U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WALTER VIDAL and DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF PRISONS, Miami, FL

Docket No. 03-910; Submitted on the Record;
Issued September 29, 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 determined that the selected position of caseworker represented appellant's wage-earning capacity.

On May 12, 1998 appellant, then a 41-year-old correctional counselor, sustained a traumatic injury to his lower back while in the performance of duty. He stopped work on May 13, 1998. The Office accepted appellant's claim for lumbar sprain. Appellant received appropriate wage-loss compensation and the Office placed him on the periodic compensation rolls.[1]

In April 1999, the Office referred appellant for a second opinion evaluation to determine whether surgical intervention was appropriate. In a report dated April 30, 1999, Dr. Basil M. Yates, a Board-certified neurosurgeon, noted that appellant's magnetic resonance imaging (MRI) scan revealed a Grade 1 retrolisthesis at L3 and L4 and a slight Grade ½ to 1 retrolisthesis of L4 and L5. He also reported a narrowing of the spinal canal at L3-4 and L4-5 with significant extradural defect and a disc herniation at L3-4. Dr. Yates advised that additional x-rays and a computerized tomography (CT) scan of the lumbar spine were necessary to evaluate whether there was any instability or stenosis. Absent evidence of instability, Dr. Yates surmised that compression of L3-4 would be adequate. He further noted that if some instability were present, then decompression of L3-5 with stabilization would be appropriate. Dr. Yates also stated that if appellant elected to do nothing he would be considered to have reached maximum medical improvement, with a whole body impairment rating of seven percent due to the ruptured disc at L3-4. However, Dr. Yates attributed only a portion of the impairment to appellant's May 12, 1998 employment injury. He stated that he did not think the other changes in appellant's spine were related to his employment injury.

---

[1] Due to his ongoing medical condition, the employing establishment terminated appellant effective October 3, 1999.

On May 6, 1999 Dr. Yates submitted a work capacity evaluation (Form OWCP-5c), indicating that appellant was capable of performing sedentary work, eight hours a day. He noted hourly limitations with respect to walking, standing, twisting, squatting, pushing, pulling and lifting. Dr. Yates did not impose any limitations with respect to the number of hours appellant was able to sit. Additionally, he imposed weight limitations with respect to pushing, pulling and lifting.[2]

In a June 8, 1998 addendum to his initial report, Dr. Yates indicated that he reviewed recent x-rays and a CT scan and concluded, based on this additional information that there was no motion and appellant was neurologically intact and, therefore, fusion was not indicated. He also noted that the CT scan confirmed the presence of stenosis at L3-4 and that if appellant wished to undergo surgical decompression for the spinal stenosis and radicular pain, this would be appropriate.

The Office forwarded Dr. Yates' findings to appellant's treating physician, Dr. Michael A. Langone, a Board-certified orthopedic surgeon, for comment on the recommended surgical procedure and the work restrictions Dr. Yates had identified. However, Dr. Langone did not timely respond to the Office's June 14, 1999 inquiry. In the absence of a response from Dr. Langone and because of appellant's reluctance to undergo surgery, the Office referred the claim for vocational rehabilitation in August 1999. A rehabilitation plan was to be developed based on Dr. Yates' assessment that appellant could perform full-time, sedentary work.

At their initial meeting in September 1999, appellant provided his rehabilitation counselor a July 14, 1999 report from Dr. Langone, wherein he noted that appellant had ongoing clinical symptoms compatible with a diagnosis of herniated lumbar disc disease. He described appellant's condition as static, but noted that it could improve with surgical intervention, which had been recommended. Dr. Langone indicated that while appellant's condition impeded his ability to resume his former duties, he was capable of performing sedentary work for a period of about four hours a day. He explained that appellant should avoid lifting, stooping, bending and be allowed periods of rest. Dr. Langone recommended that appellant avoid lifting heavy objects greater than 25 pounds. He also explained that sitting might be problematic and, therefore, such activity should not exceed four hours a day. Dr. Langone also noted that walking should be avoided for any distances that would aggravate low back pain and that driving was a potential problem due to prolonged fixed seated positioning. Lastly, he stated that climbing was absolutely taboo.

Unable to accommodate the restrictions imposed by Dr. Langone, the employing establishment relieved appellant of his duties as a correctional counselor effective October 3, 1999.

[2] Dr. Yates indicated that appellant could push or pull up to 50 pounds and he limited his lifting to a maximum of 20 pounds.

A December 10, 1999 rehabilitation plan was prepared for placement as a probation and parole officer, counseling aide/caseworker and crime analyst. The plan entailed appellant returning to college to complete coursework for a Bachelor of Arts degree in criminal justice.[3] It was anticipated that the required work could be completed over the course of three semesters. Appellant signed the plan on December 13, 1999 and the Office approved the rehabilitation plan on January 24, 2000.

On August 9, 2002 appellant received his Bachelor of Arts degree in criminal justice. Following graduation, he received three months of job placement assistance, however, he was unable to secure employment during that timeframe despite having applied for more than 50 positions. Appellant requested additional placement assistance in November 2002, but the Office denied his request.

In a report dated January 16, 2003, the Office rehabilitation specialist advised that appellant had completed his sponsored training program and had received 90 days of job placement assistance. He further noted that appellant was qualified for employment as a caseworker with potential weekly earnings of $446.80 and such positions were reasonably available in appellant's commuting area.

