U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EDWARD L. DARRISAW and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Philadelphia, PA

Docket No. 02-2251; Submitted on the Record;
Issued June 17, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation effective August 11, 2002 based on his capacity to earn wages as a computer security specialist.

The Office accepted that appellant, a former housekeeping aid, born September 3, 1967, sustained an injury on November 1, 1991 when he fell off the end of a loading dock in the performance of duty. The claim was accepted for contusions to both knees and chondromalacia of the left knee and the Office authorized arthroscopic surgery. Appellant received continuation of pay from November 19, 1991 through January 2, 1992 and was placed on the periodic rolls beginning January 3, 1992. Appellant stopped work following the injury. His position was terminated effective March 6, 2002.

Dr. Randall Smith, a Board-certified orthopedic surgeon, treated appellant for his knee condition. In a work status report dated May 9, 2000, Dr. Smith determined that appellant was no longer totally disabled for work due to the effects of his November 1, 1991 employment injury and could work for eight hours per day. He set forth work-tolerance limitations, indicating that appellant could work 1-hour maximum of standing, walking or operating a motor vehicle and could perform activities of pushing, pulling or lifting no more than 15 pounds. In a report dated June 6, 2000, Dr. Smith indicated that if certain accommodations were made for weather and his activity was restricted as outlined above, he would have the best opportunity for a successful return to regular work.

Appellant was approved for vocational rehabilitation services following his release to work. Rosemarie Devlin, the rehabilitation counselor, initiated plan development for appellant and learned that the employing establishment considered offering him a temporary position as a file clerk. In a July 10, 2000 report, Ms. Devlin indicated that if a job offer was not forthcoming, she would consider the possibility of retraining appellant in the field of network administration/engineering in either an associate degree or a certificate program in the computer technology field. The rehabilitation counselor noted that appellant received an Associate Degree

in Business Administration in 1987, at the Thompson Institute following graduation from high school. Ms. Devlin expressed some concern with retraining, noting that a potential retraining program in network administration/engineering might be inappropriate because appellant's business degree was not current, that he had not used such training in the recent past and that he had received low vocational test scores. The record reflects that full testing and review of appellant's past education and experience was done while previously in rehabilitation beginning June 1992. Vocational testing results indicated that appellant received a low spelling score and a low arithmetic score, found comparable to a 5th grade level. Ms. Devlin noted that retraining appellant in network administration/engineering would only be recommended if the position by the employing establishment was not offered.

In a November 11, 2000 report, Ms. Devlin indicated that the employing establishment was unable to offer appellant a limited duty position. The rehabilitation counselor indicated that she would prepare an individualized rehabilitation placement plan (IRPP) for placement in a realistic job objective given appellant's lack of work experience over the prior 10 years, the remoteness of appellant's associate degree, his low test results and the severe limitation to sedentary work activity. Ms. Devlin selected three job categories for appellant within his qualifications including telephone solicitor, receptionist and service clerk.

In an April 12, 2001 report, Don Millin, another rehabilitation consultant, reported that placement efforts had been unsuccessful and recommended that appellant enroll in a diploma program at CHI Institute in Computer Networking Technology for retraining. Mr. Millin indicated that although appellant possessed an Associates Degree in Business Administration, he essentially never used it vocationally and given his lack of computer skills, lack of work experience and sedentary work restrictions, success in rehabilitation efforts would be unlikely without a new direction. Mr. Millin completed a labor market survey documenting the availability of suitable positions, for which the diploma program would prepare appellant and obtained Dr. Smith's signature on two job descriptions for a user support analyst and computer security specialist dated April 11, 2001. The rehabilitation counselor also discussed appellant's earlier vocational testing performed in 1992 and stated:

> "[Appellant] had average ability to perform fine manipulations and that scores in verbal reasoning and numerical reasoning would suggest suitability for management or administrative type positions. Test results did seem to indicate low scores in spelling and borderline scores in arithmetic, but the spelling score at the 37th percentile is actually within the average range. A subsequent numerical ability test I personally administered to [appellant] (Career Ability Placement Survey-CAPS) produced results within the average range (32nd percentile)."

Mr. Millin concluded that the diploma study program would be appropriate for appellant.

Authorization was given for appellant to complete a nine-month diploma program in computer networking at CHI Institute from April 23, 2001 to February 1, 2002. Appellant successfully completed the program in network administration with perfect attendance and a grade point average of 3.57 on a 4.0 scale. On January 21, 2002 appellant signed the IRPP and agreed to cooperate with vocational placement for employment in the positions of user support analyst or computer security specialist. Mr. Millin, conducted new placement activities and

provided counseling guidance from January 21 through March 22, 2002, in order to secure employment for appellant as noted above.

Dr. Smith updated the record with a report and work status report dated March 15, 2002. The physician noted that appellant could sit for a maximum of six hours, stand and walk for a maximum of two hours and perform one-hour of pushing, pulling and lifting. Dr. Smith noted that appellant was not permitted to squat, kneel or climb while working.

