U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES L. HUTCHISON and DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Trona, CA

Docket No. 03-284; Submitted on the Record;
Issued July 10, 2003

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that the selected position of buffing machine tender/buffing machine operator fairly and reasonably represented appellant's wage-earning capacity; and (2) whether the Office properly denied appellant's request for reconsideration.

On December 3, 1997 appellant, then a 53-year-old engineering equipment operator, fell in the performance of duty and injured his lower back. The Office accepted appellant's claim for permanent aggravation of preexisting degenerative disc disease of the lumbosacral spine at L5-S1. Appellant ceased work on December 18, 1997. The Office paid appropriate wage-loss compensation and placed appellant on the periodic compensation rolls.

In a report dated July 2, 1998, appellant's treating physician, Dr. Kenneth P. Finn, a Board-certified physiatrist, released appellant to return to full-time, light-duty work. Dr. Finn stated that appellant had reached maximum medical improvement and would not be able to resume his full duties. He recommended that appellant seek employment in a light-work capacity with no lifting more than 20 pounds on an occasional basis and no extended periods of sitting, standing or walking, with alternating of those activities on an as needed basis. Dr. Finn also submitted a work capacity evaluation (Form OWCP-5c) noting a two-hour limitation on most activities with the exception of kneeling, squatting and climbing. He precluded all climbing and squatting and limited appellant's kneeling to one hour. Additionally, Dr. Finn imposed a 50-pound restriction with respect to pushing and pulling.

On July 15, 1998 the Office referred appellant for vocational rehabilitation because the employing establishment was unable to provide light-duty work. On October 8, 1998 appellant signed a rehabilitation plan for training as a computer numerical control (CNC) machinist, which the Office approved on December 16, 1998. The plan included participation in 13 courses at Pikes Peak Community College for a total of 39 credit hours, with the expectation that appellant

would obtain certification as a CNC machinist.[1] In January 1999, appellant began attending classes on a full-time basis. By May 2000 appellant had successfully completed 10 of the 12 courses he enrolled in over the prior year and a half. Appellant, however, did not obtain certification as a CNC machinist.[2]

On May 11, 2000 the Office advised appellant that it was aware he had begun to look for employment as a machine operator and that the Office would provide appellant with 90 days of job placement assistance.

As appellant did not obtain certification as a CNC machinist, the rehabilitation counselor developed a second rehabilitation plan dated June 7, 2000. This latter plan took into account the 30 credit hours of machinist's training appellant received. Two of the positions identified were buffing machine tender and buffing machine operator. The Office rehabilitation specialist approved the revised plan and advised that placement efforts would be discontinued as appellant could not be reached by telephone and failed to properly respond to the rehabilitation counselor's recent correspondence.

In a report dated October 2, 2000, Dr. Finn noted that appellant had recently sought consultation regarding the need for surgical intervention, but that no definitive determination had been reached. He recommended additional testing, including an updated magnetic resonance imaging (MRI) scan due to a previously identified increased disc herniation at L5-S1. With respect to appellant's work restrictions, Dr. Finn stated that appellant could safely perform sedentary work as long as he could alternate sitting, standing and walking on an as-needed basis. He further noted that appellant should not bend or twist repetitively, and should be limited to four hours a day maximum.

On November 13, 2000 Dr. Michael W. Brown, a Board-certified neurosurgeon, recommended that appellant undergo decompression lumbar laminectomy at L3-4, L4-5 and L5-S1. He noted that a recent electromyogram (EMG) showed bilaterally absent age reflexes consistent with bilateral S1 radiculopathy. Additionally, appellant's October 20, 2000 MRI scan revealed evidence of stenosis at L3-4, L4-5 and L5-S1 and what appeared to be a disc herniation at L5-S1 on the right. Dr. Orderia F. Mitchell, a Board-certified orthopedic surgeon who examined appellant in consultation with Drs. Finn and Brown, recommended that appellant undergo lumbar decompression and fusion with possible instrumentation. In a report dated December 13, 2000, Dr. Finn expressed his agreement with surgical intervention as recommended by Drs. Mitchell and Brown.

The Office referred appellant for a second opinion evaluation to ascertain whether the recommend surgery was appropriate. In a report dated March 6, 2001, Dr. Richard D. Talbott, a Board-certified orthopedic surgeon and Office referral physician, advised that appellant was a

[1] The rehabilitation program was expected to cover a 21-month period beginning January 18, 1999 and extending through October 31, 2000.

