U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GARY J. GATCH and DEPARMENT OF THE ARMY, NATIONAL GUARD BUREAU, Sacramento, CA

Docket No. 03-447; Submitted on the Record;
Issued June 17, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined appellant's wage-earning capacity based on the constructed position of a small products assembler.

On March 15, 1982 appellant, then a 43-year-old mechanic, filed a claim for lower back pain he experienced on March 12, 1982 when he lifted a portable generator. The Office accepted the conditions of lumbar strain and permanent aggravation of degenerative disc disease at L4-5 and L5-S1. Appellant stopped work on September 8, 1982 and has been in receipt of appropriate compensation. The record reflects that appellant could not return to the employing establishment and he underwent several unsuccessful rehabilitation efforts in 1991, 1996 and 2000. It is further noted that appellant had informed the Office in the years 1997 and 2001 of his intent to relocate to Texas.

On February 24, 1998 the Office referred appellant for an updated medical examination by Dr. Sidney C. Walker, a Board-certified orthopedic surgeon. In a March 24, 1998 report Dr. Walker advised that appellant was capable of working 8 hours a day in a light to sedentary work capacity with restrictions of lifting no more than 20 pounds and allowing for a change in position as necessary. An Office vocational rehabilitation specialist identified the position of small products assembler as vocationally and medically suitable for appellant. A labor market study within appellant's geographic area in Colorado was performed on September 8, 1987.

In April 2001, appellant advised the Office of his intent to move from Colorado to Texas. On May 2, 2001 the Office requested that appellant submit an updated medical report from his treating physician.

In a May 18, 2001 report, Dr. William Robinson Patterson, a Board-certified orthopedic surgeon, examined appellant and diagnosed degenerative disc disease of the lumbar spine at L4-5 and L5-S1. He advised that appellant considered himself to be retired and so did the physician.

Dr. Patterson opined that, if appellant were to work, he would be restricted to work involving lifting less than 20 pounds. A Form OWCP-5c work capacity evaluation was not completed.

On June 18, 2001 the Office reopened appellant's case for vocational rehabilitation services.[1] In a report documenting the service period June 18 though November 15, 2001, the vocational rehabilitation counselor focused on identifying positions in the Montrose, Colorado area and to provide wage-earning capacity information for part-time positions. He advised that the prior labor market research regarding previous identified positions of fishing rod assembler, fishing reel assembler, assembler small products II, *Dictionary of Occupational Titles* (DOT) No. 739.687-030 were considered appropriate and that a labor market survey confirmed that these positions were reasonably available. The counselor noted that the positions conformed with appellant's physical restrictions as described by Drs. Walker and Patterson and that the wage information was accurate. Further, positions such as cashier and hotel desk clerk were also identified as being readily available in appellant's geographic area and consistent with his physical capabilities.

In December 2001, appellant advised the Office that he had relocated to Harper, Texas and requested the transfer of his compensation file. On December 4, 2001 the Office closed the case for vocational rehabilitation services in Colorado.

In a September 3, 2002 report, a vocational rehabilitation specialist noted that appellant's vocational rehabilitation sponsorship was closed and that appellant had asserted that he was totally disabled for work and that he was nearing retirement age and should not have to continue in any sort of employment capacity. The vocational rehabilitation specialist recommended that the constructed position of full-time small products assembler, DOT No. 739.687-030, with a weekly wage of $6.50 per hour for a 20-hour week be used for a wage-earning capacity determination. He advised that the vocational information of record was complete and sufficient to establish that the selected position was suitable and available within appellant's commuting area. He additionally advised that considerations included the nature of injury, the degree of physical impairment, the employee's usual employment, age and qualifications for other employment. Further, the availability and salary of suitable employment has been carefully assessed.

In a letter dated September 6, 2002, the Office advised appellant that it proposed to reduce his compensation as rehabilitation efforts were unsuccessful and he could not return to the employing establishment. It noted that Dr. Walker's report of March 24, 1998 showed that appellant was only partially disabled and able to perform gainful employment. The Office advised that appellant's recent move from Colorado to Texas did not change the requirement that he must seek and obtain suitable employment in his new labor market. On September 30, 2002 appellant responded to the Office indicating that it had overlooked Dr. Patterson's 2001 report.

[1] While several Office memorandums speak to appellant not complying with rehabilitation efforts, an April 25, 2000 memorandum establishes a vocational rehabilitation specialist did not properly comply with the Office's standards.

