U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CONSTANTINO CHIARELLI and DEPARTMENT OF TRANSPORTATION, UNITED STATES COAST GUARD, Governors Island, NY

Docket No. 02-1920; Submitted on the Record;
Issued March 4, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation benefits to reflect his wage-earning capacity as a computer support specialist.

This is the second appeal in this case.[1] On the first appeal the Board reviewed a May 28, 1998 decision, by which the Office found that appellant failed to meet his burden of proof to establish that he developed a back condition as a consequence of his accepted left knee injury. By decision dated January 24, 2001, the Board found that, while appellant had submitted insufficient medical evidence to discharge his burden of establishing that his back condition is causally related to his accepted left knee injury, in the absence of medical evidence to the contrary, appellant submitted sufficient evidence to require further development of the record by the Office. The Board, therefore, set aside the Office's May 28, 1998 decision and directed the Office to refer appellant to an appropriate medical specialist for a second opinion. The complete facts of this case are set forth in the Board's January 24, 2001 decision and are herein incorporated by reference.

On remand in a decision dated March 6, 2001, the Office reviewed additional medical evidence, which had subsequently been submitted by appellant and determined that the medical opinions provided by appellant's treating orthopedist, Dr. Michael Soojian, were sufficient to establish that appellant sustained an aggravation of a lumbar sprain as a result of his altered gait due to his accepted left knee condition. The Office further noted, however, that Dr. Soojian continued to state, in frequent form reports and treatment notes, that appellant remained totally and permanently disabled for work. Therefore, in order to determine the extent of appellant's injury-related disability, if any, by letter dated April 2, 2001, the Office referred appellant together with the case record, a list of questions to be resolved and a statement of accepted facts

[1] Docket No. 99-971 (issued January 24, 2001).

to Dr. Richard S. Goodman, a Board-certified orthopedic surgeon, for a second opinion examination.

In a narrative report and accompanying work capacity evaluation form dated April 24, 2001, Dr. Goodman reviewed the medical and factual evidence of record and noted that his findings on physical examination. Dr. Goodman opined that appellant's lumbosacral sprain continued to be symptomatic and while his left meniscal tear had resolved, appellant was not capable of performing his prior duties of a fireman. Dr. Goodman concluded, however, that appellant is capable of returning to work, eight hours a day, within certain physical restrictions.

Due to the conflict in medical opinion between Drs. Soojian and Goodman, on September 20, 2001 the Office referred appellant to Dr. Lawrence E. Miller, an osteopathic surgeon. In a report dated October 4, 2001, Dr. Miller reviewed the medical and factual evidence of record and noted his findings on physical examination. He diagnosed resolved lumbosacral strain and sprain and status postsurgical intervention of the left knee. Dr. Miller stated that appellant's subjective complaints were not supported by the objective findings and that, as appellant's injury had occurred more than 5½ years ago, it was difficult to believe that appellant was still experiencing as much pain as he indicated during the examination. Dr. Miller specifically noted that there was a positive right and left Miller's test, which is physiologically impossible. He explained that "due solely to the fact that the claimant is status postsurgical intervention of the left knee and states he is unable to climb stairs or climb a ladder, there is a mild orthopedic disability with respect to the left knee only" and appellant is capable of pursuing gainful light-duty employment on a full-time basis with restrictions of no heavy lifting or extensive stair climbing. Dr. Miller stated that these restrictions were necessary to prevent reinjury. On an accompanying work capacity evaluation form OWCP-5, Dr. Miller specified that within an eight-hour day, appellant was limited to walking, standing and twisting for six hours, could perform only light pushing, pulling and lifting and needed a break every four hours. Finally, Dr. Miller stated that appellant had reached maximum medical improvement and required no additional medical treatment, no work hardening program and no functional capacity evaluation.

On January 18, 2002 at the request of the Office, a rehabilitation counselor identified the job of systems analyst as a job that was within appellant's physical restrictions, that appellant had the educational background to perform,[2] and was reasonably available. The rehabilitation counselor noted that a full-time systems analyst earns $1,080.00 per week.

In a notice of proposed reduction of compensation dated March 4, 2002, the Office found that Dr. Miller's opinion, as that of the impartial medical specialist, constituted the weight of the evidence and that the position of systems analyst was within appellant's vocational and physical parameters. The Office, therefore, proposed to reduce appellant's compensation to reflect his wage-earning capacity as a systems analyst. The Office gave appellant 30 days to respond.

