

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LYNDAL CAREY and DEPARTMENT OF THE ARMY, ARMY CORPS OF ENGINEERS, FORT WORTH DISTRICT, Fort Worth, TX

*Docket No. 02-35; Submitted on the Record;
Issued May 7, 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 reduced appellant's compensation based on its determination that the selected position of information clerk represented appellant's wage-earning capacity.

The Board has duly reviewed the case record and finds that the Office did not meet its burden of proof in this case.

On May 30, 1991 appellant, then a 55-year-old realty specialist, filed a traumatic injury claim alleging that on that date he hurt his lower back when he climbed through a barbed wire fence. He stated that his foot became entangled in the barbed wire causing him to lose his balance and fall on his back.

In a July 23, 1991 letter, the Office accepted appellant's claim for a lumbar strain. Subsequently, the Office expanded the acceptance of appellant's claim to include herniated nucleus pulposus at L4-5 and spinal stenosis with decompression laminectomy performed on March 8 and August 14, 1993.

Appellant stopped work on March 8, 1993 and returned to light-duty work as a cartographic technician for four hours a day on April 18, 1994. He stopped work on June 15, 1994 due to his back condition.

To determine the extent and duration of appellant's employment-related disability, the Office, in a November 26, 1999 letter, requested that Dr. Scott Blumenthal, a Board-certified orthopedic surgeon and appellant's treating physician, submit a medical report regarding appellant's current employment-related condition. On December 10, 1999 Dr. Blumenthal responded that he had not seen appellant in over four years. He also stated that he could not provide any information about appellant.

By letter dated January 4, 2000, the Office referred appellant along with a statement of accepted facts, a list of specific questions and medical records to Dr. J. John Stasikowski, a Board-certified orthopedic surgeon, for a second opinion examination. By letter of the same date, the Office advised Dr. Stasikowski of the referral.

Dr. Stasikowski submitted a January 20, 2000 report and an accompanying work capacity evaluation dated January 26, 2000 finding that appellant could work eight hours a day with certain physical restrictions.

The Office referred appellant to a vocational rehabilitation counselor who identified the positions of information clerk and telephone solicitor.

In a March 8, 2000 notice of proposed reduction of compensation, the Office advised appellant that it proposed to reduce his compensation because the factual and medical evidence of record established that he was no longer totally disabled, but rather, partially disabled. The Office further advised appellant that he had the capacity to earn the wages of an information clerk. The Office requested that appellant submit additional evidence or argument within 30 days if he disagreed with the proposed action.

In response, appellant submitted a letter dated April 5, 2000 disagreeing with the proposed action and accompanied by medical evidence, including the March 16 and 30, 2000 reports of Dr. James Mark Anderson, a Board-certified family practitioner, indicating that appellant had a speech and voice impairment, which prevented him from performing any clerical duties that required communication skills.

In a letter dated April 18, 2000, the Office requested that Dr. Anderson clarify his opinion. In a July 14, 2000 letter, the Office requested that Dr. Stasikowski indicate whether appellant mentioned that he suffered from a voice/speech impairment and if so how would it preclude appellant from performing the duties of the identified position, a description of which was enclosed for his review. In a January 20, 2000 letter, Dr. Stasikowski opined that appellant was not precluded from performing the duties of the selected position.

By decision dated October 2, 2000, the Office finalized the proposed reduction of compensation effective July 16, 2000. On May 1, 2001 appellant requested reconsideration of the Office's decision accompanied by medical evidence.

In a May 29, 2001 decision, the Office denied appellant's request for modification based on a merit review of the claim.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.¹ Pursuant to section 8115(a) of the Federal Employees' Compensation Act,² 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

¹ *Patricia A. Keller*, 45 ECAB 278 (1993).

² 5 U.S.C. § 8115(a).

actual earnings do not fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, his or her usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect wage-earning capacity in his or her disabled condition.³

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 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 labor market should be made through contact with the state employment service or other applicable service.⁴ The procedures provide for the claims examiner to select one of the positions in view of such factors as appellant's skills, aptitude, mental alertness, personality factors, etc. and to determine the medical suitability taking into consideration medical conditions due to the accepted work-related injury and any preexisting medical condition. Medical conditions arising subsequent to the work-related injury or disease are specifically excluded from consideration.⁵ Finally, application of the principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.⁶

