U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HARRY J. DAY and TENNESSEE VALLEY AUTHORITY, CUMBERLAND FOSSIL PLANT, Cumberland City, TN

Docket No. 02-1720; Submitted on the Record;
Issued January 28, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO, DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly determined that the position of sales attendant represented appellant's wage-earning capacity, effective June 17, 2001, the date it reduced his compensation benefits.

On October 17, 1986 appellant, then a 42-year-old machinist foreman, sustained an employment-related lumbar strain and subluxation at L4-5. He missed intermittent periods but did not stop work and sustained a recurrence of disability on January 22, 1990, for which he underwent surgery. Appellant returned to four hours per day of limited duty on December 18, 1990. On December 26, 1990 he sustained an employment-related neck sprain.[1] On February 5, 1991 appellant sustained a recurrence of disability and has not worked since that time.

The Office continued to develop appellant's claim and, by letter dated February 5, 1998, referred him to Dr. John C. McInnis, a Board-certified orthopedic surgeon, for a second opinion evaluation and in August 1998 referred him for vocational rehabilitation. On July 22, 1999 Gregory Price, a rehabilitation counselor, completed a labor market survey and determined that the positions of sales attendant and security guard fit appellant's capabilities. Finding that a conflict in the medical evidence existed between the opinions of Dr. McInnis and Dr. Rex Arendall, appellant's treating Board-certified neurosurgeon, regarding appellant's ability to work, on January 21, 2000 the Office referred him to Dr. Jan M. Gorzny, a Board-certified orthopedic surgeon, for an independent medical evaluation.[2]

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[1] The December 26, 1990 injury was adjudicated by the Office under file number 06-0506657 and was closed on March 7, 1995. On January 21, 1999 appellant underwent cervical spine surgery for a nonwork-related cervical condition. The instant case was adjudicated by the Office under file number 06-0406128.

[2] Drs. McInnis and Gorzny were furnished with the medical record, a set of questions and a statement of accepted facts.

On April 12, 2000 the Office advised appellant that it proposed to reduce his compensation based on the opinion of Dr. Gorzny who advised that appellant could work as a sales attendant for 8 hours per day with a 20-pound lifting restriction and no climbing. The Office determined that the position of sales attendant and the corresponding wages represented appellant's wage-earning capacity and found that the position was available in his commuting area. The Office advised appellant that, if he disagreed with its proposed action, he should submit contrary evidence or argument with 30 days.

In a letter dated April 17, 2000, appellant disagreed with the proposed reduction in compensation and submitted an April 24, 2000 report from Dr. Arendall, who disagreed with Dr. Gorzny's opinion. By decision dated May 19, 2000, the Office finalized the reduction of appellant's compensation, effective May 21, 2000, based on his capacity to earn wages as a sales attendant. On May 24, 2000 appellant requested a hearing. In a decision dated October 11, 2000, an Office hearing representative set aside the prior decision and remanded the case for further development. On remand the Office was instructed to revise the statement of accepted facts to include all appellant's accepted conditions and submit it to Dr. Gorzny and inquire whether appellant had any disability due to the employment-related conditions and to provide appellant's work tolerance limitations, considering all medical conditions.

Following remand, the Office prepared an updated statement of accepted facts and, by letter dated December 5, 2000, submitted it, along with a set of questions, to Dr. Gorzny requesting a supplemental report. In a report dated March 21, 2001, Dr. Gorzny advised that appellant had no disability from his employment injuries and that he could perform the sales attendant position. In a work capacity evaluation dated March 23, 2001, he advised that appellant could work 8 hours per day with a 20-pound weight restriction and placed no restrictions on his ability to operate a motor vehicle.

On April 9, 2001 Mr. Price provided an updated labor market survey regarding the position of sales attendant. On April 30, 2001 the Office advised appellant that it proposed to reduce his compensation based on Dr. Gorzny's reports. The Office again determined that the position of sales attendant and the corresponding wages represented appellant's wage-earning capacity and found that the position was available in appellant's commuting area. The Office advised appellant that, if he disagreed with its proposed action, he should submit contrary evidence or argument with 30 days.

