United States Department of Labor
Employees' Compensation Appeals Board

MARVIN ELDER, Appellant	)	
and	)	**Docket No. 03-1421**
	)	**Issued: January 26, 2005**
DEPARTMENT OF THE TREASURY, U.S. SECRET SERVICE, Pittsburgh, PA, Employer	)	

Appearances
Neal A. Sanders, for the appellant
Thomas G. Giblin, for the Director

Oral Argument October 19, 2004

DECISION AND ORDER

Before:
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On May 12, 2003 appellant filed a timely appeal from an Office of Workers' Compensation Programs decision dated April 4, 2003, which affirmed an August 12, 2002 decision reducing his compensation based on his capacity to perform the duties of a claims examiner. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly reduced appellant's compensation based on his capacity to perform the duties of a claims examiner.

FACTUAL HISTORY

On July 24, 1989 appellant, a 44-year-old special agent, injured his lower back while attempting to adjust a spare tire in the trunk of an official vehicle. He filed a claim for benefits on the date of injury, which the Office accepted for a low back strain and aggravation of lumbar degenerative disc disease. Appellant received compensation for total disability and was placed on the periodic rolls.

In order to determine appellant's current condition and his capacity to return to gainful employment, the Office referred him for a second opinion examination with Dr. Charles S. Stone, a Board-certified orthopedic surgeon. In a report dated November 11, 1999, he stated that appellant initially began to experience low back pain in 1971, when he injured his back while moving furniture. Appellant was off work for two months and reinjured his low back in 1975, 1978 and 1979. Dr. Stone noted that appellant filed a claim based on a left knee injury in 1982, from which he continued to experience pain and discomfort. He stated:

> "It is my opinion that on July 24, 1989 [appellant] sustained an injury to his left knee which, according to him, occurred sometime in 1982. This injury aggravated preexisting degenerative joint disease of the left knee and remains symptomatic. I concur with continued treatment with the knee brace, but believe he has reached maximum medical improvement of this condition and that no further treatment of his left knee is indicated at this time....
>
> "It is my opinion that [appellant] is capable of working eight hours per day in a sedentary occupation. He must use a low back support. [Appellant] must use a left knee brace. He may use crutches as needed. During an eight[-]hour day [appellant] can walk for one hour, stand for two hours. There is no limitation on the number of hours he can sit during an eight[-]hour day. [Appellant] can push for 3 hours, pull for 3 hours and lift for 3 hours, in each case objects not to weigh more than 10 pounds. He cannot squat, kneel or climb.
>
> "My diagnosis is lumbar degenerative disc disease with protrusion, supported by the positive physical findings and abnormal magnetic resonance imaging [MRI] scan. This condition is related to the medical factors of employment set out in the [s]tatement of [a]ccepted [f]acts.... [Appellant] has left knee medial and lateral compartment degenerative arthritis, substantiated by the x-ray report of August 13, 1998 and by my physical examination of November 11, 1999. I concur with the use of a left knee brace on a full-time basis."

On August 7, 2000 a vocational rehabilitation counselor issued a report summarizing his efforts to find suitable alternate employment for appellant within the restrictions outlined by Dr. Stone. The vocational counselor recommended several positions listed in the Department of Labor, *Dictionary of Occupational Titles*, which, he determined, reasonably reflected

appellant's ability to earn wages, including that of "claims examiner, DOT #241.267-018."[1] The August 4, 2000 job description for claims examiner stated that the job was sedentary, with occasional lifting not exceeding 10 pounds and required frequent reaching, handling and fingering documents and talking and hearing. The hourly wage for the position of claims examiner was listed as $13.72.

On September 11, 2000 the Office advised appellant of its proposal to reduce his wage-loss compensation because the factual and medical evidence established that he was no longer totally disabled and had the capacity to earn wages as a claims examiner at the weekly rate of $548.80 in accordance with the factors outlined in 5 U.S.C. § 8115.[2] The Office stated that the case had been referred to a vocational rehabilitation counselor, who had identified the position of claims examiner as suitable for appellant given his work restrictions and was reasonably available in his commuting area. The Office noted that appellant's compensation would be adjusted to $564.00 using the *Shadrick*[3] formula. The Office indicated that his salary on July 24, 1989 the date he began receiving compensation for temporary total disability, was $945.53 per week that the current adjusted pay rate for his job on the date of injury was $1,381.78 per week and that appellant was currently capable of earning $548.80 per week, the pay rate of a claims examiner. The Office determined that appellant had a 40 percent wage-earning capacity, which when multiplied by 3/4 amounted to a compensation rate of $425.49 per week. The Office found that based on the current consumer price index, his current adjusted compensation rate was $564.00.[4] The Office allowed appellant 30 days to respond.

