U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GAYTON C. COSTA and DEPARTMENT OF THE NAVY, PEARL HARBOR NAVAL SHIPYARD, Peal Harbor, HI

Docket No. 00-2774; Submitted on the Record;
Issued March 13, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined that the position of fitness instructor represented appellant's wage-earning capacity.

On February 21, 1984 appellant, then a 34-year-old shipfitter foreman, filed a notice of traumatic injury claiming that on that same day he injured his back while moving a large aluminum pipe. Appellant's claim was accepted for herniated lumbar disc L4-5.

The Office referred appellant to Dr. Lee R. Dorey, a Board-certified orthopedic surgeon, for a second opinion evaluation. Dr. Dorey examined appellant on September 13, 1996 and opined that appellant could no longer perform the duties of shipfitter but that he could perform other lighter activities. He recommended that appellant undergo a physical capacities evaluation.

In a physical capacities evaluation performed on October 3, 1996, it was found that appellant could perform a light-duty position with limitations of lifting and carrying up to 20 pounds occasionally, pushing and pulling 28 pounds occasionally and very limited squatting, kneeling, bending and climbing.

In a report dated December 2, 1997, Vie Banfield, a rehabilitation counselor, found that appellant could perform the position of fitness instructor.

In a work capacity evaluation dated September 28, 1998, Dr. Dorey indicated that appellant could work 8 hours per day with restrictions of pushing, pulling and lifting up to 20 pounds up to 4 hours per day. He specifically noted that appellant could perform the duties of a fitness instructor.

In a final report dated December 9, 1998, the rehabilitation counselor reported that appellant was qualified and could perform the position of fitness instructor. The counselor indicated that the position was reasonably available and within appellant's medical restrictions. The average salary for this position was $5.25 per hour or $210.00 per week.

In a notice of proposed reduction of compensation dated February 12, 1999, the Office advised appellant that it proposed to reduce his compensation benefits for the reason that he was no longer totally disabled and that he had the capacity to earn the wages of a fitness instructor at the rate of $210.00 per week.

By decision dated March 15, 1999, the Office adjusted appellant's compensation benefits effective that day on the grounds that the evidence of record established that he was no longer totally disabled for work due to the effects of his February 21, 1984 employment injury and was capable of performing the position of fitness instructor.

By letter dated March 30, 1999, appellant requested an oral hearing, which was held on April 25, 2000. Appellant's attorney argued that the Office's decision was based on old medical evidence.

By decision dated July 24, 2000, the hearing representative affirmed the Office's March 15, 1999 decision.

The Board finds that the Office properly determined that the position of fitness instructor reflected appellant's wage-earning capacity effective March 15, 1999, the date that it reduced his compensation benefits.

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.[1]

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.[2] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[3] 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.[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

[1] *David W. Green*, 43 ECAB 883 (1992); *Harold S. McGough*, 36 ECAB 332 (1984).

[2] *Pope D. Cox*, 39 ECAB 143, 148 (1988).

[3] *Richard Alexander*, 48 ECAB 432, 434 (1997).

[4] *Id*.

the Department of Labor, *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]

In this case, the Office obtained current information about the availability and pay rate for the job of fitness instructor in appellant's commuting area and determined that the position was reasonably available at wages of $5.25 per hour or $210.00 per week.

Dr. Dorey, in his September 28, 1998 work capacity evaluation, reviewed the position description and stated that appellant could perform the duties of fitness instructor. He indicated that appellant could work 8 hours per day with restrictions of pushing, pulling and lifting up to 20 pounds for up to 4 hours per day. The position description of fitness instructor indicates that it is a sedentary to light-duty position, which requires occasional lifting of 10 to 20 pounds and thus conforms with Dr. Dorey's restrictions. The position selected by the vocational rehabilitation specialist was reviewed and approved by Dr. Dorey.

The Board finds that the Office considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment and age and employment qualifications, in determining that the position of fitness instructor represented appellant's wage-earning capacity.[6] The Board also finds that the weight of the medical evidence rests with Dr. Dorey, since there is no other medical evidence of record indicating that appellant could not perform this job. He reviewed the duties of fitness instructor and stated in his September 28, 1998 report that appellant could perform those duties. The Board notes that the Office's decision to reduce appellant's compensation benefits was not based on old medical evidence since Dr. Dorey's September 28, 1998 report was sufficiently contemporaneous to the date of the Office's decision.

The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of fitness instructor and that such a position was reasonably available within the general labor market of appellant's commuting area. Since the record contains no medical evidence to the contrary, the Office properly determined that the position of fitness instructor reflected appellant's wage-earning capacity effective March 15, 1999.

[5] *Id*. at 434-35.

[6] *See id.* at 435.

The July 24, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
March 13, 2002

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member