[2] Appellant had not enrolled in seven of the courses originally identified as prerequisites to obtaining certification as a CNC machinist. And two courses, which appellant received failing grades in, were not required for purposes of obtaining certification as a CNC machinist.

poor candidate for surgery because of his chronic smoking habit and marked obesity. Dr. Talbott also stated that he believed there was some symptom magnification. While acknowledging that the proposed surgery was causally related to appellant's December 3, 1997 employment injury, Dr. Talbott explained that the extent of surgery proposed was doomed to fail because of deconditioning and appellant's weight, which was reported to be 270 pounds. Absent the recommended surgery, he stated that appellant "probably could perform sedentary to light work now." Dr. Talbott noted pulling, pushing and lifting restrictions of less than 20 pounds.[3]

On March 13, 2001 the Office advised Dr. Mitchell that it would not authorize payment for the proposed lumbar decompression and fusion. The Office provided Dr. Mitchell with a copy of Dr. Talbott's report.

By decision dated June 27, 2001, the Office formally denied authorization for back surgery.[4] That same day the Office issued a notice of proposed reduction of compensation. The notice advised appellant that the medical and factual evidence established that he had the capacity to earn weekly wages of $418.00 as a buffing machine tender or buffing machine operator. The Office further noted that the work restrictions initially imposed by Dr. Finn on July 2, 1998 remained in effect, as confirmed by Dr. Talbott's recent examination on February 28, 2001.

In a decision dated November 7, 2001, the Office determined that the selected position of buffing machine tender/buffing machine operator with earnings of $418.00 per week fairly and reasonably represented appellant's wage-earning capacity. Accordingly, the Office reduced appellant's compensation benefits to reflect his wage-earning capacity as a buffing machine tender/buffing machine operator.

Appellant requested reconsideration on February 1, 2002.[5] By decision dated May 7, 2002, the Office denied appellant's request for reconsideration.

The Board finds that the Office incorrectly determined that the selected position of buffing machine tender/buffing machine operator fairly and reasonably 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.[6] An injured employee who is either unable to return to

[3] In a follow-up report dated April 6, 2001, Dr. Talbott clarified that without surgery appellant was capable of performing sedentary to light work 8 hours per day with restrictions of no pulling, pushing and lifting greater than 20 pounds.

[4] Dr. Mitchell later concurred with Dr. Talbott's assessment noting that appellant was "at high risk due to his weight and tobacco intake." In his July 30, 2001 treatment notes, Dr. Mitchell stated he advised appellant that if he desires to have surgery "it would be to his benefit to undergo weight reduction, decrease his smoking and undergo a conditioning program."

[5] Appellant's request for reconsideration was incorrectly dated "February 1, 2001" and was received by the Office on March 7, 2002.

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

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.[7]

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 or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent the employee's wage-earning capacity, or if the employee has no actual wages, the wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, the employee's usual employment, age, qualifications for other employment, the availability of suitable employment, and other factors and circumstances which may affect his wage-earning capacity in his or her disabled condition.[8]

The Office must initially determine appellant's medical condition and work restrictions before selecting an appropriate position that reflects appellant's vocational wage-earning capacity. The Board has stated that the medical evidence upon which the Office relies must provide a detailed description of appellant's condition.[9] Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.[10]

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* (DOT), 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. 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.[11]

As previously noted, Dr. Finn initially advised that appellant could return to full-time, light-duty work with restrictions of no lifting more than 20 pounds on an occasional basis and no extended periods of sitting, standing or walking, with alternating of those activities on an as needed basis. His July 2, 1998 work capacity evaluation (Form OWCP-5c) noted a two-hour limitation on most activities with the exception of kneeling, squatting and climbing. Dr. Finn precluded all climbing and squatting and he limited appellant's kneeling to one hour. He also imposed a 50-pound restriction with respect to pushing and pulling.

[7] 20 C.F.R. §§ 10.402, 10.403 (1999); *see Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

[8] 5 U.S.C. § 8115(a); *see Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

[9] *Samuel J. Russo*, 28 ECAB 43 (1976).

[10] *Carl C. Green, Jr.*, 47 ECAB 737, 746 (1996).