In a September 27, 2000 work restriction evaluation, Dr. Hassan Hassouri, Board-certified in psychiatry and neurology and appellant's treating physician, outlined the following physical restrictions: sitting for no more than three hours; walking for no more than one half hour; lifting only light objects; occasional bending; climbing only on rare occasions; standing for no more than one half an hour; and no squatting, kneeling or twisting, pushing or pulling, no operating a motor vehicle. Dr. Hassouri advised that appellant had a limited-work capacity and could function on light duty for three to four hours with the help of medication and braces. In a

[1] The job description for claims examiner stated:

> "Analyzes insurance claims to determine extent of insurance carrier's liability and settles claims with claimant in accordance with policy provisions; Compares data on claim application, death certificate or physician's statement with policy file and other company records to ascertain completeness and validity of claim. Corresponds with agents and claimants or interviews them in person to correct errors or omissions on claim forms and to investigate questionable entries. Pays claimant amount due. Refers most questionable claims to investigator (clerical) or to claim adjuster (business ser.: insurance) for investigation and settlement. May investigate claims in field. May be designated according to type of claim handled as Accident-And-Health–Insurance – Claim Examiner (insurance); Automobile-Insurance-Claim Examiner (business ser.; insurance); Marine-Insurance-Claim Examiner (business ser.; insurance)."

[2] 5 U.S.C. § 8115.

[3] *Albert C. Shadrick*, 5 ECAB 376 (1953); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.814.2 (April 1995).

[4] The Office stated that the job description for claims examiner indicated that the work would be inside 75 percent of the time. No such indication, however, appears on the job description.

report dated October 2, 2000, Dr. Hassouri stated that appellant had experienced chronic low back pain since 1976 and had developed significant knee pain over the past seven to eight years, particularly in the left knee. He stated:

> "In general, I believe that appellant is severely incapacitated and disabled. Even though he may be able to use his upper extremities for simple manipulation, answering the [tele]phone and doing fine work, etc. for a few hours a day ... the use of medications and his ongoing pain and discomfort, which is unlikely to go away, is a major distraction. Having known [appellant] for over seven years, I strongly believe that he is disabled and I have witnessed many of his problems over the last seven to eight years summarized by himself since 1975 up to this date."

On October 27, 2000 the Office made an addendum to the statement of accepted facts, stating that the claim had been accepted for aggravation of lumbar degenerative disc disease and that appellant had sustained three knee and leg injuries under case files 03183700, 030076516 and 030090239.

The Office found that there was a conflict in the medical evidence between Dr. Hassouri, the attending physician, and Dr. Stone, the referral physician, regarding the hours appellant could work in a part-time, light-duty capacity. It referred appellant, together with the statement of accepted facts and the case record, to Dr. Michael Levine, a Board-certified orthopedic surgery, for an impartial medical evaluation. In a report dated November 28, 2000, Dr. Levine stated that appellant's pain was primarily attributable to his low back, but that he also experienced significant pain in his knees, which limited his ability to function. Dr. Levine advised that appellant's 1989 low back strain aggravated a preexisting chronic lumbar spondylosis. He opined that appellant was not totally disabled and agreed with Dr. Stone that he was capable of sedentary, light duty, but was not able to return to full-time employment. Dr. Levine concluded that appellant could do some light manual chores in a standing position but not on a regular basis and that appellant was not able to return to his usual job as a special agent.

In a November 28, 2000 work capacity evaluation, Dr. Levine outlined restrictions of two hours of walking and standing, one hour of operating a motor vehicle, two hours of pushing, pulling, lifting not exceeding 10 to 15 pounds and no squatting, kneeling and climbing. He also opined that appellant should be allowed breaks of 10 to 15 minutes every 2 hours. Dr. Levine submitted a supplemental January 15, 2001 report in which he clarified that appellant was capable of working full time in a sedentary job and was able to perform light-duty work on a part-time basis for eight hours per day.

By decision dated February 7, 2001, the Office advised appellant that it was reducing his compensation because the weight of the medical evidence, as represented by Dr. Levine's impartial medical opinion, showed that he was capable of working eight hours per day with restrictions and that the position of claims examiner represented his wage-earning capacity.

By letter dated February 26, 2001, appellant requested an oral hearing, which was held on April 30, 2002. Appellant contended that the claims examiner position was not suitable because the position description contained an open-ended requirement to go out into the field and

investigate accidents. He contended that his back condition affected his ability to drive long distances, which would make it difficult for him to perform the claims examiner position. Appellant also asserted that he would be required to go out into the field and investigate a wreck, something which occasionally involved getting down on hands and knees and crawling into tight places to examine the manner in which a particular vehicle had sustained damages. These activities were very difficult for him to perform due to his knee and back conditions.

