U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VERNON L. LEE and DEPARTMENT OF AGRICULTURE, DEADWOOD RESERVOIR, Lowman, ID

Docket No. 03-165; Submitted on the Record;
Issued March 11, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly denied modification of appellant's wage-earning capacity.

This case was previously before the Board. In a June 11, 2002 decision, the Board affirmed the Office's May 10 and December 21, 2000 decisions reducing appellant's compensation based on its determination that the selected position of lot attendant represented appellant's wage-earning capacity. The Board, however, reversed the Office's May 3, 2001 decision refusing to reopen appellant's claim for merit review pursuant to 5 U.S.C. § 8128(a) and remanded the case for further consideration on its merits. The Board noted that appellant had submitted new evidence from automobile dealerships providing a description of the job duties of a lot attendant and from Dr. R. Richard Maxwell, a Board-certified orthopedic surgeon, indicating that appellant could not perform the duties of the selected position. The facts and circumstances are set forth in the Board's June 11, 2002 decision and are herein incorporated by reference.[1]

Upon return of the case record, the Office reviewed the evidence submitted by appellant and issued an October 9, 2002 decision denying modification of its prior decisions.

The Board finds that the Office properly denied modification of appellant's wage-earning capacity.

When the Office makes a medical determination of partial disability and of specific work restrictions, it may 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 market, that fits the employee's capabilities with regard to his or her physical limitations, education, age and prior experience. Once this selection is made, a

[1] Docket No. 01-1685 (issued June 11, 2002).

determination of wage rate and availability in the labor market should be made through contact with the state employment service or other applicable service.[2] Finally, application of the principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.[3]

Once a loss of wage-earning capacity is determined, a 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 in fact erroneous.[4] The burden of proof is on the party attempting to show the award should be modified.[5]

In this case, appellant did not submit sufficient evidence to show that the Office's original determination with regard to his wage-earning capacity was erroneous. Appellant submitted a job description from Tim's automobile dealership indicating that a lot attendant was required to wash and detail vehicles, fuel vehicles, clean the lot which included weed pulling, sweeping, etc., move cars and perform maintenance and janitorial work in the buildings. A job description from Prescott Auto Sales required a lot attendant to wash cars, put gas in the cars, clean the dealership, move parts and other articles in excess of 50 pounds and deal with hazardous chemicals. A sample job description from Lamb Chevrolet provided the duties of a lot attendant. The physical requirements included standing 6 to 8 hours per shift and lifting parts weighing up to 70 pounds several times during each shift.

Appellant submitted a March 12, 2001 note entitled "Job Description" from Dr. Maxwell indicating that he was unable to fulfill the lifting requirement of 70 pounds. The Board notes that the Office relied on Dr. Maxwell's report restricting appellant to lifting no more than 35 pounds, and no bending, stooping and climbing stairs and ladders in determining that appellant could perform the duties of a lot attendant in referring appellant to a vocational rehabilitation counselor.

Although the above job descriptions contain some duties that fall outside the physical requirements set forth by Dr. Maxwell, the Board finds that the selected position of lot attendant represents appellant's wage-earning capacity. The wage-earning capacity and physical requirements for the position are established according to the information provided in the *Dictionary of Occupational Titles*, which in this case is a "light" position that has a maximum lifting of up to 20 pounds. This lifting requirement was not based upon information from a few employers.

Further, Dr. Maxwell did not provide an opinion, supported by medical rationale, explaining that appellant was unable to perform the duties of a lot attendant due to a change in the nature or extent of his September 12, 1997 employment injury. Therefore, his opinion that

[2] *See Dennis D. Owen*, 44 ECAB 475 (1993).

[3] 5 ECAB 376 (1953).

[4] *Stanley B. Plotkin*, 51 ECAB 700 (2000); *Derrick Higgin*, 50 ECAB 213 (1998).

[5] *See James D. Champlain*, 44 ECAB 438, 440 (1993).

appellant cannot lift 70 pounds does not establish that the Office's December 21, 2000 wage-earning capacity determination was erroneous.

In light of the above, the Office correctly found the evidence of record insufficient to warrant modification of appellant's wage-earning capacity.

The October 9, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
March 11, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member