U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT D. KERLEY and DEPARTMENT OF THE NAVY, NAVAL SEA SYSTEMS COMMAND, Keyport, Wash.

Docket No. 96-846; Submitted on the Record;
Issued May 26, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM, BRADLEY T. KNOTT

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

On July 31, 1990 appellant, then a 45-year-old ordinance equipment repairer, sustained injury to his low back while in the performance of duty. He stopped working on August 2, 1990. The Office accepted the claim for low back strain and a recurrent lumbar disc protrusion at L5-S1 for which he underwent a laminectomy on November 9, 1990.[1] Appellant received appropriate compensation benefits.

Appellant was treated by Dr. Robert Morelli, a Board-certified neurosurgeon and appellant's attending physician, who submitted reports discussing the lumbar laminectomy and appellant's progress.

In April 1991 appellant was referred for vocational rehabilitation services and worked with a rehabilitation counselor, Edward A. Howden. After a period of training and placement activity, rehabilitation efforts did not result in a return to work with the federal government or other permanent placement. He initially participated in an on-the-job training program with his previous employer as an engineering technician from December 1991 to August 1992. Mr. Howden submitted various reports concerning appellant's progress in the on-the-job training program, but permanent employment was not achieved when the job training program ended in August 1992.

In a March 7, 1993 report, Mr. Howden noted that the area where appellant lives, Hawthorne, Nevada, "is one of the most difficult areas in Nevada at this time to gain employment." Mr. Howden indicated that the federal government and the ammunition plant

[1] Appellant previously had lumbar surgeries in 1981 and 1987. The record reflects that appellant's duty station was located in Hawthorne, Nevada.

operated by contractor Day Zimmermann/Basil (DZB) were the only two major employers in the area. He further stated that the area where appellant lives had a diminishing labor market, the closest secondary market was located sixty miles away and was also depressed, and that a commute of fifty miles would be difficult for appellant on a daily basis in light of his back condition. He stated: "[W]ithout relocation, I believe the injured worker's future employment options in Hawthorne are quite bleak when we are looking at any type of job above $5.00 to $6.00 per hour." He concluded that he would identify other vocation options.

In a work restriction evaluation dated July 28, 1993, Dr. Morelli reevaluated appellant and indicated that he was capable of working 8 hours per day, to include sitting 1 to 2 hours per interval, walking 10 to 30 minutes per interval, standing intermittently and lifting/bending/squatting/climbing/kneeling/twisting -- occasionally throughout day. He also indicated that appellant had a lifting restriction of 20 to 35 pounds. In a clinic note dated November 17, 1994, Dr. Morelli restricted appellant's lifting to 15 to 20 pounds but did not otherwise change the work restrictions.

In an October 19, 1993 report, Mr. Howden determined that the positions of expediter, facility planner and production planner were suitable for appellant given his physical restrictions and background experience. On Office forms prepared defining the positions, Mr. Howden addressed availability noting: "Hawthorne, Nevada is a small rural community in central Nevada more than 50 miles from the nearest alternative employment area, none of which offer a better employment option than Hawthorne...." He concluded that an alternative to rating appellant was by looking into other jobs in the community, such as a motel desk clerk or night auditor. No immediate action was taken to rate appellant and placement efforts continued. On January 15, 1994 Mr. Howden again commented on the limited job opportunities existing in Hawthorne. He noted that there were "jobs performed in reasonable numbers in the Hawthorne area as reported in a rating of October 1993", but did not address whether this pertained to the three selected positions or to other positions within the community as mentioned as an alternative.

On September 12, 1994 appellant's rehabilitation file was closed by Office rehabilitation specialist Duwayne Smith. Mr. Smith noted that appellant had not returned to work despite extensive placement efforts and that Mr. Howden had previously completed labor market surveys concerning the three jobs for which appellant was found suitable in October 1993. Mr. Smith stated: "This information received, indicating the injured worker can perform the duties of ... expediter, remains current and the jobs continue to be performed in sufficient numbers as documented by the counselor."

The Office obtained information from the employing establishment regarding appellant's pay rate as an ordnance equipment repairer. The employing establishment informed the Office that the current pay rate for the job of ordnance equipment repairer was $533.60 per week. In an October 24, 1994 memorandum, the Office calculated appellant's loss of wage-earning capacity, using the *Shadrick*[2] formula, based on earnings as an expediter of $360.00 per week, and

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

determined that appellant had a 67 percent wage-earning capacity or a 33 percent loss of wage-earning capacity.

In a letter dated October 24, 1994, the Office notified appellant that it proposed to reduce his compensation on the grounds that he had the capacity to earn wages as an expediter at the rate of $360.00 per week.

In a letter dated October 27, 1994, appellant argued that the positions of expediter, facility planner and production planner were not available nor performed in sufficient numbers in the area of Hawthorne. Appellant noted that the local economy was depressed and that the figures concerning the number of positions available were not reflective of work availability in Hawthorne.

