

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN W. KENDALL and DEPARTMENT OF THE AIR FORCE,
WRIGHT PATTERSON AIR FORCE BASE, Dayton, OH

*Docket No. 01-502; Submitted on the Record;
Issued September 9, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that the position of information clerk represented appellant's wage-earning capacity.

On April 24, 1968 appellant, then a 34-year-old blocker and bracer, filed a notice of traumatic injury claiming he was unloading tires and several of them fell on him causing him to injure his back and knees.¹ His claim was accepted for retro-pattellar osteochondritis; synovitis of the knees; torn medial meniscus of the right knee; and the Office authorized five subsequent knee surgeries. Appellant received appropriate compensation benefits and worked intermittently until 1990 when he stopped completely.

Appellant submitted various employing establishment records from October 1972; medical records from Dr. William J. West, a Board-certified orthopedist, dated April 24, 1973 to January 6, 1982; and medical records from Dr. E.J. Schmitt, a family practitioner, dated August 4, 1974 to October 31, 1978. The records noted a history of appellant's work-related injuries of 1965 and 1968 and his subsequent treatment.

Appellant worked intermittently from 1968 until January 7, 1982.

On January 7 and September 9, 1982 appellant underwent two knee surgeries. The January 7, 1982 operative note indicated that Dr. West performed an arthroscopic medial and lateral partial meniscectomy; and chondroplasty of the medial and lateral femoral condyles of the right knee. Dr. West diagnosed appellant with a degenerative tear of the medial meniscus of the right knee. The September 9, 1982 operative report noted that a partial synovectomy and debridement of the right knee was performed. Dr. West diagnosed appellant with degenerative arthritis of the right knee.

¹ The record reflects that appellant filed two other claims for disability due to traumatic injuries sustained September 13, 1965 and August 30, 1968. Apparently all claims were accepted by the Office.

Appellant returned to work on February 27, 1984 and stopped completely on November 3, 1984.

Thereafter, in the course of developing appellant's claim he was referred to several second opinion physicians.

On June 10, 1988 appellant underwent an arthroscopic partial medial meniscectomy of the left knee; chondroplasty to the patella and medial femoral condyle; a biopsy of synovium; and partial synovectomy. Dr. West diagnosed appellant with torn medial meniscus along with Grade 3 chondromalacia of the medial femoral condyle; Grade 3 chondromalacia of the patella; and proliferic synovitis of the left knee.

On June 29, 1988 appellant filed a claim for recurrence of disability alleging that on October 19, 1987 he experience pain and swelling in both knees causally related to his accepted work-related injuries of 1965 and 1968.

Thereafter, appellant filed a claim for a schedule award. On August 8, 1990 the Office granted appellant a schedule award for 35 percent permanent impairment of the left leg and 35 percent permanent impairment of the right leg.

On April 22, 1993 appellant underwent a total left knee replacement. Dr. West diagnosed appellant with degenerative arthritis of the left knee.

Thereafter appellant submitted various records from Dr. West and Dr. Gerald A. Dehner, an orthopedist, dated January 31, 1994 to October 1997; and an operative report dated September 16, 1997. Dr. West noted appellant's progress post total left knee replacement indicating appellant's continued complaints of swelling and decreased range of motion. In a work capacity evaluation date stamped December 1993, he noted appellant was unable to return to work due to his right knee arthritis and the total replacement of the left knee. Dr. Dehner's treatment notes document appellant's complaints of the right knee pain and swelling. He recommended a total right knee replacement.² In an operative report dated September 16, 1997, Dr. Dehner indicated that he performed a total knee arthroplasty of the right knee. He diagnosed appellant with osteoarthritis of the right knee. The doctor's report dated October 14, 1997 indicated that appellant's present disability was causally related to appellant's industrial injury.

In a letter dated April 2, 1998, the Office requested that Dr. Dehner submit a medical report addressing whether appellant sustained any residuals of his work-related injury.

Dr. Dehner submitted a work capacity evaluation dated April 25, 1998 indicating that appellant could perform a sedentary position for four to six hours per day and within two to three months appellant could return to an eight-hour workday. He noted the following limitations per day: sitting for 4 to 6 hours; walking for 1 hour; standing and reaching for 1 to 2 hours; no reaching above the head or twisting; operating a motor vehicle for 1 to 2 hours a day; no squatting, kneeling or climbing; lifting of 15 to 20 pounds; and limited pushing and pulling.

² The case record was referred to the district medical adviser who concurred in Dr. Dehner's recommendation for a total arthroplasty of the right knee.