[2] In January 1999 appellant earned a Bachelor of Science degree in Industrial Technology and Management of Technology and in January 2001, he earned additional certification in Computer Systems Technology and Business Programming & Systems.

On March 28, 2002 appellant submitted a narrative statement contesting the Office's proposed decision. Appellant asserted that he was physically and mentally incapable of performing any gainful employment and further noted that only a systems analyst with three to five years of prior experience would be paid at the rate of $1,080.00 per week.

On May 13, 2002 at the request of the Office, a rehabilitation counselor identified the job of computer support specialist, as an entry-level job that was within appellant's physical restrictions, that appellant had the educational background to perform and was reasonably available. The rehabilitation counselor noted that a full-time computer support specialist earns $755.90 per week. The job duties were described, in part, as receiving telephone calls from users having problems using computer software and hardware or inquiring how to use specific software, determining the source of the problem and talking with coworkers to research the problem and find a solution. The physical requirements were described as sedentary with maximum lifting up to 10 pounds. Occasional was defined as up to one third of the time.

By decision dated June 3, 2002, the Office reduced appellant's compensation on the grounds that the sedentary position of computer support specialist represented his wage-earning capacity. The Office noted that the position was within appellant's physical restrictions, as it was sedentary and required no lifting over 10 pounds and further found that appellant had the experience to perform the job and it was reasonably available.

The Board finds that the case is not in posture for a decision.

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction of benefits.[3] Under section 8115(a) of Federal Employees' Compensation Act, if the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, his or her usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances, which may affect wage-earning capacity in his or her disabled condition.[4] 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.[5] Finally, application of the principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss

[3] *Sylvia Bridcut*, 48 ECAB 162 (1996); *James B. Christenson*, 47 ECAB 775 (1996).

[4] *See Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); *petition for recon. denied*, Docket No. 92-118 (issued February 11, 1993); *see also* 5 U.S.C. § 8115(a).

[5] *Raymond Alexander*, 48 ECAB 432 (1997); *Dorothy Lams*, 47 ECAB 584 (1996).

of wage-earning capacity.[6] The basic rate of compensation paid under the Act is 66 2/3 percent of the injured employee's monthly pay.

In this case, to resolve the conflict between Drs. Soojian and Goodman regarding appellant's ability to work, the Office referred appellant to the impartial medical specialist Dr. Miller, who opined that appellant could perform light-duty eight hours a day. The Board has held that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict in medical opinion evidence, the opinion of such specialist, if sufficiently well rationalized and based on a proper medical background, must be given special weight.[7] In the present case, although the Office properly identified a conflict of medical opinion on the question of appellant's ability to work and further properly sought to refer appellant to an impartial medical specialist in order to resolve the conflict, the referral should have been to a physician certified by the American Board of Medical Specialties (ABMS). The record reflects that Dr. Miller is an osteopath and while he lists himself as a Board-certified orthopedic surgeon, he is not listed in the applicable medical directory[8] as a Board-certified specialist. Absent any documentation of special qualifications, which might exempt Dr. Miller from the requirement that he be Board certified by a board recognized by the ABMS, he cannot serve as an impartial specialist in the present case.[9]

Therefore, there remains an unresolved conflict in medical opinion in this case. The Office should refer appellant, the case record and a statement of accepted facts to an appropriate physician who is properly Board-certified for a reasoned medical opinion regarding appellant's ability to work.

[6] *Dorothy Lams*, 47 ECAB 584 (1996); *Albert C. Shadrick*, 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.303.

[7] *Mary A. Moultry*, 48 ECAB 566 (1997).

[8] The Official ABMS Directory of Board-Certified Medical Specialists, (30th edition 1998).

[9] "A physician who is not Board-certified may be used if he or she has special qualifications for performing the examination, but the MMA [medical management assistant] must document the reasons for the selection in the case record." Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4b(1) (March 1994).

The decision of the Office of Workers' Compensation Programs dated June 3, 2002 is set aside and the case remanded to the Office for further action consistent with this decision of the Board.

Dated, Washington, DC
March 4, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member