rehabilitation counselor, who listed nine separate security companies she contacted and reported that all of the employers indicated that they either have current openings or frequently hire for protective signal operators. It was noted that these positions were also called dispatchers and that the pay was approximately $10.00 an hour, but varied with employer. The rehabilitation counselor noted that specific vocational preparation was six months to one year, but noted that all contacted employers indicated that they were willing to train entry-level employees on the job, but that they did require a legal background check and drug screening before being hired. An Office rehabilitation specialist agreed that the position of protective signal operator was functionally suitable for appellant based upon Dr. McIvor's report, that such positions were reasonably available in appellant's local labor market and that they appeared to fairly and reasonably represent his wage-earning capacity.

On August 16, 2000 the Office gave appellant a notice of the proposed reduction of compensation and it advised that, based upon Dr. McIvor's report, he could work a full-time light-duty position of a security guard and that the position of protective signal operator was sedentary and was physically less demanding than the position of security guard, such that it was clearly within the work restrictions articulated by Dr. McIvor. The Office gave appellant 30 days within which to submit further evidence or argument if he disagreed with the proposed action.

On September 28, 2000 the Office reduced appellant's compensation benefits by 57 percent based on his ability to perform the job of a protective signal operator. The job description indicated that this position involved reading, recording and interpreting signals received on electronic and other security systems from subscribers' premises that indicate opening and closing of protected premises, progress of security guard, unlawful intrusions or fire. The position reports "irregular signals for corrective action, reports alarms to police or fire department, posts changes of subscriber opening and closing schedules, prepares daily alarm activity and subscribed service reports, may adjust central station equipment to ensure uninterrupted service and may dispatch security personnel to premises after receiving alarm."

Appellant disagreed with this reduction and he requested an oral hearing before an Office hearing representative. A hearing was held on March 21, 2001 at which appellant testified. He claimed that he was incapable of performing the duties of a protective signal operator and that it was not reasonably available within his commuting area. Appellant also submitted several medical records already of file, which predated the 1994 and 1995 reports, which originally caused the conflict. These reports identified cervical spine-related problems.

By decision dated June 29, 2002, the Office hearing representative affirmed the reduction of appellant's compensation, finding that the weight of the medical evidence of record established that he could perform the sedentary duties of a protective signal operator. The hearing representative also found that the weight of the factual evidence as provided by the rehabilitation counselor and rehabilitation specialist, established that the job was performed in sufficient numbers within appellant's commuting area so as to be readily available.

The Board finds the constructed position of protective signal operator represents appellant's wage-earning capacity.

In this case, appellant's treating physician, Dr. Joseph Pramuk, a Kaiser Permanente physician specializing in orthopedic surgery, opined in two 1995 reports that appellant could work only four hours a day light duty.

However, the Office second opinion specialist, Dr. Norman L. Portello, a Board-certified orthopedist, stated in 1994 that appellant was able to work eight hours a day light duty.

The Federal Employees' Compensation Act, at 5 U.S.C. § 8123(a), in pertinent part, provides: "If there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."

In this case, the Office properly found a conflict between Dr. Pramuk and Dr. Portello and it appropriately referred appellant, together with a statement of accepted facts, questions to be addressed and the relevant case record, to Dr. McIvor, for an impartial medical opinion to resolve the conflict as to appellant's ability to work light duty.

Dr. McIvor found that appellant had limited motion about the shoulder, abnormal appearance of the biceps muscle belly and weakness of grip on the right, such that work involving repetitive heavy lifting, strong pushing or pulling actions or sustained overhead use of the right arm would be precluded. He opined that appellant's condition was stationary and ratable and opined that although he could not return to work as a materials handler since presumably heavy lifting is an integral part of that work assignment, he could work for eight hours a day within certain restrictions. Dr. McIvor noted that the job description of security guard had been reviewed and that appellant was capable of working, in that position for eight hours a day. He found absolutely nothing wrong with appellant's lower extremities and noted that with the injury to his arm this would not curtail him from working a full schedule.

Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.[4]

As Dr. McIvor's reports were based upon a proper factual background and were well rationalized, they are entitled to that special weight. Therefore, the weight of the medical evidence of record established that appellant could perform a light-duty position of a security guard for weight hours a day.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[5] 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

[4] *Aubrey Belnavis*, 37 ECAB 206, 212 (1985).

[5] *Harold S. McGough*, 36 ECAB 332 (1984). *See* Federal (FECA) Procedure Manual, Chapter 2.812.3 (March 1987).

employment.[6] The Office met its burden of proof with the well-rationalized report of Dr. McIvor.

Section 8115(a) of the Act,[7] which provides that the "wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity." The Board has stated: "Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure."[8] However, if the actual earnings do not fairly and reasonably represent the employee's 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.[9]

Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions given the nature of the employee's injuries and the degree of physical impairment, his or her usual employment, the employee's age and vocational qualifications and the availability of suitable employment.[10] Accordingly, the evidence must establish that jobs in the position selected for determining wage-earning capacity are reasonably available in the general labor market in the commuting area in which the employee lives. In determining an employee's wage-earning capacity, the Office may not select a makeshift or odd lot position or one not reasonably available on the open labor market.[11]

After the Office makes a medical determination that the employee is disabled and has specific work restrictions, it may refer the appellant's case to a vocational rehabilitation counselor authorized by the Office or to an Office rehabilitation 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; this position must fit that employee's capabilities with regard to his physical limitations, education, age and prior experience.[12] Once this selection is made, a wage rate and the availability of the selected position in the open labor market should be determined through contact with the state employment service or other applicable service.[13]

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[6] *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

[7] 5 U.S.C. § 8115(a).

[8] *Floyd A. Gervais*, 40 ECAB 1045, 1048 (1989); *Clyde Price*, 32 ECAB 1932, 1934 (1981).

[9] *Richard Alexander*, 48 ECAB 432 (1997); *Pope D. Cox*, 39 ECAB 143 (1988).

[10] *See generally*, 5 U.S.C. § 8115(a); A. Larson *The Law of Workmen's Compensation* § 57.22 (1989).

[11] *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

[12] *Dorothy Lams*, 47 ECAB 584 (1996).

[13] *James R. Verhine*, 47 ECAB 460 (1996).

In this case, after the weight of the medical evidence established that appellant was partially disabled, the Office selected the position of protective signal operator, a sedentary position, with a 10-pound lifting limit. The Board finds that the physical requirements of this position are clearly within the parameters and restrictions set forth by Dr. McIvor and that, therefore, such a position is physically suitable for appellant.

In her closing report, the rehabilitation counselor summarized that appellant's skills, training and physical activity restrictions qualified him for full-time light-duty employment, that the specific vocational preparation for protective signal operator was satisfied as all contacted employers stated that they were willing to train entry level employees on the job and that when she consulted numerous employers, they confirmed that the job of protective signal operator was readily available within appellant's commuting area. The Board now concurs in this assessment.

The Board, therefore, finds that the Office considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment and age and employment qualifications, in determining that the position of protective signal operator represented appellant's wage-earning capacity.[14] The weight of the evidence or record establishes that appellant had the requisite physical ability, skill and experience to work as a protective signal operator in a sedentary position and that such positions were reasonably available within the general labor market of appellant's commuting area. Therefore, the position of protective signal operator properly reflected appellant's wage-earning capacity effective September 28, 2000.

The decision of the Office of Workers' Compensation Programs dated June 29, 2002 is hereby affirmed.

Dated, Washington, DC
October 10, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[14] *See Donald W. Woodall*, 49 ECAB 415 (1998) (finding that the Office followed its established procedures for determining that the position of gate guard represented appellant's wage-earning capacity).