In a May 26, 1998 report, Dr. Dehner diagnosed appellant with status post bilateral total knee arthroplasties. He noted that appellant had well-healed surgical scars; range of motion of 2 to 100 degrees of flexion on the right knee; and 0 to 90 degrees on the left knee. Dr. Dehner noted that appellant could not return to a position as a block and bracer because it required significant walking, climbing, squatting, kneeling and heavy lifting. He noted that appellant could work in a sedentary position with limited walking; no lifting over 15 to 20 pounds; and no repetitive lifting overhead.

In a letter dated May 13, 1999, the Office requested Dr. Dehner to submit a medical report addressing whether appellant sustained any residuals of his work-related injury. The Office specifically requested the doctor to comment on whether appellant's work tolerance levels increased since the last work capacity evaluation was completed on April 25, 1998.

In a letter dated June 11, 1999, Dr. Dehner noted appellant sustained residuals of his work-related injuries including limited motion of 90 to 100 degrees of both knees following bilateral knee arthroplasties. He noted that appellant's work tolerance did not change from that described in the work capacity evaluation of April 25, 1998.

In a memorandum dated August 19, 1999, the Office indicated that appellant must be referred for vocational rehabilitation services. The Office indicated that a loss of wage-earning capacity evaluation (LWEC) was in place prior to 1997 however appellant underwent an approved knee surgery on September 16, 1997. As a result of this surgery, the Office would not be able to reapply the former LWEC as appellant's work restrictions were lessened. The Office indicated that appellant would be referred for vocational rehabilitation.

By letter dated August 26, 1999, the Office referred appellant for vocational rehabilitation services.

In a vocational rehabilitation report dated October 17, 1999, the counselor indicated that two positions were identified which matched appellant's qualifications and medical restrictions. The jobs were as a check cashier and information clerk, and these positions exist in the local economy with current openings. The counselor indicated that appellant was willing to return to employment at the employing establishment, however, he was not interested in returning to the private sector.

In a status report dated November 10, 1999, the rehabilitation specialist indicated that the new employer job goals as an information clerk and check cashier were identified, however, appellant rejected job placement services. Appellant desired to return to the employing establishment, however, this facility was now closed. The rehabilitation specialist found that appellant could perform the duties of an information clerk and check cashier. Appellant's decision ended the rehabilitation case.

In a memorandum dated December 3, 1999, the Office noted that as of December 3, 1999 the positions of check cashier and information clerk were available in a full-time and part-time basis with hourly wages of \$6.00 and \$8.50 per hour respectively.

On December 6, 1999 the Office issued a notice of proposed reduction of compensation, finding that appellant was no longer totally disabled. The Office noted that appellant was

partially disabled and had the capacity to earn wages as an information clerk at the rate of \$255.00 a week.

By decision dated January 7, 2000, the Office adjusted appellant's compensation benefits to reflect his wage-earning capacity as an information clerk. The wage-earning capacity determination took into consideration such factors as appellant's disability, training, experience, age and the availability of such work in the commuting area in which he lived. Attached to the decision was a notice of appeal rights, specifying the procedures necessary for reconsideration, a hearing before the Office or an appeal to the Board.

By letter dated January 12, 2000, appellant requested an oral hearing before an Office hearing representative. The hearing was held on July 25, 2000 before an Office hearing representative. Appellant testified that the nonemployment-related conditions including diabetes, diabetic neuropathy, cardiovascular disease developed after his work-related injury. His attorney argued that the Office did not consider all aspects of appellant's life including his education, and all medical conditions which were work related or nonwork related as described by Dr. Helena Duque, a Board-certified family practitioner.

Appellant submitted reports from Dr. Dehner dated December 22, 1999, January 12 and February 9, 2000; an electromyogram (EMG) dated January 28, 2000; and a report from Dr. Duque, dated April 26, 2000. Dr. Dehner's report dated December 22, 1999 indicated that appellant fell in July and experienced radiating pain. He noted appellant's left knee was asymptomatic. Dr. Dehner's January 12, 2000 note revealed no changes from the December 22, 1999 examination. He noted that appellant was a diabetic and may have developed peripheral neuropathy. Dr. Dehner's February 9, 2000 report indicated that appellant had an EMG which revealed a mixed motor sensory polyneuropathy which was most likely related to his diabetes. He noted that appellant still had discomfort with the right knee. The report from Dr. Duque dated April 26, 2000 indicated that she had treated appellant since 1992 for hypertension, cardiovascular disease, diabetes, hyperlipidemia and diabetic neuropathy. She noted that appellant was unstable when walking and his gait impairment was aggravated by an increasing diabetic neuropathy. Dr. Duque indicated that she did not consider appellant suitable for any employment and noted prolonged sitting would be detrimental for his neuropathy as well as his cardiovascular disease. She recommended appellant not work considering his physical condition.

In a decision dated October 10, 2000, the hearing representative affirmed the decision of the Office dated January 7, 2000.

The Board finds that the Office properly determined that the position of information clerk reflects appellant's wage-earning capacity effective January 7, 2000, the date it reduced his compensation benefits.

