U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RAYNALDO SOLIZ and DEPARTMENT OF THE NAVY, NAVAL UNDERSEA WARFARE CENTER, Keyport, WA

Docket No. 02-2301; Submitted on the Record;
Issued February 25, 2003

DECISION and ORDER

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

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

The Office accepted that on October 1, 1994 appellant, then a 42-year-old ordnance equipment mechanic, sustained right shoulder impingement syndrome, for which he underwent a right shoulder acromioplasty on October 9, 1996. Thereafter appellant was totally disabled and received appropriate compensation benefits.

In a report dated November 20, 1996, appellant's treating physician, Dr. Charles A. Peterson, a Board-certified orthopedic surgeon, indicated that appellant could return to light work. Appellant elected to receive a monetary incentive and to begin his retirement effective January 10, 1997. At the time of his retirement, Dr. Peterson's physician recommended additional surgery to the right shoulder. On February 19, 1997 appellant underwent another right shoulder arthroscopy for a tear of the supraspinatus tendon. He thereafter began improvement.

In December 1998 appellant was referred for vocational rehabilitation services. Following an initial vocational interview and several follow-up visits, and after it was determined that the employing establishment was unable to reemploy appellant in a light-duty position, the rehabilitation specialist recommended a program to enable appellant to obtain a one-year certificate in construction management and to qualify for the positions of project director, estimator or progress clerk. On May 26, 1999 appellant approved the rehabilitation plan.

On February 22, 1999 appellant underwent a performance-based physical capacity evaluation (PBPCE) to update his physical restrictions and he was determined to be capable of a medium level of physical demands.[1] The rehabilitation counselor thereafter noted that the

[1] A psychological evaluation with vocational interest and aptitude testing was also performed on March 16, 1999.

selected positions of construction superintendent, assistant construction superintendent, and progress clerk were within the sedentary to light level of physical demands, which was lower than the physical demands reported in the PBPCE.

On March 26, 1999 the Office requested that Dr. Peterson provide an opinion as to whether he agreed with the findings of the PBPCE that appellant was capable of medium strength work eight hours per day. Dr. Peterson replied on March 31, 1999 that he agreed with the evaluation and findings and that appellant could perform medium strength work eight hours per day. On May 11, 1999 he specifically approved of the position descriptions for estimator and progress clerk. On May 20, 1999 Dr. Peterson approved of the position description of project director but commented "not [illegible] for one and a half years."

On July 24, 2000 he received a certificate in construction management from the University of Washington.[2]

Thereafter appellant was provided an assisted reemployment placement which continued until February 28, 2001. A deferred position was obtained for appellant as a project engineer, and his rehabilitation case was closed.

The rehabilitation specialist then obtained the Department of Labor's *Dictionary of Occupational Titles* (DOT) description for the position of program manager, noted that it was sedentary, without extreme exposures and had a specific vocational preparation of 8, which was 4 to 10 years. The rehabilitation specialist noted that appellant met the specific vocational preparation with his nine-month certificate in construction management from the University of Washington, the two years of academic work he performed when obtaining his AA degree at Olympic College, and the eight years of experience in commercial and residential construction, apart from his employing establishment experience.

The rehabilitation specialist referred to a Labor Market Survey report and individual employer contacts and determined that the position of program manager was being performed in sufficient numbers so as to be considered to be reasonably available in appellant's commuting area.

On May 18, 2001 the Office issued appellant a notice of proposed reduction of compensation on the grounds that he was only partially disabled due to his accepted work-related injury and that the position of a program manager reasonably represented his wage-earning capacity. The Office advised that appellant was physically capable of the sedentary position and vocationally qualified for the duties and that the job was being performed in sufficient numbers in appellant's commuting area so as to be considered reasonably available. Appellant was advised that he had 30 days within which to respond if he disagreed with the proposed action and to submit evidence establishing that he was either not partially disabled or that the position of program manager did not represent his wage-earning capacity.

[2] Appellant's resume stated that his objective was a position in the construction management field and it listed his education and multiple skills, work history which included construction supervision and management, and additional qualifications related to the construction trade.

By response dated June 19, 2001, appellant claimed that he could not find a job as a program manager in the construction industry. He claimed that was an incorrect job title,[3] that he did not meet the requirements for the position of a program manager and that his injury was evaluated on old medical records dating back to February 22, 1999.

By decision dated July 22, 2001, the Office finalized the reduction of appellant's compensation finding that the position of program manager reasonably represented his wage-earning capacity. The Office found that the terms construction manager, project director, and project manager, were alternate titles, that, considering appellant's resume, his construction manager certificate, his AA degree and his eight years in commercial and residential construction and construction management, they more than met the vocational requirements of the position, and that he was physically capable of the sedentary position based on Dr. Peterson's opinion and the PBPCE findings on his ability to perform medium level work. The Office also noted that there was no medical evidence of record to contradict the findings of the PBPCE. The Office further noted that the Labor Market Survey revealed that there were 336 openings per year expected to occur within appellant's commuting distance which averaged out to 6.46 openings per week available.

Appellant disagreed with this decision and requested an oral hearing before an Office hearing representative. The hearing was held on March 29, 2002 at which appellant testified. Appellant argued that the record contained no current medical evidence regarding his work activity restrictions after February 22, 1999.

