U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TAYLOR HODGSON and DEPARTMENT OF THE NAVY, NAVAL AIR FACILITY, El Centro, CA

Docket No. 03-346; Submitted on the Record;
Issued June 25, 2003

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to modify appellant's August 18, 1997 wage-earning capacity determination.

On July 5, 1994 appellant, then a 35-year-old firefighter, filed a notice of traumatic injury (Form CA-1) alleging that on June 28, 1994 when taking fire extinguishers off a rack, he sustained a pain to his lower back. By letter dated August 25, 1994, the Office accepted appellant's claim for lumbosacral strain. The Office later accepted an L4-5 herniated nucleous pulposus/laminectomy and adjustment disorder.

Appellant was treated with physical therapy and epidural steroid injections in July 1994. He remained off work from July 5 to November 8, 1994. Appellant returned to modified duty part time effective November 9, 1994 and full-time modified duty effective November 23, 1994. He received continuation of pay for the period July 5 through August 18, 1994. Appellant received temporary total disability payments for the period from August 19 through November 8, 1994 and compensation for loss of wage-earning capacity from November 9, 1994 through April 27, 1997.

On January 21, 1996 appellant was promoted to the position of fire protection inspector. By decision dated May 15, 1997, the Office found that the position of fire protection inspector fairly and reasonably represented his wage-earning capacity. Appellant was advised that no additional wage-loss compensation was due for the reason that his wages as fire protection inspector exceeded the current wages of his date-of-injury job. Appellant requested reconsideration and by decision dated August 18, 1997, the Office modified its decision to find that appellant was entitled to compensation at the rate of $166.00 every four weeks.

On January 29, 1999 appellant underwent a two-level right-sided decompressive lumbar laminectomy, decompression of L4-5 nerve roots, foraminotomy, facetectomy and discectomy. On May 21, 1999 he resigned from his position as fire inspector, noting that he could no longer perform the duties required for this position.

At the request of the Office, on July 2, 1999, appellant was examined by Dr. Sidney H. Levine, a Board-certified orthopedic surgeon. In his July 15, 1999 report, Dr. Levine discussed appellant's work and medical history, reviewed his medical records and listed his impressions as discogenic disease, L4-5 and status post lumbar laminectomy January 29, 1999. He noted that appellant's discogenic disease was directly caused by his work injury. With regard to disability, Dr. Levine opined:

> "From a prophylactic standpoint, relative to the low back, I would consider the patient's overall level of disability equivalent to a disability precluding between very heavy work and heavy work, contemplating he has lost approximately three-eighths of his preinjury capacity for performing such activities as bending, stooping, lifting, pushing, pulling, climbing or other activities involving comparable physical effort."

Appellant's treating physician, Dr. Larry D. Dodge, a Board-certified orthopedic surgeon, issued a report on September 26, 2001. Dr. Dodge listed his objective findings as: (1) positive-straight leg raising test on the right; (2) documented recurrent disc herniation and stenosis, L4-5; (3) healed surgical scar, lumbar spine, status post January 29, 1999 laminectomy; and (4) electrodiagnostic tests, which disclosed a chronic right S1 radiculopathy. He noted:

> "It is my medical opinion this patient has a disability precluding heavy work, which contemplates the individual has lost approximately one-half of his preinjury capacity for such activities as bending, stooping, lifting, pushing, pulling and climbing or other activities involving comparable physical effort."

In response to questions from the Office, Dr. Dodge in a January 2, 2002 letter, indicated that appellant continued to have back as well as right radicular leg pain. With regard to appellant's level of weakness or atrophy on a scale of zero to five, Dr. Dodge checked "[five]" for "active movement against gravity with full resistance."

On September 29, 1999 appellant filed a notice of recurrence of disability. The Office accepted appellant's claim for recurrence and paid temporary total disability compensation benefits.

By letter dated November 8, 1999, the Office referred appellant to a vocational rehabilitation counselor. The rehabilitation counselor developed a plan for appellant to return to work by enrolling him in vocational training classes. On June 29, 2001 appellant received his certificate of completion for training as a "Computer A+ and Network+ Technician." On February 20, 2002 the rehabilitation counselor performed a labor market survey for the position of electronics mechanic/computer repairer and determined that opportunities for this position were available in sufficient numbers so as to make it reasonably available within appellant's commuting area. He contacted eight employers and two current job openings and one future job opening was identified. The rehabilitation counselor noted a computer repairer's duties including, repairing electronics equipment, testing faulty equipment and applying knowledge of functional operation to diagnose the cause of malfunctions. He described the job as requiring medium strength. The rehabilitation counselor noted the weekly wage was from $300.00 to $520.00. In an April 22, 2002 report, he noted that positions as computer technician, computer

operator and customer service representative were available in sufficient numbers in appellant's area. The rehabilitation counselor further noted that these jobs were within appellant's aptitudes and abilities.

On September 24, 2002 the Office issued a notice of proposed reduction of benefits, as it determined that the constructed position of electronics mechanic/computer repairer represented appellant's wage-earning capacity. The Office noted appellant's participation in vocational rehabilitation qualified him for the selected position. In determining appellant's wage-earning capacity, the Office utilized the figure of $300.00 per week, as it was the amount most advantageous to appellant. By letter dated October 3, 2000, appellant noted that his objection to the proposed reduction of compensation, noting that his injury still caused him great pain and discomfort. By decision dated November 6, 2002, the Office made the proposed reduction of benefits final effective November 3, 2002.

The Board finds that the Office met its burden of proof to modify appellant's August 18, 1997 wage-earning capacity determination.

Once the Office properly determines the wage-earning capacity of an injured employee, modification of such a determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was erroneous. The burden of proof is on the party attempting to show a modification of the wage-earning capacity.[1]

In the instant case, the evidence indicates that appellant has vocationally rehabilitated. He earned a certificate for completion of computer technician classes. A rehabilitation counselor noted that the positions of computer technician, computer operator and customer service representative were available in sufficient numbers in appellant's area and that these jobs were within appellant's aptitudes and abilities. There is no indication that these positions would require appellant to do the heavy work that he was precluded from doing. The rehabilitation counselor noted that the weekly wage for these jobs ranged from $300.00 to $520.00 per week. In computing appellant's wage-earning capacity, the Office used the figure most advantageous to appellant: $300.00.

The Office considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment, age and employment qualifications, in determining that the position of electronics mechanic/computer repairer represented appellant's wage-earning capacity.[2] The Office properly relied on the opinion of the rehabilitation counselor that appellant was vocationally capable of performing the electronics mechanic/computer repairer position and the medical evidence shows that appellant is physically capable of performing the position. The weight of the evidence of record establishes that appellant has the requisite physical ability, skill and expertise to perform the position of electronics mechanic/computer repairer and that such position was reasonably available within the general labor market of appellant's commuting area. For these reasons, the Office properly adjusted

[1] *Peggy L. Baggett*, 50 ECAB 559, 563-64 (1999).

[2] *See Clayton Varner*, 37 ECAB 248, 256 (1985).

appellant's compensation effective November 3, 2002 based on his capacity to earn wages as a electronics mechanic/computer repairer, as the Office successfully showed that appellant had been vocationally rehabilitated.

The decision of the Office of Workers' Compensation Programs dated November 6, 2002 is hereby affirmed.

Dated, Washington, DC
June 25, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member