In a status report of December 6, 1994, Mr. Smith noted that while the local economy was depressed, "there is nothing to refute that the identified jobs are performed in sufficient numbers."

By decision dated December 8, 1994, the Office reduced appellant's compensation effective December 11, 1994, based on his capacity to earn wages as an expediter. The Office found that the position of expediter most closely met Dr. Morelli's physical restrictions. The Office further noted that, in his November 17, 1994 clinic note, Dr. Robert Morelli restricted appellant's lifting limits to 15 to 20 pounds and that the position of expediter only required lifting of up to 10 pounds. The Office concluded that the position of expediter fairly and reasonably represented appellant's wage-earning capacity.

Appellant requested review of the record by an Office hearing representative. In a decision dated December 8, 1995 and finalized December 11, 1995, the Office hearing representative affirmed the December 8, 1994 wage-earning capacity.[3]

The Board finds that the Office did not meet its burden of proof to reduce appellant's 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 or modification of such benefits.[4]

The Office determined that appellant was no longer totally disabled for work due to the effects of his July 31, 1990 work-related injury. In his July 28, 1993 report, Dr. Morelli indicated that appellant could work 8 hours a day, which included sitting 1 to 2 hours per interval, walking 10 to 30 minutes per interval, stand intermittently, and lift, bend, squat, climb, kneel and twist occasionally throughout the day. In a clinic note dated November 17, 1994, Dr. Morelli restricted appellant's lifting to 15 to 20 pounds.

[3] By letter dated March 20, 1995, appellant advised the Office that he started employment as a purchasing agent with Day Zimmerman/Basil on February 20, 1995.

[4] *Carla Letcher*, 46 ECAB 452 (1995).

The Office has stated that in some circumstances extensive rehabilitation efforts will not succeed. In such circumstances, the Office procedures instruct the rehabilitation counselor to submit a final report summarizing that placement efforts were not successful and submit relevant information to the Office.[5]

In this case, Mr. Howden submitted reports on October 19, 1993 and on January 15, 1994, indicating that placement efforts had been unsuccessful due to Hawthorne being a very limited labor market primarily dependent on one major employer. The counselor provided required information concerning the several position descriptions which conformed with appellant's medical restrictions and experience. However, Mr. Howden qualified his reports to the Office by repeatedly commenting on the limited availability of positions within appellant's commuting area.

In *David Smith*,[6] the Board noted:

> "Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions given the nature of the employee's injuries and the degree of physical impairment, his usual employment, his age and vocational qualifications, and the availability of suitable employment. Accordingly, the evidence must establish that jobs in the position selected for determining wage-earning capacity are reasonably available in the general labor market in the commuting area in which the employee lives. In determining an employee's wage-earning capacity, the Office may not select a makeshift or odd lot position or one not reasonably available on the open labor market."[7] (Citations omitted)

In the present case, the Board finds that the Office has failed to demonstrate that the selected position of expediter was reasonably available within appellant's commuting area. Although the Office found the position was available to appellant, there is insufficient evidence to establish that the position was reasonably available in the general labor market of his commuting area. In this regard, the Board notes that Mr. Howden commented on several occasions as to the limited availability of employment in the area around Hawthorne, Nevada. He noted that there was only one major private employer in the area, a defense contractor. In his October 19, 1993 report addressing the three positions selected for appellant, Mr. Howden again commented on the limited availability of such employment in the area. He noted that the alternative was to rate appellant in other jobs existing in the community. On January 15, 1994 Mr. Howden stated that job opportunities in the Hawthorne, Nevada area were virtually nonexistent. He commented that "there are jobs performed in reasonable numbers in the Hawthorne area as reported in a rating in October 1993" but did not address how this pertained to the position of expediter as was selected by the Office. Mr. Smith, in finding that the position

[5] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, Reemployment: Determining Wage-Earning Capacity, Chapter 2.813.11(c)(2) (December 1993).

[6] 34 ECAB 409 (1982).

[7] *Id*. at 411; *see also Samuel J. Russo*, 28 ECAB 43 (1976).

of expediter was performed in sufficient numbers as to be reasonably available merely cited to the reports of Mr. Howden. He did not address what evidence of record would support this determination or address Mr. Howden's conflicting statements that such job opportunities were limited.

The Board notes that while the Office need not secure a job for appellant, the evidence must establish that jobs in the position selected are reasonably available and performed in sufficient numbers in the general labor market in which the employee lives.[8] In this case, the evidence of record fails to establish that the position of expediter was reasonably available in appellant's commuting area. For this reason, the Office did not meet its burden of proof to reduce his compensation benefits.

The decision of the Office of Workers' Compensation Programs dated December 8, 1995 and finalized December 11, 1995 is hereby reversed.

Dated, Washington, D.C.
May 26, 1999

George E. Rivers
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

[8] *Alfred R. Hafer*, 46 ECAB 553 (1995).