On January 21, 2003 the Office issued a notice of proposed reduction of compensation. The notice advised appellant that the medical and factual evidence established that he had the capacity to earn weekly wages of $446.80 as a caseworker. The Office relied on Dr. Yates' April 30, 1999 evaluation in determining that the selected position was medically suitable. Appellant was afforded 30 days to submit additional evidence or argument in response to the proposed reduction of compensation.

The Office received a February 17, 2003 note from Dr. Langone, who indicated that appellant was presently under his care and receiving treatment. He further stated that appellant was presently unable to return to work.[4]

In a letter to the claims examiner dated February 18, 2003, appellant noted that Dr. Langone found him to be totally disabled and that he was currently considering surgery for his herniated disc. Appellant also alleged that he lacked the necessary certification to perform the selected position. Lastly, appellant stated that the placement assistance he received was inadequate and that his rehabilitation counselor's participation in the process was minimal.

In a decision dated February 24, 2003, the Office determined that the selected position of caseworker with earnings of $446.80 a week represented appellant's wage-earning capacity. The Office did not specifically address appellant's February 18, 2003 letter or Dr. Langone's

[3] Appellant had previously completed approximately 100 credit hours of college-level coursework with an emphasis on criminal justice and psychology. The rehabilitation counselor in consultation with an academic coordinator determined that appellant needed to complete an additional 45 credit hours (15 courses) of coursework in order to obtain a Bachelor of Arts degree in criminal justice from Florida Atlantic University.

[4] Dr. Langone continued to treat appellant on a regular basis during the three-year period he participated in vocational rehabilitation. The record includes the numerous progress notes over this time period. Prior to his February 17, 2003 note, Dr. Langone last advised the Office of appellant's condition on January 6, 2003.

February 17, 2003 disability statement, both of which the Office received on February 21, 2003. The Office stated that "as of today," February 24, 2003, appellant had "not submitted any medical or factual evidence to support [his] inability to perform the position of Case Worker (sic)."

The Board finds that the Office improperly determined that the selected position of caseworker represented appellant's wage-earning capacity.

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[5] An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.[6]

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 or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent the employee's wage-earning capacity or if the employee has no actual wages, the wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, the employee's usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect his wage-earning capacity in his or her disabled condition.[7]

The Office must initially determine appellant's medical condition and work restrictions before selecting an appropriate position that reflects his vocational wage-earning capacity. The Board has stated that the medical evidence upon which the Office relies must provide a detailed description of appellant's condition.[8] Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.[9]

In the instant case, the Office relied on an almost four-year-old medical report in determining that appellant was physically capable of performing the duties of a caseworker. Dr. Yates last examined appellant on April 30, 1999 and based on this examination he later reported on May 6, 1999 that appellant was capable of performing sedentary work, eight hours a day with restrictions. In July 1999, appellant's treating physician, Dr. Langone, similarly stated that appellant was able to perform sedentary work with restrictions, but only for about four hours a day. He explained that appellant should avoid lifting, stooping, bending and be allowed periods of rest. Dr. Langone recommended that appellant avoid lifting heavy objects greater than 25 pounds. He also explained that sitting might be problematic and, therefore, such activity

[5] *James B. Christenson*, 47 ECAB 775, 778 (1996); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

[6] 20 C.F.R. §§ 10.402, 10.403 (1999); *see Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

[7] 5 U.S.C. § 8115(a); *see Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

[8] *Samuel J. Russo*, 28 ECAB 43 (1976).

[9] *Carl C. Green, Jr.*, 47 ECAB 737, 746 (1996).

should not exceed four hours a day. The primary differences between the reports of Drs. Yates and Langone is that Dr. Langone believed that appellant was capable of working only four hours a day and that prolonged sitting would be problematic. Dr. Yates did not impose any restrictions with respect to appellant's ability to sit. Unlike Dr. Yates, Dr. Langone continued to treat appellant over the ensuing years and regularly provided the Office with updates regarding appellant's ongoing low back condition. On February 17, 2003 Dr. Langone advised that appellant was still under his care and receiving treatment and was presently unable to return to work.

The record includes conflicting evidence regarding appellant's ability to perform full-time sedentary work, such as the selected position of caseworker. The Office made no attempt to address the contrary opinions of Drs. Yates and Langone. It is not apparent from the February 24, 2003 decision that the Office was even aware of Dr. Langone's February 17, 2003 disability statement.[10] Moreover, Dr. Yates opinion, which the Office relied upon, was approximately 4 years old when the Office issued its February 24, 2003 decision. Given the totality of the circumstances, Dr. Yates' April 30, 1999 evaluation cannot be considered a reasonably current medical evaluation.[11] Accordingly, the Office failed to demonstrate that the selected position of caseworker is medically suitable. The Office bears the burden to justify modification or termination of benefits and the Board finds that the Office failed to meet its burden in the instant case.[12]

[10] Inasmuch as the Board's decisions are final as to the subject matter appealed, it is crucial that all relevant evidence that was properly submitted to the Office prior to the time of issuance of its final decision be addressed by the Office. 20 C.F.R. § 501.6(c); *see William A. Couch*, 41 ECAB 548, 553 (1990). Whether the Office receives relevant evidence on the date of the decision or several days prior, such evidence must be reviewed by the Office. *Willard McKennon*, 51 ECAB 145 (1999).

[11] *Carl C. Green, Jr.*, *supra* note 9.

[12] *James B. Christenson*, *supra* note 6.

The February 24, 2003 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, DC
September 29, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member