Appellant again disagreed with the proposed reduction and submitted a December 26, 2000 attending physician's report in which Dr. Arendall advised that appellant remained totally disabled. By decision dated June 4, 2001, the Office finalized the reduction of appellant's compensation, effective June 17, 2001, based on his capacity to earn wages as a sales attendant. On June 14 and 15 appellant, through congressional representation, requested a hearing.

At the hearing, held on February 25, 2002, appellant testified regarding his condition, stating that he could not stand or sit eight hours a day and could not drive for any distance. Appellant also submitted a March 16, 2000 report of lumbosacral computerized tomography (CT) scan and medical reports from Dr. Arendall and Dr. John W. Culclasure, a Board-certified anesthesiologist. In a decision dated May 24, 2002, an Office hearing representative affirmed the prior decision. The instant appeal follows.

The Board finds that the Office properly reduced appellant's compensation benefits.

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction in such benefits.[3] Under section 8115(a) of the Federal Employees' Compensation Act,[4] wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity or if the employee has no actual earnings, wage-earning capacity is determined with due regard to the nature of injury, degree of physical impairment, usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect the employee's wage-earning capacity in his or her disabled condition.[5]

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 specialist for selection of a position, listed in the Department of Labor's *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, a determination of wage rate and availability in the labor market should be made through contact with the state employment service or other applicable service.[6] Finally, by applying the principles set forth in *Albert C. Shadrick*, the employee's loss of wage-earning capacity can be ascertained.[7]

In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[8] Here the Office determined that a conflict of medical opinion existed between appellant's treating physician Dr. Arendall and Dr. McInnis who provided a second opinion evaluation for the Office. The Office then referred appellant, along with the medical record, a statement of accepted facts and a list of questions, to Dr. Gorzny to resolve the conflict. He specifically advised that appellant could perform the selected position of sales attendant and advised that he had no restrictions on driving.

While appellant submitted a March 16, 2000 CT scan that demonstrated a worsening of his L5-S1 disc condition which was not employment related,[9] the Office, however, need not consider this worsening condition in determining appellant's wage-earning capacity, as it arose

[3] *Garry Don Young*, 45 ECAB 621 (1994).

[4] 5 U.S.C. §§ 8101-8193.

[5] *See Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); 5 U.S.C. § 8115(a).

[6] *See Dennis D. Owen*, 44 ECAB 475 (1993).

[7] 5 ECAB 376 (1953); *see* 20 C.F.R. § 10.403 (1999).

[8] *See Kathryn Haggerty*, 45 ECAB 383 (1994); *Edward E. Wright*, 43 ECAB 702 (1992).

[9] *Compare* March 16, 2000 CT scan with lumbar myelography performed November 11, 1998.

subsequent to the work-related injury.[10] In a March 27, 2000 report, Dr. Arendall indicated that he reviewed the discogram. In a report dated April 24, 2000, he merely indicated his disagreement with Dr. Gorzny's conclusion that appellant could work and in an attending physician's report dated December 26, 2000, he simply indicated that appellant continued to be disabled. Furthermore, the record indicates that Dr. Arendall last examined appellant on October 8, 1999. Dr. Culclasure's reports dated May 31, August 23 and November 15, 2001 and February 5, 2002 provide diagnoses and report appellant's treatment program but do not discuss his ability to work. Thus, there is no indication that the selected position of sales attendant is outside the restrictions set forth by Dr. Gorzny. The Board, therefore, finds that the Office properly assessed appellant's physical impairment in determining that the position of sales attendant represented his wage-earning capacity.

As noted above, the selected position must not only be medically suitable but must also be available in appellant's commuting area. The rehabilitation counselor in this case indicated that the recommended position was reasonably available and that the position paid $240.00 per week in the open market. Appellant's compensation was accordingly reduced to reflect such wage-earning capacity under the principles set forth in *Shadrick*.[11]

The decision of the Office of Workers' Compensation Programs dated May 24, 2002 is hereby affirmed.

Dated, Washington, DC
January 28, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

[10] *Dorothy Jett*, 52 ECAB ____ (Docket No. 99-297, issued January 29, 2001).

[11] *Supra* note 7.