In a final report dated May 19, 2002, Mr. Millin indicated that appellant had failed to fully comply with the IRPP agreement and successful completion of the vocational rehabilitation plan had not occurred by the end of the three-month placement period. Although employment was not obtained, the rehabilitation counselor maintained that the position of computer security specialist was consistent with appellant's physical limitations, that this position was reasonably available and that based on psycho-vocational testing and transferable skills it should make him an appropriate candidate for the position.

On June 17, 2002 the Office issued a notice of proposed termination of compensation on the basis that the constructed position of computer security specialist was both medically and vocationally suitable and represented his wage-earning capacity.

By decision dated August 6, 2002, the Office reduced appellant's compensation effective August 11, 2002 on the basis that the position of computer security specialist represented his wage-earning capacity.

The Board finds that the Office improperly reduced appellant's compensation effective August 11, 2002, based on his capacity to earn wages as a computer security specialist.

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.[1] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[2]

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.[3] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment

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

[2] *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

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

conditions.[4] 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.[5]

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's *Dictionary of Occupational Titles*, or otherwise available in the open labor market, that fits that employee's capabilities with regard to his 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.[6]

In the present case, Dr. Smith, an attending Board-certified orthopedic surgeon, found that appellant was not totally disabled for work and had a capacity to perform work for eight hours a day subject to specified work restrictions. Appellant's vocational rehabilitation counselor determined that he was able to perform the position of computer security specialist and that state employment services showed the position was available in sufficient numbers so as to make it reasonably available within appellant's commuting area. By decision dated August 6, 2002, the Office reduced appellant's compensation effective August 11, 2002 based on his capacity to earn wages as a computer security specialist. The Office determined that appellant was able to work eight hours a day in this position.

The Board notes that the Office established that appellant is physically capable of performing the computer security specialist position for eight hours a day. The position is sedentary in nature and requires lifting up to 10 pounds and the ability to reach, handle and finger. On April 11, 2001 Dr. Smith signed the job description indicating that he had reviewed a description of the duties required by the position and that appellant was able to perform them. In an updated work status report dated March 15, 2002, Dr. Smith restricted appellant to six hours of sitting, two hours of standing and walking and noted that she could perform one-hour of pushing, pulling and lifting with no squatting, kneeling or climbing. These restrictions would be within the job requirements of the computer security specialist position.

The Board finds, however, that the Office did not establish that appellant is vocationally capable of performing the computer security specialist position. The position involves regulation of access to computer files; monitoring of data file use; updating of computer security files; entering commands into computers; and modifying security files. Appellant's vocational rehabilitation counselors indicated that the computer security specialist position required one to two years of specific vocational preparation.

---

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

[5] *Id*.

[6] *See Dennis D. Owen*, 44 ECAB 475, 479-80 (1993); *Wilson L. Clow, Jr.*, 44 ECAB 157, 171-75 (1992); *Albert C. Shadrick*, 5 ECAB 376 (1953).

The record contains several reports from appellant's rehabilitation counselors, which indicate that placement efforts had been unsuccessful in the private sector given appellant's lack of computer skills and work experience in any field for 10 years. The rehabilitation counselors acknowledged that the Associate Degree in Business Administration obtained by appellant in 1987, was not a significant asset to the placement process since he never essentially used it vocationally. Appellant's counselors further noted in reports that appellant underwent vocational testing in 1992, which indicated a low spelling percentile and an especially low (5^{th} grade) arithmetic level and that network engineering might not be a suitable vocational objective for appellant. Because the rehabilitation counselors determined that vocational success was unlikely without further training, a new rehabilitation plan was developed for appellant, which included authorization for appellant to complete a nine-month diploma program in computer networking at the CHI Institute.

The Board notes that although appellant successfully completed the nine-month technical diploma program for computer networking with a 3.57 grade point average and perfect attendance, the computer security specialist position ultimately recommended by appellant's rehabilitation counselors requires at least one to two years of experience. After three months of vocational placement activities, appellant had not been placed in the selected computer security specialist position, although the record reflects that appellant had not fully cooperated with rehabilitation efforts.

The record establishes that appellant had no prior work experience in the field of computer technology before the nine-month diploma program in computer networking. Appellant initially worked as a housekeeping aid for the employing establishment and following his employment injury, appellant was out of work for 10 years. Because appellant had no computer skills prior to the nine-month program or related work experience, and the position of computer security specialist requires one to two years experience, there is insufficient evidence to support a finding that appellant is capable of performing the selected position.

Therefore, the Office did not adequately consider all the proper factors, including appellant's qualifications in determining that the position of computer security specialist represented his wage-earning capacity. The Office improperly reduced appellant's compensation effective August 11, 2002, based on his capacity to earn wages as a computer security specialist.

The August 6, 2002 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, DC
June 17, 2003

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member