In an October 16, 2002 decision, the Office reduced appellant's compensation finding that he was capable of performing the constructed position of small products assembler. The Office advised that appellant's reduction in compensation would be effective October 6, 2002.

The Board finds that the Office has not met its burden of proof to justify the reduction of appellant's compensation to reflect his capacity to earn wages in the constructed position of small products assembler.

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[2] After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[3]

Section 8115(a) of the Federal Employees' Compensation Act provides that in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his actual earnings, if his actual earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings of the employee do not fairly and reasonably represent his wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity as appears reasonable under the circumstances is determined with due regard to the nature of appellant's injury, the degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors or circumstances, which may affect appellant's wage-earning capacity in his disabled condition.[4]

When the Office makes a medical determination of partial disability and of the specific work restrictions, it should 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* or otherwise available in the open labor market, that fits the employee's capabilities in light of 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.[5]

In determining an employee's wage-earning capacity based on a position deemed suitable but not actually held, the Office must consider the degree of physical impairment, including impairments resulting from both injury-related and preexisting conditions but not impairments resulting from postinjury or subsequently acquired conditions.[6] Any incapacity to perform the

[2] *Harold S. McGough*, 36 ECAB 332 (1984).

[3] *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

[4] 5 U.S.C. § 8115(a).

[5] *Hattie Drummond*, 39 ECAB 904 (1988); *see Albert C. Shadrick*, 5 ECAB 376 (1953).

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*,

duties of the selected position resulting from subsequently acquired conditions is immaterial to the loss of wage-earning capacity that can be attributed to the accepted employment injury and for which appellant may receive compensation. The record in this case reflects that appellant has a conversion disorder, which is not accepted as work related and arose subsequent to the work injury of March 12, 1982. Accordingly, the Office excluded this condition when determining whether the selected position was medically suitable for appellant.

The Office selected the part-time position of small products assembler in determining appellant's wage-earning capacity. In a May 18, 2001 report, Dr. Patterson advised that appellant would be restricted to work, which involves lifting of less than 20 pounds. Dr. Walker's March 24, 1998 report noted that appellant was able to work either part time or full time with a lifting restriction of no more than 20 pounds so long as he had the ability to change positions as needed. It is well established, however, that a wage-earning capacity determination must be based on a reasonably current medical evaluation.[7] As Dr. Walker's March 24, 1998 work restriction evaluation was over four years old at the time of the Office's determination of appellant's wage-earning capacity, his report does not provide a reasonable basis for a 2002 wage-earning capacity determination.[8] Dr. Patterson examined appellant in May 2001, but the physician did not complete a work capacity evaluation form. He merely indicated his agreement with appellant's status as verified. He failed to indicate how many hours appellant was capable of working and his opinion is not "clear and unequivocal" concerning appellant's ability to work. Accordingly, the Board finds that there is insufficient medical evidence to support appellant's capacity to perform the duties of the part-time selected position.

The selected position must not only be medically suitable but must also be reasonably available in appellant's commuting area.[9] The record indicates that appellant relocated to Harper, Texas in 2001. His move to Harper, Texas was approximately a year prior to the October 16, 2002 decision, when the Office advised that the position was reasonably available based on appellant's former residence in Colorado. The Office failed to consider whether appellant moved into an isolated area, or whether Harper, Texas is sufficiently close to San Antonio or Austin so as to base the wage-earning capacity on his new residential area. The Denver office kept jurisdiction of the file and based reasonable availability on appellant's prior residence in Colorado without any consideration of the move to Texas. This is inconsistent with the Office's procedures as set forth in Chapter 2.814.8(c)(1).[10] Thus, the selected position is not reasonably available as the Office relied on data based on appellant's former location in Colorado in issuing its October 16, 2002 decision. As the Office has not established that the selected part-time position was medically suitable to appellant's restrictions or that the position

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Chapter 2.814.8.a (December 1993).

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

[8] *See Keith Hanselman*, 42 ECAB 680 (1991); *Ellen G. Trimmer*, 32 ECAB 1878 (1981).

[9] *Philip S. Deering*, 47 ECAB 692, 699 (1996).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.814.8(c) (December 1993).

was reasonably available in appellant's commuting area, it did not meet its burden of proof to reduce his compensation.

The October 16, 2002 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, DC
June 17, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member