By decision dated August 12, 2002, an Office hearing representative affirmed the Office's February 7, 2001 decision.

By letter dated November 7, 2002, appellant's attorney requested reconsideration and submitted an October 16, 2002 report from Dr. Hassouri, who stated that appellant continued to have significant low back pain and left knee pain and had considered left knee replacement surgery. He also noted that appellant also experienced right knee pain. Dr. Hassouri reiterated that appellant had degenerative joint disease and a history of disc degeneration in the lumbar spine and advised that there was some evidence that he had a degenerative condition in his cervical spine as well. He stated that appellant's degenerative joint disease affected his knees as well, especially the left one. Dr. Hassouri concluded:

> "With respect to [appellant's] disability, I have mentioned in the past and I will restate that appellant has significant problems with his low back and now with his cervical spine, as well as other joints, especially the left knee joint. I do believe that he is disabled and I do believe that this capacity to do any meaningful physical activity and gainful employment is minimal to none."

By decision dated April 4, 2003, the Office denied modification of the August 12, 2002 decision.

LEGAL PRECEDENT

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 of benefits.[5] 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 vocational qualifications and the availability of suitable employment.[6] 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 in the open labor market.[7]

[5] *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

[6] *Samuel J. Chavez*, 44 ECAB 431 (1993); *Hattie Drummond*, 39 ECAB 904 (1988); *see* 5 U.S.C. § 8115; Larson, *The Law of Workers' Compensation* § 57.22 (1989).

[7] *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

ANALYSIS

The Board finds that the medical evidence does not support a finding that the selected position as claims examiner is within appellant's physical limitations. The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by the medical evidence.[8] The Office referred appellant to a vocational rehabilitation counselor who identified the constructed position of claims examiner to be within appellant's physical restrictions. Dr. Stone opined that appellant was capable of working eight hours per day in a sedentary occupation, with the use of a low back support, a left knee brace and crutches, as needed. He restricted appellant from walking for one hour and standing for two hours, with no limitation on sitting during an eight-hour day. Dr. Stone recommended no pushing or pulling for more than 3 hours with objects weighing more than 10 pounds. The Office found in the September 11, 2000 proposed reduction of compensation that the position of claims examiner was within appellant's physical restrictions. However, on October 27, 2000 the Office made an addendum to the statement of accepted facts which indicated that appellant had sustained three previous knee and leg injuries. Therefore, due to the inclusion in the statement of accepted facts of these claims pertaining to a preexisting left knee condition, appellant now had greater restrictions than those upon which the claims examiner job had been based. Following the September 11, 2000 proposed reduction of compensation, the Office referred the case to Dr. Levine, the impartial medical examiner, who indicated that appellant was capable of performing sedentary work and returning to work within the indicated restrictions. However, he only addressed appellant's low back conditions in his report. The Office found that Dr. Levine's report represented the weight of the medical evidence in the February 7, 2001 decision reducing appellant's compensation. However, in selecting a modified job, the Office is required to include those conditions, regardless of etiology, which existed prior to the job offer.[9] In determining wage-earning capacity impairments, which preexisted the injury and all injury-related impairments must be taken into consideration in the selection of the position.[10] Once the additional restrictions stemming from appellant's knee conditions were included with the statement of accepted facts, this raised the issue of whether the duties of the claims examiner position exceeded the restrictions imposed by Dr. Stone which only addressed the low back conditions. Therefore, the Office erred in relying on the opinion of Dr. Levine, who did not consider any additional restrictions based on appellant's accepted knee conditions, in reducing his compensation based on his capacity to perform the duties of a claims examiner. Accordingly, the Office did not meet its burden of proof in this case to reduce appellant's compensation benefits pursuant to 5 U.S.C. § 8115.

[8] *Robert Dickinson*, 46 ECAB 1002 (1995).

[9] *See* 20 C.F.R. § 10.124(c).

[10] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.814.8.a(2), (5), (6) (December 1993); *see also* Chapter 2.814.8(d), *Medical Suitability*, which states: "The CE [claims examiner] is responsible for determining whether the medical evidence establishes that the claimant is able to perform the job, taking into consideration medical conditions due to the accepted work-related injury or disease *and any preexisting medical conditions*." (Emphasis added.)

CONCLUSION

The Board finds that the Office did not meet its burden to reduce appellant's compensation benefits pursuant to 5 U.S.C. § 8115.

ORDER

IT IS HEREBY ORDERED THAT the April 4, 2003 and August 12, 2002 decision of the Office of Workers' Compensation Programs be reversed.

Issued: January 26, 2005
Washington, DC

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member