U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARTIN D. SIMON and DEPARTMENT OF THE NAVY, NAVAL AVIATION DEPOT, San Diego, CA

Docket No. 03-1388; Submitted on the Record;
Issued September 17, 2003

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly adjusted appellant's wage-earning capacity based on his ability to work as a hotel desk clerk.

On May 3, 1999 appellant, then a 72-year-old aircraft sheet metal mechanic, filed a notice of occupational disease and claim for compensation alleging that he sustained a hearing loss as a result of his federal employment which required him to be exposed to excessive noise from, *inter alia*, a microshaver, pneumatic drill, rivet guns, band saw and hammers.

Appellant submitted audiogram reports covering the period of January 11, 1988 to March 29, 1999. The Office referred appellant to Dr. Theodore Mazer, a Board-certified otolaryngologist, for a second opinion. In a report dated June 14, 1999, Dr. Mazer diagnosed appellant with bilateral sensorineural hearing loss. Dr. Mazer concluded:

> "There is no objective finding of any worsening of the patient's hearing or speech functions since his 21 percent impairment settlement. Clinically, however, he complains of increased intolerance to noise. As he is aging, there will be further falloff due to presbycusis and probable increased hyperacusis as well. Thus, it is reasonable, if at all possible, to mitigate his sound exposures by continuing his employment in a less noisy environment, as in his current work placement."

On June 30, 1999 the Office accepted appellant's claim for bilateral hearing loss. However, the Office found that as appellant had previously been paid a schedule award for a 21 percent binaural hearing loss from October 25, 1993 to August 14, 1994, and as appellant's present hearing loss did not exceed the amount previously awarded, appellant's claim for an additional hearing loss was rejected.

On October 8, 1999 appellant filed a claim for compensation (Form CA-7) for leave without pay commencing November 8, 1999. In response to a November 22, 1999 letter from the Office, the employing establishment indicated that appellant worked as an aircraft sheet

metal mechanic from January 4, 1978 to April 1999. They indicated that, at that time, he was placed in a light-duty position at production control until he separated from the employing establishment in October 1999. The employing establishment also submitted a copy of a March 24, 1999 memorandum, wherein the employing establishment had recommended that appellant not work in any position that involved routine exposure to hazardous noise levels due to the extent of his permanent hearing loss. Finally, the employing establishment submitted a November 1, 1999 memorandum wherein it notified appellant that he was separated from employment effective November 5, 1999 due to permanent medical limitations which precluded him from performing the duties of his position efficiently and safely. The Office paid appropriate compensation benefits and placed appellant on the periodic rolls on January 2, 2000.

On January 27, 2000 appellant commenced vocational rehabilitation. Initially, the vocational counselor and appellant explored plans for finding appellant employment as a product assembler and as an electronics assembler. On November 20, 2000 a plan was developed for appellant to get the vocational training necessary to obtain a job as a desk clerk/travel clerk. In this regard, appellant commenced classes on December 5, 2000. Appellant completed his hotel/motel management training program on August 6, 2001, which included an externship in hotel maintenance.

Appellant then began a 90-day period wherein placement assistance was provided by the vocational counselor. In a November 6, 2001 report, appellant's vocational counselor indicated that the jobs of desk clerk, DOT (Department of Labor's *Dictionary of Occupational Titles)* 238.367-038 and travel clerk, DOT 238.367-030 were performed in sufficient numbers so as to be considered reasonably available and that there were a sufficient number of job openings to expect a successful job placement at the conclusion of the rehabilitation effort within commuting distance of appellant's home. The vocational counselor indicated that these jobs would pay $9.26 per hour or $370.40 per week and $8.54 per hour or $361.60 per week, respectively. The vocational rehabilitation counselor believed that appellant's lack of success in obtaining a job as a hotel desk clerk was attributable to, *inter alia*, his insistence of informing potential employers that he was "handicapped," his failure to dress appropriately for interviews, his failure to initiate any contact with potential employers on his own and appellant's belief that, if he accepted a job with a private employer, he would be taking the employing establishment "off the hook."

On May 3, 2002 the Office issued a notice of proposed reduction of compensation. The Office noted that the evidence established that appellant had the capacity to earn wages as a hotel desk clerk at a rate of $370.40 weekly. By decision dated June 4, 2002, the Office reduced his wage-loss compensation benefits based on the constructed earnings in this position. Appellant requested an oral hearing and, by decision dated April 17, 2003, the hearing representative affirmed the Office determination that appellant could perform the duties of hotel desk clerk at a salary of $370.40 per week.

The Board finds that the Office properly reduced appellant's compensation benefits based on his capacity to earn wages as a hotel desk clerk.

Section 8115 of the Federal Employees' Compensation Act[1] provides that 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 the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, the degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect his wage-earning capacity in his disabled condition.[2]

When the Office makes a 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 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 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. Finally, application of the principles set forth in *Albert C. Shadrick*[3] will result in the percentage of the employee's loss of wage-earning capacity. The basic range of compensation paid under the Act is 66 2/3 percent of the injury employee's monthly pay.[4]

In the instant case, no medical evidence establishes that appellant cannot perform the duties of hotel desk clerk. The only medical restriction placed on appellant was that he work in a "less noisy environment." With regard to appellant's ability to perform the duties of hotel clerk, appellant underwent vocational rehabilitation and received six months of training in hotel management. The vocational counselor indicated that this position was considered reasonably available within commuting distance of appellant's home, and that appellant had the capacity to earn $370.40 per week in this position. Appellant's contentions that this position was not appropriate for him due to his hearing impairment and age were considered by the vocational counselor. The vocational counselor noted that, if appellant had difficulty with hearing, he should wear the hearing aids recommended by his doctor. There is no evidence that appellant was too old for the position of hotel desk clerk other than appellant's unsupported assertions that this was so. The vocational counselor attributed appellant's inability to obtain employment to his improper dress for interviews, his insistence on telling potential employers that he was handicapped and his lack of effort in obtaining positions on his own. Accordingly, the Office appropriately found that the position of hotel desk clerk represented appellant's wage-earning capacity.

[1] 5 U.S.C. §§ 8101-8193, 8115.

[2] *James Henderson, Jr.*, 51 ECAB 268 (2000).

[3] 5 ECAB 376 (1953).

[4] 5 ECAB 376 (1953).

The decisions of the Office of Workers' Compensation Programs dated April 17, 2003 and June 4, 2002 are hereby affirmed.

Dated, Washington, DC
September 17, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member