U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ROBERT E. GRAHAM and DEPARTMENT OF THE ARMY, HEALTH SERVICES, ABERDEEN PROVING GROUNDS, Aberdeen, MD

*Docket No. 00-721; Submitted on the Record; Issued July 11, 2001*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in reducing appellant's compensation effective November 1, 1999, based on his capacity to earn wages in the position of a claims examiner.

On July 28, 1994 appellant, then a 68-year-old safety and occupational health manager, was injured at work when he slipped and fell on a wet floor. The Office accepted appellant's traumatic injury claim for a cervical sprain, lumbar sprain and left knee meniscus tear. He received continuation of pay and was placed on the periodic rolls for total disability.

An x-ray of the spine was performed on July 28, 1994 and showed osteoarthritic changes at C4-5 and C6 with moderate narrowing of the C5-6 disc space and narrowing of C4-5 with mild encroachment on the cervical neural formina at those levels. There was no evidence of acute bony injury, acute fracture, dislocation or joint effusion. The diagnosis was cervical spondylosis.

An x-ray of the left thumb performed on July 28, 1994 showed arthritic changes with mild deformity of the proximal aspect of the first metacarpal "probably on the basis of remote injury." No acute fracture or dislocation was identified.

An x-ray of the left ankle taken on July 28, 1994 showed no evidence of acute fracture, dislocation or joint effusion.

Appellant came under the care of Dr. John N. Im, a Board-certified orthopedic surgeon, on August 5, 1994. He noted that appellant had full range of motion of his left knee at the time of examination with no effusion. There was limited flexion of the neck to 40 degrees, extension 30 degrees and rotation 40 degrees. Range of motion of the low back was described as limited and straight leg raising was 75 degrees bilaterally with no motor weakness. The diagnosis was cervical strain, cervical degenerative disc disease, a lumbar sprain of the left knee, sprain of the left ankle and a sprain of the first metacarpal joint of the left hand with degenerative arthritis.

Dr. Im recommended a magnetic resonance image (MRI) scan, to rule out internal derangement with respect to appellant's left knee.

An MRI of the left knee was performed on August 31, 1994 which reported a "tiny tear"of the posterior horn of the medial meniscus, a small knee effusion and subcortical degenerative cysts in the tibial plateau.

The record includes numerous treatment notes by Dr. Im. On September 7, 1994 he reported that appellant was seen for complaints of left knee giving way. Dr. Im recommended that appellant undergo arthroscopic surgery based on the results of the August 31, 1994 MRI report. It was noted that appellant's neck and back problems were improving.

On September 16, 1994 Dr. Im noted that appellant had fallen in his driveway at home and twisted his knee again. Range of motion of the left knee was from 20 to 90 degrees and range of motion of the low back was described as limited with straight leg raising of 80 degrees. Dr. Im advised that appellant did not want to have surgery. He prescribed medication and released appellant to light-duty deskwork effective September 21, 1994.

In an October 14, 1984 treatment note, Dr. Im related that appellant had fallen at a wedding because his left knee gave way. An electromyogram and nerve conduction study was reported as showing bilateral carpal tunnel syndrome and bilateral ulnar neuropathy "probably due to diabetes." Dr. Im also reported that an MRI of the cervical spine had revealed bulging disc at C4-5 and C5-6 without impingement to the spinal cord.[1]

An MRI of the lumbar spine was taken on December 14, 1994. There was a mild disc bulge at L1-2, L4-5 and L5-S1with mild effacement of the thecal sac and moderate narrowing of the disc space.

In a February 6, 1995 report, Dr. Im noted that appellant had been under his care since August 5, 1994 resulting from a work injury on July 29, 1994. He diagnosed cervical strain with cervical disc degeneration at C5-6, lumbar strain with degenerative disc disease and sprains of the left knee, carpometacarpal joint of the thumb with degenerative arthritis. Dr. Im further noted that appellant suffered from bilateral carpal tunnel syndrome and diabetes. He opined that appellant was permanently disabled from his regular duties.

In a physician's supplemental report dated April 20, 1995, Dr. Im approved appellant for light-duty deskwork only.

In a July 27, 1995 report, a rehabilitation nurse assigned to appellant's case by the Office, indicated that light duty was not available for appellant; therefore, he had been terminated from his job with the employing establishment.

On August 1, 1995 Dr. Albert H. Tannin, a Board-certified orthopedist, performed a second opinion evaluation at the request of the Office. He reported appellant's range of motion of the left knee as 0 to 60 degrees with no swelling or effusion. Dr. Tannin diagnosed ankylosis

[1] The record includes a cervical MRI report dated October 3, 1994.

and laceration of the medial meniscus, left knee. He opined that appellant could perform sedentary office work for four hours per day.[2] Dr. Tannin based his work recommendation solely on appellant's knee condition and did not take into consideration his nonwork-related diabetic condition. He recommended that appellant be referred to a neurologist to ascertain whether appellant's history of giving way of the left extremity was "due to the condition of the left knee." Dr. Tannin also recommended that appellant undergo a course of physical therapy.

