U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN H. McCLURE and DEPARTMENT OF THE AIR FORCE, WRIGHT-PATTERSON AIR FORCE BASE, OH

Docket No. 01-843; Submitted on the Record; Issued April 24, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON, A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly reduced appellant's wage-loss compensation based on its determination that the selected position of part-time information clerk represented his wage-earning capacity; and (2) whether the Office abused its discretion by refusing to reopen appellant's case for merit review under 20 C.F.R. § 10.608.

On May 7, 1985 appellant, then a 46-year-old maintenance mechanic, sustained a traumatic injury in the performance of duty. The Office accepted appellant's claim for low back strain, herniated disc at L5-S1 with radiculopathy and aggravation of congenital spondylolisthesis at L5-S1. On June 3, 1985 appellant returned to work in a limited-duty capacity, but he continued to experience intermittent periods of temporary total disability. On February 14, 1992 appellant ceased work and subsequently filed a claim for recurrence of total disability. The Office accepted appellant's claim for recurrence of disability and placed him on the periodic compensation rolls. Appellant has not resumed any type of gainful employment since his February 1992 recurrence of disability.

By a decision dated July 15, 1999, the Office found that the selected position of part-time information clerk represented appellant's wage-earning capacity.[1] In determining that appellant was physically capable of performing the duties of a part-time information clerk, the Office

[1] On June 14, 1999 the Office issued a notice of proposed reduction of compensation advising appellant of its preliminary determination that he was no longer totally disabled. The notice afforded appellant 30 days to submit additional medical and factual information or argument relevant to his ability to perform the duties of a part-time information clerk. Appellant responded by letter dated July 5, 1999, noting that he found the proposed reduction of compensation "unbelievable." He also stated that there were days when he seldom got off the floor, answered the telephone or left the house. Appellant further indicated that a report from his treating physician was forthcoming. With respect to the latter referenced medical report, no such evidence was submitted prior to the Office's issuance of the July 15, 1999 decision.

relied upon the August 26, 1998 opinion of Dr. Richard T. Sheridan, a Board-certified orthopedic surgeon and Office referral physician.

Appellant subsequently requested an oral hearing, which was held on February 15, 2000. In a decision dated April 27, 2000, the Office hearing representative affirmed the prior decision dated July 15, 1999.

In a letter dated September 28, 2000, appellant requested reconsideration of the hearing representative's April 27, 2000 decision. The request was accompanied by a May 5, 2000 report from appellant's treating physician, Dr. Paul M. Gangl, a Board-certified orthopedic surgeon, who stated that appellant was permanently and totally disabled. By decision dated October 18, 2000, the Office denied appellant's request for reconsideration without reaching the merits of the claim.[2]

The Board finds that the Office erred in determining that the selected position of part-time information clerk 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.[3] 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.[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 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.[5]

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 labor 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 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

[2] The Office characterized Dr. Gangl's May 5, 2000 report as "cumulative and repetitious," and, therefore, insufficient to warrant reopening the case for merit review.

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

[4] 20 C.F.R. §§ 10.402, 10.403 (1999); *see Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

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

principles set forth in the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.[6]

The Office must initially determine appellant's medical condition and work restrictions before selecting an appropriate position that reflects appellant's vocational wage-earning capacity. The medical evidence which the Office relies upon must provide a detailed description of appellant's condition.[7]

Appellant's treating physician, Dr. Gangl, submitted several reports dating back to 1992 indicating that appellant was totally and permanently disabled as a consequence of his May 7, 1985 employment injury. However, when the Office requested in May 1997 that he submit a recent comprehensive report, Dr. Gangl responded by resubmitting his prior report of July 28, 1995. Dr. Gangl's May 30, 1997 cover letter stated that appellant continued under his care for lumbosacral strain and spondylolisthesis. He further stated that appellant's history, physical examination and limitations had not changed and Dr. Gangl referred the Office to his July 28, 1995 report. While Dr. Gangl subsequently provided treatment notes dated June 6 and December 19, 1997, he did not submit an updated medical report prior to the issuance of the Office's July 15, 1999 decision.

The Office referred appellant for a second opinion examination with Dr. Sheridan. And as previously noted that the Office relied on Dr. Sheridan's August 26, 1998 opinion in determining appellant's medical condition and work restrictions. Dr. Sheridan stated there was objective medical evidence present to support that the low back strain and herniated disc appellant sustained on May 7, 1985 was still active. Moreover, he identified 11 injury-related findings that were indicative of appellant's ongoing employment-related condition.[8] Dr. Sheridan also stated there was objective evidence to confirm the continued presence of the accepted condition of aggravation of congenital spondylolisthesis at L5-S1. He opined that the residual effects of appellant's May 7, 1985 employment injury rendered him disabled from performing his prior duties as a maintenance mechanic. However, Dr. Sheridan stated that appellant "can engage in only sedentary activity."

