U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MERLE D. GRANT and DEPARMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, Browning, MT

Docket No. 03-1007; Submitted on the Record;
Issued December 5, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in reducing appellant's compensation based on its determination that the position of a deli clerk represented appellant's wage-earning capacity.

The Office accepted that, on August 23, 1994, appellant, then a 33-year-old seasonal firefighter, sustained a left knee medial collateral ligament strain. He underwent left knee surgery on October 6, 1994 and January 8, 1996, which the Office had approved. Appellant did not return to work and has been paid on the periodic rolls. The record reflects that appellant had been undergoing vocational rehabilitation services since March 1995.

In a March 15, 2000 OWCP-5c work capacity evaluation form, appellant's treating physician, Dr. Gregory S. Tierney, a Board-certified orthopedic surgeon, advised that appellant was able to work 8 hours a day with restrictions on walking for 1 to 2 hours, standing for 2 to 4 hours a day, lifting no more than 5 to 10 pounds, 4 to 8 hours a day and pushing and pulling no more than 5 to 10 pounds, 2 hours a day. As the employing establishment was unable to provide reemployment, the case was referred to vocational rehabilitation services for plan development in April 2000.

On September 28, 2000 appellant underwent a second opinion evaluation with Dr. Boyd Maxfield Iverson, a Board-certified orthopedic surgeon, who stated that appellant's knee was stable relative to the anterior cruciate ligament (ACL) injury and subsequent reconstruction in 1996. He noted that the x-rays showed more advanced osteoarthritic changes than those present in 1994. Dr. Iverson opined that there was no significant rationale for appellant's 5- to 10-pound weight restrictions as appellant had minimal discomfort at the present time. He noted that, at the time Dr. Tierney placed appellant on weight restrictions, appellant was apparently having more complaints of pain which would have been a consequence of the osteoarthritic changes and not as a consequence of the ACL reconstruction. Dr. Iverson stated that the 1994 osteoarthritic changes in appellant's medical compartment predated the work-related injury of August 23, 1994 and was more likely related to appellant's original injury in 1984, in which he underwent a

debridement and reconstruction of a torn ACL. He stated that, although appellant's osteoarthritic changes might have been slightly accelerated by the work injury of August 23, 1994, the osteoarthritic problem preceded the ACL tear that resulted from the work injury of August 23, 1994 and would realistically be expected to progress and ultimately may require a total knee replacement given appellant's injury and surgery in 1984 as well as aggravation by his obesity. In a work capacity evaluation form dated September 28, 2000, Dr. Iverson opined that appellant could work eight hours a day with a one-hour restriction imposed on squatting, kneeling and climbing.

In an October 18, 2000 rehabilitation placement plan, the counselor indicated that there were several jobs available in appellant's area of residence which were suitable to his medical restrictions and functional capacity level. Appellant was evaluated to have transferable skills and was provided with job search assistance towards employment in light to medium strength positions such as deli clerk, bus driver and cashier. The above jobs were noted to be within the medical restrictions established by Dr. Iverson, suitable and readily available in appellant's commuting area. Age was not a barrier to employment in any of the selected positions. The labor market study provided by the rehabilitation counselor documented numerous deli clerk positions were available in appellant's commuting area and that the wage of the position was $220.00 per week for a deli clerk. The rehabilitation counselor noted that there were deli clerk positions available and as appellant had some secondary level education, he could comprehend demonstration of job duties within the 30-day vocational preparation requirement.

In a November 3, 2000 report, Dr. Tierney stated that he agreed with the findings expressed in Dr. Iverson's second opinion report. He related that the work restrictions were related to degenerative changes due to appellant's osteoarthritis and probably were contributed to by his obesity and were not directly related to the work injury of August 1994. Dr. Tierney advised that appellant was at maximum medical improvement and probably would have continuing disability of the knee, some of which had been accelerated by the work injury of August 1994. In a work capacity evaluation form dated October 27, 2000, Dr. Tierney stated that appellant was able to work 8 hours a day with a 4- to 6-hour restriction on walking and standing, a 1-hour restriction on squatting, kneeling and pushing, pulling and lifting no more than 50 pounds.