Appellant subsequently came under the care of Dr. Charles Episalla on August 23, 1995. In a series of treatment notes dating from August to November 1995 he noted numerous falls by appellant due to giving way of his left knee. Dr Episalla strongly advised appellant to undergo arthroscopic surgery since he was at risk for developing severe traumatic arthritis given the state of the torn cartilage in his knee. Appellant was urged to wear a knee brace and use a cane at all times.

The Office determined that a conflict existed between Drs. Tannin, Episalla and Im. Consequently the Office referred appellant for an impartial medical evaluation with Dr. Richard W. Moscowitz, a Board-certified orthopedic surgeon, on June 6, 1996. In a report dated June13, 1996, Dr. Moscowitz indicated that appellant was reluctant to have his knee examined. On physical examination, he stated that the cervical spine showed satisfactory range of motion, slight limitation of rotation to the left and right. The low back was reported as showing adequate range of motion and straight leg raising was negative bilaterally. With regard to appellant's left knee, Dr. Moscowitz reported 20 degrees of extension and flexion to 60 degrees with no effusion and no swelling. He stated as follows:

> "At this point we are dealing with someone who I believe is mildly disabled, as regards the knee with very little objective support of evidence for any kind of major tear of the meniscus. I think there is very little causally related evidence for disability as regards the neck, back or knee itself and I think [appellant's] major pathology is that of some arthritic changes throughout as well as definite diabetic neuropathy. His unwillingness to pursue the knee pathology far out of proportion to anything logical really brings into question the legitimacy of this case.
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> "[Appellant's] knee ostensibly would be acting as if one would have a completely locked knee and was unable to move it and if untreated this is the way it would act. However again, the MRI shows just a 'tiny meniscus tear.'
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> "As regards the cervical and lumbar strains, I think [appellant] has recovered to the point where he is *status quo ante* and there is no causally-related disability. The causally-related disability to the knee I would still have to say is mild. In reviewing the job description as a safety and occupational manager, I do not feel that he is able to continue in this capacity as the continual walking up and down stairs, possibly crawling would not be able to be done. However, I think he could

[2] In an OWCP-5 work evaluation form, Dr. Tannin reported that appellant should completely avoid kneeling, bending, twisting, reaching and lifting. He indicated that appellant could stand for periods of 20 minutes at a time. He further stated that it was not safe for appellant to drive a motor vehicle until range of motion had improved in his left knee and until the status of the peripheral polyneuropathy had been defined by a neurologist.

have a sedentary job as has been offered. The work limitations would be that he would not be able to climb ladders or do excessive walking. The walking may very well require the use of a cane or single crutch."

Dr. Moscowitz opined that arthroscopic surgery would not benefit appellant since he demonstrated signs of symptom magnification and "by purposely constraining his knee he had managed to decrease availability of motion by at least 30 degrees over these years." He opined that appellant's knee impairment was mild and permanent but made worse by diabetes, which he considered a contributing factor to appellant's many falls. Dr. Moscowitz further noted that appellant's "voluntary" position of his knee in a somewhat flexed position would lead to faltering as well.

On an (OWCP-5) work evaluation form dated June 18, 1996, Dr. Muscowitz reported that appellant could work eight hours per day with restrictions.

On July 24, 1996 appellant's case was opened to vocational rehabilitation. Because there was some confusion as to whether appellant wished to receive benefits from the Office of Personnel Management (OPM) or compensation benefits from the Office, there was a delay in the rehabilitation process. Appellant also moved to a location that was no longer within the geographical commuting area of his prior employer.

In a December 30, 1998 letter, the Office requested that Dr. Episalla complete a work evaluation form, outlining appellant's work restrictions. His office advised, however, that appellant was no longer a patient as he refused to receive recommended treatment.

The Office subsequently referred appellant for a second opinion evaluation with Dr. George L. Steiner, a Board-certified orthopedic surgeon, for a determination regarding appellant's capacity for work. In a March 23, 1999 report, he noted appellant's history of injury, complaints of low back pain and symptoms of giving away of the left knee, which prompted appellant to begin walking with a cane. Dr. Steiner also noted physical findings of the lumbar spine and left knee.[3] The diagnosis given was mild degenerative arthritis of the left knee with ankylosis, spondylosis of the cervical and lumbosacral spine. According to Dr. Steiner, appellant had essential anklosis of the left knee, which he described as being "very largely self-generated by virtue of his wearing the brace virtually all times. He indicated that the brace caused gait abnormality whereby appellant was stooped forward in his posture, producing "secondary spasm of the lumbosacral spine in an attempt by the body to keep itself upright." Dr. Steiner reported that appellant had residuals related to his work injury which precluded him from returning to his former job position due to the instability of appellant's left knee. He stated, "I believe [appellant] could, however, work safely in a more protected environment where he has to do very little walking, with no ladders or scaffolds, minimal stairs and be basically doing sedentary desk work as defined in the [D]ictionary of [O]ccupational [T]itles."