By letter dated April 29, 2002, the employing establishment argued that FECA Bulletin No. 91-28, issued September 19, 1991, which provided that "regardless of age," medical evidence which initially established an employee's partial disability may be used for loss of wage-earning capacity purposes unless more recent medical evidence has been submitted establishing a worsening or change in the employee's accepted condition, should control in this case. The employing establishment noted that the PBPCE report, which reflected that appellant could work at a medium capacity, was reviewed by Dr. Peterson on May 4, 1999 and found to be acceptable, and that appellant had not sought any further medical treatment since that time, which indicated that his accepted work injury was fixed and stable. It further noted that Dr. Peterson's approval of the offered position was received on May 21, 1999, and that, although appellant stated that he knew what a construction project manager was, and admitted that was what he was being trained for, his conclusion that he did not have the qualifications for the position had no basis in fact.

By decision dated July 2, 2002, the hearing representative affirmed the July 22, 2001 Office determination finding that the Office followed proper procedures in determining that the position of program manager represented appellant's wage-earning capacity.

The Board finds that the Office properly determined that the constructed position of program manager reasonably represented appellant's wage-earning capacity.

[3] Appellant alleged that the correct title was "project manager."

Once the Office has made a determination that an employee is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction of benefits.[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 his 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 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.[5]

After the Office makes a medical determination of partial disability and of special work restrictions, it may refer the employee's case to an Office wage-earning capacity specialist for selection of a position listed in the *Dictionary of Occupational Titles* or otherwise available in the open 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, determination of wage rate and availability in the open labor market should be made through contact with the state employment services or other applicable services. 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.[6]

Further, the Office is not obligated to actually secure a job for an appellant. The Board has held that a lack of current job openings does not equate to a finding that the position was not performed in sufficient numbers to be considered reasonably available. The Office must only provide evidence that the selected position is performed in sufficient numbers in the geographical area to be reasonably available.[7]

In the present case, the medical evidence of record establishes that appellant is only partially disabled and can perform medium level work. Although the PBPCE was conducted on February 22, 1999, and hence was two years old at the time of the wage-earning capacity determination, appellant would have only improved further since that time following the most recent 1997 surgery, and therefore use of that evaluation is conservative as to his work activity limitations. Moreover, there has been no additional medical evidence submitted to the record which establishes any change or worsening of appellant's injury-related condition, such that the February 22, 1999 physical capacity evaluation constitutes the weight of the medical evidence of record on the issue of appellant's work activity limitations. Additionally, the evaluation determined that appellant was capable of medium level work, but the position chosen for his wage-earning capacity determination required only sedentary to light level work, which is well

[4] *William H. Woods*, 51 ECAB 619 (2000); *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

[5] *Samuel J. Chavez*, 44 ECAB 431 (1993).

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

[7] *See Alfred R. Hafer*, 46 ECAB 553 (1995).

within the limitations identified during the comprehensive physical capacity evaluation. Therefore, the position of program manager is suitable to appellant's partially disabled physical condition.

The evidence of record also establishes that appellant is vocationally qualified for the position of program manager as described by the *Dictionary of Occupational Titles.* According to the *Dictionary of Occupational Titles* job description, the vocational qualifications for the chosen position required 4 to 10 years of preparation for the position. The rehabilitation specialist noted, with reference to appellant's extensive resume, that he had obtained an AA degree at Olympic College, and a certificate of successful completion of a nine-month program for construction management at the University of Washington and that he had eight years of actual experience in residential and commercial construction, including construction management and inspection duties. The rehabilitation specialist found that these qualifications were more than satisfactory in meeting the vocational requirement for the position of program manager and that therefore the position was suitable to appellant's vocational background and preparation.

The evidence of record further establishes that the position of construction program manager was performed in sufficient numbers within appellant's general commuting area so as to be considered to be reasonably available. Labor Market Survey results documented that there were approximately 336 openings per year expected to occur within appellant's commuting area, which averaged out to 6.46 openings per week. Further, employer contact demonstrated that this position was being performed regularly in multiple construction companies in appellant's local area. The Office does not have to actually secure a job for appellant, but rather, it must only provide evidence that the selected position was being performed in sufficient numbers in appellant's geographical area to be considered reasonably available.[8] Accordingly, the Office properly determined that the position of program manager was reasonably available to appellant.

Appellant argues that the term "program manager" is improper in the construction trade, however, it is a term used by the *Dictionary of Occupational Titles,* and is noted to be synonymous with the terms project manager, project director and construction manager. Therefore, the Office's use of the term in not incorrect.

As the Office has demonstrated that the position of program manager is within appellant's demonstrated physical capabilities, is appropriate to his vocational and academic qualifications, and is being performed in sufficient numbers within appellant's geographical area, the Office met its burden of proof to establish that the constructed position of program manager represents appellant's wage-earning capacity, and to reduce appellant's compensation to reflect his wage-earning capacity.

[8] *See supra* note 7.

Accordingly, the decision of the Office of Workers' Compensation Programs dated July 2, 2002 is hereby affirmed.

Dated, Washington, DC
February 25, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member