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

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

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.⁴ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.⁵ 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.⁶

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, *Dictionary of Occupational Titles* or otherwise available in the open labor market, that fits that employee's capabilities with regard to his physical limitation, 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.⁷

In this case, the Office received a work capacity evaluation from appellant's attending physician, Dr. Dehner, dated April 25, 1998, who found that appellant could perform a sedentary position for 4 to 6 hours per day and within 2 to 3 months he could return to an 8-hour workday with the following limitations: sitting for 4 to 6 hours; walking for 1 hour; standing and reaching for 1 to 2 hours; no reaching above the head or twisting; operating a motor vehicle for 1 to 2 hours a day; no squatting, kneeling or climbing; lifting of 15 to 20 pounds; and limited pushing and pulling. He did not make any finding that appellant remained totally disabled or unable to do any work due to residuals of his lower extremities.⁸

In a vocational rehabilitation report dated October 17, 1999, the counselor indicated that two positions were identified which matched appellant's qualifications and medical restrictions. The jobs were as a check cashier and information clerk, and these positions exist in the local economy with current openings. The rehabilitation specialist found that appellant could perform the duties of an information clerk and check cashier. He determined that the position was available in sufficient numbers so as to make it reasonably available within appellant's commuting area and that the wage of the position was \$255.00 per week. The rehabilitation counselor noted that there were information clerk jobs that were entry level and for which

⁴ See *Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

⁵ *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

⁶ *Id.*

⁷ See *James Smith*, Docket No. 00-1103 (issued October 25, 2001).

⁸ *Id.*

appellant met the requirements and which were within appellant's medical restrictions. He provided a job description for the position of information clerk which indicated that the position would require lifting up to a maximum of 10 pounds, frequent talking, hearing and occasional reaching and handling; all in a moderate intensity of noise depending on the location. The position required no climbing, balancing, stooping, kneeling, reaching above the shoulder or crawling. The counselor indicated that appellant was willing to return to employment at the employing establishment, however, the base had been closed and appellant indicated he was not interested in returning to the private sector. In a status report dated November 10, 1999, the rehabilitation specialist indicated that appellant rejected job placement services. Where vocational rehabilitation is unsuccessful, the rehabilitation counselor will prepare a final report, which lists two or three jobs which are medically and vocationally suitable for the employee and proceed with information from a labor market survey to determine the availability and wage rate of the position.⁹

The Board 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 information clerk represented appellant's wage-earning capacity.¹⁰ The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of information clerk and that such a position was reasonably available within the general labor market of appellant's commuting area. The Office properly determined that the position of information clerk reflected appellant's wage-earning capacity effective January 7, 2000.

The Board finds appellant's argument that the Office did not consider all aspects of appellant's life including all medical conditions which were work related or nonwork related as described by Dr. Duque, nonpersuasive. Dr. Duque, indicated in her report dated April 26, 2000, that appellant has been treated for hypertension, cardiovascular disease, diabetes, hyperlipidemia and diabetic neuropathy. She noted appellant was unstable when walking and his gait impairment was aggravated by an increasing diabetic neuropathy. Dr. Duque indicated that she did not consider appellant suitable for any employment and noted prolonged sitting would be detrimental for his neuropathy as well as his cardiovascular disease. However the Board notes that these conditions were nonwork related and developed after appellant's injury.

The Office procedure manual¹¹ states in pertinent part:

“d. Medical Suitability. The claim examiner is responsible for determining whether the medical evidence establishes that the claimant is able to perform the job, taking into consideration medical conditions due to the accepted work-related injury or disease, and any preexisting medical conditions. (Medical conditions arising subsequent to the work-related injury or disease will not be considered). If

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.813.2 (December 1993).

¹⁰ See *Clayton Varner*, 37 ECAB 248, 256 (1985).

¹¹ The Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814(8)(d) (December 1993).

the medical evidence is not clear and unequivocal, the claims examiner will seek medical advice from the district medical adviser, treating physician or second opinion specialist as appropriate.”

The record indicates that appellant testified that the nonemployment-related conditions including diabetes, diabetic neuropathy, cardiovascular disease developed after his work-related injury. The Board finds that the Office properly determined that the above conditions were not to be considered in determining the medical suitability of a position. Dr. Dehner indicated that appellant did have some degree of residual disability and provided a work capacity evaluation dated April 25, 1998 delineating appellant’s medical restrictions and that the position of information clerk complied with these restrictions. The Board finds that the selected position of information clerk fairly and reasonably represents appellant wage-earning capacity.

The October 10 and January 7, 2000 decisions of the Office of Workers’ Compensation Programs are hereby affirmed.

Dated, Washington, DC
September 9, 2002

Alec J. Koromilas
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member