[3] Dr. Steiner noted active range of motion of the left knee approximately 10 to 70 degrees, tenderness in both the internal and external rotation of the per-patella area on McMurray's test. The lumbar spine showed forward flex to approximately 30 degrees, zero extension, sideward bending less than 5 degrees on the right and left, discomfort on straight leg raising and diminished sensation in the left S1 distribution.

In a report dated September 23, 1999, appellant's rehabilitation counselor indicated that efforts were made to place appellant back with his previous employer but that a staffing change had resulted in cancellation of the agency's plans to reemploy him. It was noted that job placement assistance through a rehabilitation program had been unsuccessful, therefore, a market survey was conducted and it was determined that appellant could performed the constructed job of a claims examiner. The rehabilitation specialist reported that the job of claims examiner was within appellant's qualifications and that appropriate jobs had been located within appellant's commuting area. According to the Department of Labor, *Dictionary of Occupational Titles* (DOT) the job of a claims examiner is sedentary with a maximum lifting requirement of 10 pounds. The job was stated as being performed indoors more than 75 percent of the time with earning of $861.20 per week for a 40 hour week.

In a notice of proposed reduction of compensation dated September 23, 1999, the Office advised appellant that it proposed to reduce his compensation benefits to reflect his capacity to earn the wages of a claims examiner at the rate of per week. A Form CA-816 was attached to explain specific calculations regarding entitlement. Appellant was advised to submit additional evidence or argument if he disagreed with the proposed action.

In a letter dated October 5, 1999, appellant noted that the labor survey had been conducted in Binghampton, NY, which he alleged was "well over 100 miles" from his commuting area. He alleged that the labor survey should have been conducted in an area closer to his home, such as the Monticello N.Y. State Employment Office where his name was on file and which was only 30 miles from his home.

In a decision dated November 1, 1999, the Office reduced appellant's compensation on the grounds that he was no longer totally disabled and that he had the capacity to earn wages as a claims examiner.

The Board finds that the Office met its burden of proof in reducing appellant's compensation effective November 1, 1999 based on his capacity to earn wages in the position of a claims examiner.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[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 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 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.[5] Wage-earning capacity is a measure of the

[4] *Betty F. Wade*, 37 ECAB 556 (1986); *Ella M. Gardner*, 36 ECAB 238 (1984).

[5] *See Pope D. Cox*, 39 ECAB 143 (1988); 5 U.S.C. § 8115(a).

employee's ability to earn wages in the open labor market under normal employment conditions.[6] 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.[7]

When the Office makes a medical determination of 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 the Department of Labor, DOT 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.[8]

In the present case, the medical opinions of record are in agreement that appellant is capable of performing sedentary office work.

Appellant's vocational rehabilitation counselor determined that appellant was able to perform the position of a claims examiner. He reported that the position was available in sufficient numbers so as to make it reasonably available within appellant's commuting area and that the minimum wage of the position was $861.20 per 40-hour work week. The vocational rehabilitation counselor stated that he had located claims examiner jobs for which appellant met the requirements and which were within appellant's medical restrictions. He provided a job description for the claims examiner position under the Department of Labor, DOT indicating that the position was sedentary with a lifting requirement not to exceed 10 pounds consistent with appellant's work restrictions. According to appellant's vocational rehabilitation counselor there were jobs as a claim examiner that were reasonably available with the general labor market of appellant's commuting area. While appellant alleged that the market survey was conducted in Binghampton, some 100 miles from his home, the record reflects that the rehabilitation counselor's office was in Binghampton but that the market survey was conducted of positions in appellant's geographical area.

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 claim examiner represented appellant's wage-earning capacity. The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of claims examiner and that such a position was reasonably available within appellant's commuting area. Therefore, the Office properly determined that the position of claims examiner reflected appellant's wage-earning capacity and reduced his compensation benefits effective November 1, 1999.

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[6] *Richard Alexander*, 48 ECAB 432 (1997); *Albert L. Op*, 37 ECAB 684 (1986).

[7] *Id*.

[8] *Alexander, supra* note 7.

The decision of the Office of Workers' Compensation Programs dated November 1, 1999 is hereby affirmed.

Dated, Washington, DC
July 11, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member