Vocational rehabilitation efforts were closed in March 2001. In an August 2, 2001 report, the vocational rehabilitation specialist noted that the vocational rehabilitation was unsuccessful as appellant had self-limited his job search and did not obtain employment. Dr. Tierney's October 27, 2000 work restriction report was noted to allow for full-time medium exertion-level work, lifting no more than 50 pounds. The vocational rehabilitation specialist informed the Office that appellant had participated in vocational efforts and positions in the noted areas of deli clerk and cashier were found vocationally and medically suitable and available in appellant's area. Both positions offered a weekly salary of $220.00.[1]

[1] The vocational rehabilitation specialist noted that the position of bus driver should not be used for a wage-earning capacity consideration as the work was not consistently available and driver job openings were not readily available.

On October 15, 2002 the Office proposed to reduce appellant's compensation on the grounds that the position of deli clerk reasonably represented his wage-earning capacity. He was provided 30 days in which to submit any evidence or argument disagreeing with the Office's proposal to reduce his compensation benefits. The record is devoid of any response from appellant.

By decision dated November 18, 2002, the Office reduced appellant's compensation on the grounds that the position of deli clerk represented appellant's wage-earning capacity. The beginning date of the new pay rate was noted as being December 1, 2002.

The Board finds that the Office properly determined that the position of a deli clerk represented appellant's wage-earning capacity.

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[2] An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.[3]

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case 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 the employee's capabilities with regard to his or her 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.[4] In determining the availability of suitable employment, 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.[5]

The physical requirements of the constructed position of deli clerk are medium in nature[6] and include frequent reaching, handling and fingering with near acuity. On September 28, 2000 Dr. Iverson, an Office referral physician, opined that appellant could work eight hours a day with a one-hour restriction imposed on squatting, kneeling and climbing. On October 27, 2000 Dr. Tierney, appellant's treating physician, agreed that appellant could work 8 hours a day with a 4- to 6-hour restriction on walking and standing, a 1-hour restriction on squatting and kneeling and a weight restriction of no more than 50 pounds for pushing, pulling and lifting. Appellant

[2] *James B. Christenson*, 47 ECAB 775, 778 (1996); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

[3] 20 C.F.R. §§ 10.402, 10.403 (1999); *see Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

[4] *Albert C. Shadrick*, 5 ECAB 376 (1953).

[5] *David Smith*, 34 ECAB 409, 411 (1982).

[6] A medium nature job is described as being able to exert a force of 20 to 50 pounds, occasionally, 10 to 25 pounds frequently, and up to 10 pounds constantly.

has not challenged the selected position on the basis that it is not medically suitable and the evidence of record establishes that appellant is physically capable of performing the selected position.

Additionally, the evidence further reflects that appellant is vocationally capable of performing the duties of a deli clerk as the rehabilitation counselor advised that appellant had transferable skills and would be able to meet the 30-day vocational preparation requirement. Appellant has not presented any challenges regarding the suitability of the selected deli worker position. The Office's procedure manual provides that "[b]ecause the [rehabilitation specialist] is an expert in the field of vocational rehabilitation, the [claims examiner] may rely on his or her opinion as to whether the job is reasonably available and vocationally suitable."[7] The fact that appellant is unable to secure employment as a deli worker does not establish that the constructed position is not vocationally suitable.[8] Accordingly, the Office met its burden of proof to justify termination or modification of compensation benefits.[9]

The decision of the Office of Workers' Compensation Programs dated November 18, 2002 is hereby affirmed.

Dated, Washington, DC
December 5, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(b)(2) (December 1993).

[8] *See Phillip S. Deering*, 47 ECAB 695 (1996).

[9] *James B. Christenson*, *supra* note 2.