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

In May 2000, Dr. Brown stated that appellant should not be "involved in any type of strenuous activity or work whatsoever" pending further evaluation by Dr. Mitchell. The doctor also provided a May 17, 2000 note stating that appellant was unable to return to work or attend school until evaluated by Dr. Mitchell.

On October 2, 2000 Dr. Finn imposed new restrictions. He stated that appellant could safely perform sedentary work as long as he could alternate sitting, standing and walking on an as-needed basis. Dr. Finn further noted that appellant should not bend or twist repetitively, and should be limited to four hours a day maximum.

Dr. Talbott, the Office referral physician, stated that without surgery appellant was capable of performing sedentary to light work 8 hours per day with restrictions of no pulling, pushing and lifting greater than 20 pounds.

In finding that appellant was physically capable of performing the duties of a buffing machine tender/buffing machine operator the Office relied on Dr. Finn's July 2, 1998 opinion in conjunction with Dr. Talbott's more recent February 28, 2001 evaluation. The buffing machine tender and buffing machine operator positions identified by the Office both fall into the category of light-duty work.[12] However, neither position description specifically identifies the amount of sitting, standing or walking required by the job. Although Dr. Talbott did not identify any limitations with respect to appellant's ability to sit, stand or walk, Dr. Finn stated in his July 2, 1998 report that appellant's limitations included, among other things, no extended periods of sitting, standing or walking, with alternating of those activities on an as needed basis.[13]

The record does not affirmatively establish that either selected position is within appellant's work restrictions. The Board notes that no physician of record has reviewed the selected positions and offered an opinion on whether either position is medically suitable. Additionally, Dr. Finn later changed his opinion regarding the type of work and the number of hours appellant was capable of working per day. While Dr. Finn's latter report may lack adequate explanation, it nonetheless reflects a change in the doctor's opinion from his July 2, 1998 work assessment. At a minimum, it would have been prudent for the Office to obtain clarification from appellant's treating physician regarding his ability to perform either of the selected positions.

[12] The designated strength level of both positions is "light," with occasional lifting of 20 pounds or less and frequent lifting of 10 pounds or less. Neither position requires any climbing, balancing, kneeling, crouching or crawling. Whereas the buffing machine operator position requires occasional stooping of up to 1/3 of the time, the buffing machine tender position does not require any stooping. The reaching and handling requirements for the buffing machine operator position are identified as frequent, which entails 1/3 to 2/3 of the time, and those same duties under the buffing machine tender position are identified as constant, which is defined as 2/3 or more of the time. The fingering requirements for the buffing machine tender and buffing machine operator positions are respectively listed as occasional and frequent.

[13] The Office disregarded Dr. Finn's more recent October 20, 2000 assessment that appellant was only capable of performing part-time, sedentary work. While limiting appellant to part-time, sedentary work, Dr. Finn maintained his earlier position that appellant should be permitted to alternate sitting, standing and walking on an as-needed basis.

Additionally, the DOT position descriptions for both buffing machine tender and buffing machine operator do not offer any specific information concerning the amount of sitting, standing or walking required and whether appellant would be able to alternate such activities on an as needed basis. While some of this information was provided elsewhere in the record, this relevant and pertinent information was not properly reflected in the DOT position descriptions relied upon by the Office.[14] Accordingly, the Office failed to demonstrate that the selected positions are medically suitable. The Office bears the burden to justify modification or termination of benefits and the Board finds that the Office failed to meet its burden in the instant case.[15]

The November 7, 2001 decision of the Office of Workers' Compensation Programs is reversed and the Office's May 7, 2002 decision is set aside.[16]

Dated, Washington, DC
July 10, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[14] While the position descriptions do not specifically address the amount of sitting, standing or walking required by the job, the Office rehabilitation consultant's June 7, 2000 "Updated Essential Elements Report" indicated that his contacts with potential employers in the local labor market revealed that generally the "positions are considered light allowing for minimal lifting, the ability to sit and stand as necessary, and assistance with any lifting if required." This report, however, does not address the amount of walking required by the selected positions.

[15] *James B. Christenson*, *supra* note 6.

[16] In view of the Board's disposition of the case on the merits, the issue of whether the Office properly denied appellant's February 1, 2002 request for reconsideration is rendered moot.