In an accompanying Form OWCP-5c, Dr. Sheridan stated that appellant "can only work four hours per day." He imposed a one-hour limitation with respect to sitting, walking and standing. Additionally, Dr. Sheridan limited appellant to a half-hour of reaching, twisting,

[6] *Albert C. Shadrick*, 5 ECAB 376 (1953).

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

[8] Dr. Sheridan reported the following injury-related findings: rotoscoliosis; loss of lordosis; muscle spasm; atrophy, left calf and left thigh; L5 and S1 hypesthesia; absent ankle jerk, left; dropfoot, left; weakness of eversion, inversion and plantar flexion, left foot; positive sciatic stretch tests; positive corroborative stretch tests for sciatica; and magnetic resonance imaging scans showing a spondylolisthesis and a ruptured disc at L5-S1.

pushing, pulling and lifting; with the latter 3 activities further limited to under 10 pounds. He precluded any squatting, kneeling and climbing as well as operating a motor vehicle and advised that appellant would require a 15-minute break every 2 hours.[9]

While Dr. Sheridan provided a detailed description of appellant's condition, his report does not include any rationale in support of his finding that appellant is capable of working four hours per day with certain restrictions. Given the extensive physical findings noted by Dr. Sheridan, it is not readily apparent from his report how he came to conclude that appellant was capable of working four hours per day despite the apparent severity of his ongoing employment-related condition. On the August 26, 1998 Form OWCP-5c, Dr. Sheridan stated: "I think [appellant] can only work four hours per day due to the findings noted in the body of the report." Presumably, he was referring to the 11 injury-related findings previously mentioned.[10] However, noticeably absent from his report is any explanation as to how appellant is capable of performing four hours of "sedentary activity" with objective findings of, *inter alia*, rotoscoliosis, loss of lordosis, muscle spasm, left calf and thigh atrophy, left dropfoot, weakness of eversion, inversion and plantar flexion, left foot and spondylolisthesis and a ruptured disc at L5-S1.

The Board has long held that a medical opinion not supported by medical rationale is of little probative value.[11] Although the Office hearing representative indicated that Dr. Sheridan "provided medical rationale for the opinion that the claimant was capable of working four hours per day with limitations," the hearing representative did not specifically identify Dr. Sheridan's rationale.[12] As Dr. Sheridan failed to provide any rationale for his opinion that appellant was capable of performing sedentary work four hours per day consistent with the limitations set forth in his August 26, 1998 Form OWCP-5c, the Office erred in relying upon his findings. Consequently, the Office failed to meet its burden of proof to justify modification of compensation benefits.[13]

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[9] In response to the Office's requests for clarification, Dr. Sheridan provided two supplemental reports dated March 18 and April 12, 1999. In his March 8, 1999 report, Dr. Sheridan stated that appellant could sit for an hour at a time and four hours a day. He made similar statements with respect to appellant's ability to stand and walk during a four-hour period. With respect to appellant's driving restriction, Dr. Sheridan stated that appellant's dropfoot on the left would hinder him from driving any kind of motor vehicle either to and from work or on the job. In his April 12, 1999 report, Dr. Sheridan rescinded the driving restriction noting that he was unaware that a motor vehicle could commonly be operated using only the right lower extremity.

[10] *See supra* note 8.

[11] *E.g., Annie L. Billingsley*, 50 ECAB 210, 213 (1999).

[12] While the hearing representative apparently overlooked the deficiencies in Dr. Sheridan's report, she was particularly critical of a February 10, 2000 report from Dr. Martin Fritzhand who found that appellant was totally disabled from performing any remunerative work on a sustained basis. Dr. Fritzhand explained that appellant's tolerance for standing, stooping, lifting, carrying, bending and sitting was poor. He also stated that appellant had a "severe functional impairment." Neither Drs. Sheridan nor Fritzhand was particularly demonstrative regarding the bases for their respective opinions.

[13] *James B. Christenson*, *supra* note 3.

The April 27, 2000 decision of the Office of Workers' Compensation Programs is hereby reversed and the October 18, 2000 decision is set aside.[14]

Dated, Washington, DC
April 24, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

[14] In light of the Board's decision an the merits, the second issue is moot.