In this case, the Office relied on the second opinion of Dr. Stasikowski that appellant could work eight hours a day with certain physical restrictions. In his January 20, 2000 report, Dr. Stasikowski provided a description of appellant's back pain, May 30, 1991 employment injury and medical treatment. He indicated a review of medical records and his findings on physical and objective examination. Dr. Stasikowski diagnosed status post multiple lumbar spine operative procedures with L4-5 fusion with internal fixation and dynamic retrodisthesis of L3 on L4. In response to the Office's questions, Dr. Stasikowski stated that appellant's employment injury was still active and partially disabling. He noted that appellant could perform sedentary work with light walking for up to 10 minutes at a time. Dr. Stasikowski also stated that appellant could return to his date-of-injury job and light-duty job provided the restrictions above. He opined that the described conditions, as well as appellant's cardiac condition, ulcer and glaucoma prevented him from returning to full employment based on appellant's need for additional medications and medical care for these nonwork-related conditions. In an accompanying work capacity evaluation dated January 26, 2000, Dr. Stasikowski indicated that appellant was limited to walking and reaching 10 minutes and standing 30 minutes. Appellant could reach above his shoulder and operate a motor vehicle

³ See *Dorothy Lams*, 47 ECAB 584 (1996).

⁴ See *Dennis D. Owen*, 44 ECAB 475 (1993); see also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8 (December 1995).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(d) (December 1995).

⁶ 5 ECAB 376 (1953).

one hour. He could not twist, squat, kneel and climb. He could push, pull and lift 10 pounds for 1 hour and take 10-minute breaks every 2 hours.

After reviewing a description of the information clerk position, Dr. Stasikowski stated in his January 20, 2000 letter that he did not note appellant's voice or speech impairment and that appellant did not mention them to him. He opined:

"On the basis of my evaluation from a medical point of view [appellant] is not precluded from performing the identified position. This because after reviewing the enclosed job description and the attachments I find that the job is physically very light and falls within [appellant's] capabilities."

In his March 16, 2000 letter, appellant's treating physician, Dr. Anderson stated:

"[Appellant] has a speech and voice impairment that prevents him from performing duties of any clerical-type nature where communicative skills would be necessary. This impairment dates back to prior to 1970. Prior to his injury with his back and disability [appellant] functioned in a capacity that did not require extensive communicative skills verbally."

Similarly, in his March 30, 2000 letter, Dr. Anderson opined that appellant was totally disabled secondary to chronic lumbar degenerative disease and that appellant also suffered from a secondary impairment of his speech and voice. He stated:

"The impairment on both these dates back to the 70s. Prior to the injury of his back and subsequent permanent disability from this, [appellant] functioned in a capacity that did not require extensive communicative skills and was able to function. However, any effort by [appellant] to use communicative skills such as speech would not be possible."

In response to the Office's April 18, 2000 letter requesting clarification of his opinion that appellant could not perform clerical duties due to his speech and voice impairment, Dr. Anderson stated in an April 20, 2000 letter:

"[Appellant] has a vocal chord paralysis, partial, that impairs his speech and causes early fatigue. It would only impair him from any type of activity that would involve prolonged use of his voice such as phone service, etc.... Regarding the orthopedic restrictions as outlined by Dr. Stasikowski, I do not have any differing opinions. Specific restrictions regarding [appellant's] speech and voice impairment would limit him to minimal conversation in which it was a quiet environment so that he would not have to strain his voice. If necessary, we could ask an ear, nose and throat consultation for further evaluation. His prognosis regarding any recovery is minimal recovery since this has been a chronic condition over the last 10 years and has not improved."

The medical evidence of record does not establish that the duties of information clerk were within appellant's medical restrictions. The position of information clerk was characterized as a clerical position and involved the following duties:

“Answers inquiries from persons entering establishment: Provides information regarding activities conducted at establishment and location of departments, offices, and employees within organization. Informs customer of location of store merchandise in retail establishment. Provides information concerning services, such as laundry and valet services, in hotel. Receives and answers requests for information from company officials and employees. May call employees or officials to information desk to answer inquiries. May keep record of questions asked.”

Regarding its physical requirements, the information clerk position did not require any climbing, balancing, stooping, kneeling, crouching, crawling, fingering, feeling, taste/smelling, far acuity, depth perception, accommodation, color vision and field of vision. Further, the position required occasional reaching and handling, and frequent talking, hearing and near acuity.

In determining loss of wage-earning capacity, preexisting ailments must be considered by the Office in determining whether appellant can perform the selected position. Dr. Anderson's opinion indicates that appellant had a preexisting voice and speech impairment. Although Dr. Stasikowski stated that appellant did not mention this impairment and he did not observe it during appellant's examination, the Office should have referred appellant to a specialist to determine whether appellant had a voice and speech impairment and whether such impairment prevented him from performing the information clerk position. The record, therefore, is unclear as to whether appellant had a medical condition prior to his employment injury, which continued to limit his wage-earning capacity. As the Office did not sufficiently develop the medical evidence relative to appellant's preexisting medical condition, the Office did not meet its burden of proof to reduce appellant's compensation benefits.

The May 29, 2001 and October 2, 2000 decisions of the Office of Workers' Compensation Programs are hereby reversed.

Dated, Washington, DC
May 7, 2002

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member