U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL R. BURNSIDE and DEPARTMENT OF DEFENSE, DEFENSE COMMUNICATIONS AGENCY, McCLELLAN AIR FORCE BASE, CA

Docket No. 02-80; Submitted on the Record;
Issued March 19, 2003

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation effective April 12, 2000 based on his capacity to earn wages as a computer technician.

On October 27, 1983 appellant, then a 29-year-old storekeeper, sustained a lumbosacral strain and aggravation of preexisting L5 spondylosis and spondylolisthesis due to lifting at work. On March 7, 1988 appellant underwent Office-authorized surgery, including a laminectomy at L5 and fusion at S1 and L4-5. He worked in limited-duty positions before stopping work and received compensation for periods of disability. Appellant has a nonwork-related eye condition which has rendered him legally blind. He can see with corrective lenses, but he is unable to obtain a driver's license. In February 1999 appellant began participating in a vocational rehabilitation program.[1] In June 2000 he successfully completed a training course designed to qualify him as a computer technician. The course was approved by appellant's vocational rehabilitation counselor. By decision dated April 12, 2000, the Office adjusted appellant's compensation effective that date on the grounds that he had the ability to work as a computer technician.[2] By decision dated July 6, 2001, the Office affirmed its April 12, 2000 decision.

The Board finds that the Office improperly reduced appellant's compensation effective April 12, 2000 based on his capacity to earn wages as a computer technician.

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[1] Appellant had previously participated in a vocational rehabilitation program beginning in the late 1980s. He received training as an apartment manager, but he was not able to obtain employment at that time.

[2] The computer technician position involved analyzing requirements for data processing systems, planning the layout and installation of new systems, and modifying existing systems. The position required occasional lifting of up to 20 pounds and frequent lifting of up to 10 pounds.

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.[3] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[4]

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.[5] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[6] 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.[7]

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.[8]

In determining that appellant was physically capable of performing the selected computer technician position, the Office relied on the medical reports of Dr. John R. Lang, an attending Board-certified orthopedic surgeon.[9] In an undated work restriction form received by the Office

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

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

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

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

[7] *Id.* The commuting area is to be determined by the employee's ability to get to and from the work site; *see Glen L. Sinclair*, 36 ECAB 664, 669 (1985).

[8] *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).

[9] In determining wage-earning capacity based on a constructed position, consideration is given to the residuals of the employment injury and the effects of conditions which preexisted the employment injury; *see Jess D. Todd*, 34 ECAB 798, 804 (1983). Therefore, appellant's eye and preexisting back problems would be taken into consideration.

on November 22, 1995, Dr. Lang indicated that appellant should limit his standing, bending and reaching, that he should not engage in repetitive motion, and that he should limit sitting, walking or standing to one hour at a time. He recommended that appellant only lift 10 pounds on an occasional basis; he also indicated in another portion of the form that appellant could lift up to 20 pounds.[10] In a report dated December 14, 1995, Dr. Lang indicated that appellant was restricted to lifting 10 pounds but also stated that appellant could lift between 10 and 20 pounds. In a January 2, 1996 report, he stated that appellant could lift between 10 and 25 pounds on occasion. The record also contains a May 30, 1997 work restriction form in which Dr. Lang provided an assessment of appellant's ability to work which was similar to that contained in his November 1995 report. Dr. Lang again indicated that appellant should limit his standing, bending and reaching, that he should not engage in repetitive motion, and that he should limit sitting, walking or standing to one hour at a time; he variously noted that appellant only lift 10 pounds on an occasional basis and that he could lift 20 pounds.

The Board finds that the Office did not present sufficient medical evidence to establish that appellant was physically able to perform the computer technician position around the time his compensation was adjusted in April 2000. The Office relied on the opinion of Dr. Lang in determining that he could perform the position. However, as detailed above, Dr. Lang did not provide an opinion on appellant's ability to work around the time of the adjustment in his compensation.[11] The record does not otherwise contain any medical evidence showing that appellant could perform the computer technician position around April 2000.

Moreover, the medical evidence indicates that it is unclear whether appellant was capable of commuting to the computer technician job.[12] Appellant's legal blindness limited him to taking public transportation which might require him to stand for extended periods. In several reports, Dr. Lang indicated that appellant's back condition limited the extent of time that he could spend in commuting to work. In a report dated November 30, 2000, Dr. Lang stated that appellant's symptoms and condition were stable, but noted, "My concern, as noted per my letter of August 26, 1999, is that there is considerable force obviously exerted on particularly the L3-4 spinal disc/motor unit of the lumbar spine, and I believe that forces on these discs, such as in commuting, excessively, is responsible for precipitating his pain. Dr. Lang indicated that appellant "may be restricted from commuter demands more than 30 minutes from his home region."[13]

[10] Dr. Lang later indicated that it was an error to indicate that appellant could lift 20 pounds.

[11] Moreover, the computer technician position requires lifting up to 20 pounds and Dr. Lang's reports provided conflicting and confusing recommendations regarding lifting. The record contains several reports dated between July and November 1999 in which Dr. Lang briefly detailed appellant's condition, but these reports do not contain any clear assessment of appellant's ability to work other than to state that he had limitations on commuting.

[12] As noted above, the commuting area is to be determined by the employee's ability to get to and from the work site; *see supra* note 7 and accompanying text.

[13] Dr. Lang had earlier expressed concern about appellant's commute in reports dated July 30 and August 26, 1999. Given that several forms of public transportation might have to be taken to get to the site of a selected computer technician position, it is unclear how long it would take to commute to such a position.

For these reasons, the Office improperly reduced appellant's compensation effective April 12, 2000 based on his capacity to earn wages as a computer technician.

The July 6, 2001 decision of the Office of Workers' Compensation Programs is reversed.

Dated, Washington, DC
March 19, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member