U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HAROLD W. KNUTSON and DEPARTMENT OF AGRICULTURE, AGRICULTURE MARKETING SERVICE, Fresno, CA

Docket No. 03-1834; Submitted on the Record;
Issued September 15, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation to reflect his wage-earning capacity in the selected position of telephone solicitor.

The Office accepted that appellant sustained a left knee fracture in the performance of duty on February 15, 1989 when he fell from a bin approximately five feet above the ground. Appellant returned to his regular duties as an inspector and stopped working in January 1997. He received compensation for temporary total disability and underwent knee replacement surgery on April 26, 1999.

With respect to appellant's work capacity, the Office found that a conflict in the medical evidence arose between appellant's attending orthopedic surgeon, Dr. David Taylor, and a second opinion orthopedic surgeon, Dr. Craig MacClean. Dr. Taylor indicated in a work capacity evaluation (Form OWCP-5b) dated March 6, 2000 that appellant could not work eight hours per day, and he did not anticipate an increase in the number of hours appellant could work. By narrative report dated May 31, 2000, Dr. Taylor indicated that appellant could work three hours per day. Dr. MacClean, on the other hand, opined in a July 26, 2000 report that appellant could work eight hours per day. Dr. MacClean reported that appellant could not sit for more than two hours per day or six hours total, with intervals of walking and standing, was limited to 10 pounds lifting, and should be able to keep his left leg propped up on a stool.

To resolve the conflict, the Office referred medical records and a statement of accepted facts, to Dr. Robert M. Mochizuki, a Board-certified orthopedic surgeon, who, in a report dated October 31, 2000, provided a history and results on examination. In a report dated November 21, 2000, Dr. Mochizuki opined that appellant could work eight hours per day if he could sit or stand at will and be able to prop up his left leg as needed. Dr. Mochizuki completed a work capacity evaluation and indicated that appellant could lift no more than 10 pounds.

In a letter dated March 5, 2001, the Office notified appellant that it proposed to reduce his compensation on the grounds that he had the capacity to earn wages of $262.40 per week as a telephone solicitor. The Office found that the position conformed to appellant's work restrictions and was available in appellant's commuting area. Appellant was advised that he could submit additional relevant evidence within 30 days.

On May 4, 2001 the Office received a report dated April 18, 2001 from Dr. Taylor who provided results on examination, stating that appellant's condition was permanently disabled.

By decision dated April 3, 2002, the Office reduced appellant's compensation based on his capacity to earn wages of $262.40 per week. In a decision dated April 14, 2003, an Office hearing representative affirmed the reduction of compensation.

The Board finds that the Office properly reduced appellant's compensation to reflect his wage-earning capacity.

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 in such 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]

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.[3] Finally, application of the

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

[2] *See Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); *see also* 5 U.S.C. § 8115(a).

[3] *See Dennis D. Owen*, 44 ECAB 475 (1993). The Board notes that the Office does not have to identify an employer willing to hire appellant, and even if appellant had applied for and been unsuccessful in obtaining a job in the selected position, the position may still be reasonably available in the labor market. *See Steve Costello*, 37 ECAB 251 (1985).

principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.[4]

The Office selected the position of telephone solicitor in determining appellant's wage-earning capacity in this case. The position of telephone solicitor (*Dictionary of Occupational Titles* number 299.357-014) is a sedentary position with a 10-pound lifting restriction. According to the job description, the position involves calling prospective customers, recording transactions and entering data on a computer.

The initial question presented is whether the selected position is within appellant's physical restrictions. In this regard the medical evidence was in conflict and the case was referred to Dr. Mochizuki for resolution of the conflict. Section 8123(a) of the Act provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.[5] In his November 21, 2001 report, Dr. Mochizuki found that appellant could work 8 hours per day with a 10-pound lifting restriction, provided he could sit or stand as needed and prop his left leg. Dr. Mochizuki provided a reasoned opinion, based on an accurate background, with respect to appellant's work restrictions. It is well established that when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[6] The Board finds that Dr. Mochizuki's report represents the weight of the medical evidence. Appellant submitted an April 18, 2001 report from Dr. Taylor, but he indicated that appellant's condition remained stationary. Additional reports from a physician on one side of the conflict that is properly resolved by an impartial specialist are generally insufficient to overcome the weight accorded the impartial specialist's report or create a new conflict.[7] The Board finds that the Office properly relied on Dr. Mochizuki's opinion as to appellant's work restrictions.

An Office rehabilitation specialist indicated that the telephone solicitor position would allow an individual to stand, walk or prop up a leg as needed. There is nothing in the position description that would preclude standing or elevating a leg when necessary.[8] The lifting requirement was 10 pounds, which is in accord with appellant's lifting restrictions. Based on the evidence of record, the Board finds that the selected position was within appellant's work restrictions and was appropriate for a wage-earning capacity determination.

The rehabilitation specialist determined that appellant's education and work history were adequate vocational preparation for the selected position. In addition, the specialist confirmed

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[4] 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.403.

[5] *Robert W. Blaine*, 42 ECAB 474 (1991); 5 U.S.C. § 8123(a).

[6] *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

[7] *See id.; see also Dorothy Sidwell*, 41 ECAB 857 (1990).

[8] *See Steve Costello, supra* note 3, where the Board noted that there was no indication that the duties of the telephone solicitor position could not be performed with intermittent standing.

availability of the position in appellant's commuting area by contact with the state employment service, at a weekly wage of $262.40. The Board finds that the evidence of record supports the conclusion that the position was selected with due regard to the factors enumerated in section 8115(a). Appellant's compensation is therefore properly reduced according to the *Shadrick* formula based on his wage-earning capacity as a telephone solicitor.

The decision of the Office of Workers' Compensation Programs dated April 14, 2003 is affirmed.

Dated, Washington, DC
September 15, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member