United States Department of Labor
Employees' Compensation Appeals Board

RILEY A. BROWNING, Appellant	)	
and	)	**Docket No. 03-2086**
	)	**Issued: May 3, 2004**
DEPARTMENT OF LABOR, MINE SAFETY & HEALTH ADMINISTRATION, Mt. Hope, WV, Employer	)	

Appearances:
Riley A. Browning, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On July 3, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated January 13, 2003. Pursuant to 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 monetary compensation benefits effective January 3, 2002, on the grounds that he had the wage-earning capacity of an insurance agent clerk.

FACTUAL HISTORY

On April 13, 1990 appellant, then a 50-year-old mine safety and health inspector, filed a notice of traumatic injury alleging that on that date he stepped in a hole and sustained injury to his left leg. The Office accepted that appellant sustained back strain and a herniated lumbar disc and it approved a laminectomy and a left knee arthrogram. Concurrent disability not due to

injury was noted to include a left jaw fracture, an old inferior wall myocardial infarction, a 1970 left knee injury, a hiatal hernia, degenerative changes with disc space narrowing at L5-S1, degenerative arthritis with spondylophytosis and hypertension. Appellant underwent a laminectomy at L4-5 and L5-S1 on February 21, 1991 and arthroscopic left knee medial meniscectomy with shaving of the patella and femoral condyles and debridement of the lateral meniscus on July 9, 1992.

Appellant was treated during the following years by Dr. Kyle R. Hegg, a Board-certified orthopedic surgeon for his left knee problems, including Grade 3-4 chondromalacia and by Dr. Thomas F. Scott, a Board-certified orthopedic surgeon, for his back, knee and other orthopedic concerns.

On August 11, 1994 Dr. George M. Gumbert, Jr., a Board-certified orthopedic surgeon, noted that appellant had reached maximum medical improvement and "could probably not work more than a 3- [to] 4-hour day," and "probably could not work a straight 5-day (half-day) work shift."

On May 15, 1995 the Office granted appellant a schedule award for a 13 percent impairment of his left lower extremity for the period April 8 until December 26, 1994, for a total of 37.44 weeks of compensation. The schedule award was affirmed by decision dated September 20, 1996.

On a work capacity evaluation dated July 7, 1997, Dr. William R. Jeffrey, a Board-certified internist, indicated appellant's activity restrictions and noted that they were due to knee and back injury. He further noted that appellant had coronary artery disease status post coronary artery bypass surgery and indicated that appellant could work zero hours per day. In a July 7, 1997 narrative report, Dr. Jeffrey indicated that appellant had been disabled since August 1990, that he had chronic numbness in his left lower extremity from his knee distally and chronic back pain and that in 1995 he suffered a myocardial infarction and underwent a coronary artery bypass graft in October 1995. Dr. Jeffrey noted that appellant underwent a cholecystectomy in May 1997 and continued to use pain medication as needed.

Vocational rehabilitation was attempted with appellant, but on August 12, 1997 it was noted that appellant's work tolerance limits received from Dr. Jeffrey would not allow for vocational rehabilitation services to proceed.

By report dated February 17, 1999, Dr. Hegg noted that appellant was seen after an absence of 2¼ years with a left knee flare-up. He diagnosed osteoarthritis of the left knee and to a lesser extent the right knee and he indicated that an injection was given, but he did not discuss appellant's disability status.

On June 30, 1999 the Office determined that a second opinion examination was required as to the status of appellant's disability. The Office referred appellant, together with a statement of accepted facts, the relevant case record and questions to be answered, to Dr. Paul Bachwitt, a Board-certified orthopedic surgeon, for a second opinion examination.

By report dated December 20, 1999, Dr. Bachwitt reviewed appellant's factual and medical history, evaluated that statement of accepted facts and the relevant case record, reported the results of his physical examination and testing, including range of motion and strength testing results and diagnosed degenerative arthritis of the left knee and lumbosacral sprain/strain. Dr. Bachwitt noted that the joint space narrowing in the left knee was an objective finding but that there were no objective findings relative to appellant's back. He indicated that the etiology of the diagnosed conditions was wear and tear from performing appellant's job over a significant period of time and he noted that he did not have any specific recommendation for further treatment at this point in time. Dr. Bachwitt noted: "I feel that [appellant] could do sedentary and light work. I would defer higher demand categories to a qualified vocational expert with appropriate validity testing. I do not find this [appellant] to be permanently and totally disabled and is employable from an orthopedic standpoint." Dr. Bachwitt completed a Form OWCP-5 work capacity evaluation indicating that appellant could sit, stand and walk for 4 to 6 hours per day and could reach, twist, push, pull and lift for 2 to 3 hours per day with a limit of 10 to 20 pounds. He stated that appellant could perform sedentary to light work from an orthopedic standpoint, but that appellant's heart disease should be considered in finalizing his functional capacity evaluation.

Also submitted was a January 28, 2000 report from Dr. Hegg, which noted that he had not seen appellant for nearly one year, but that he was back complaining of left knee flare-up and requesting an injection. Disability was not discussed.

On March 8, 2000 appellant was referred for vocational rehabilitation services. It was noted that appellant felt that he was very limited in his ability to achieve a full day of work. The rehabilitation specialist noted that the employing establishment was slow about finding light duty and that a constructed wage-earning capacity should be done if no job offer from the employing establishment was forthcoming.

By report dated July 17, 2000, the rehabilitation counselor indicated that the employing establishment had no job to offer appellant.

Appellant underwent vocational assessment and testing and by report dated October 10, 2000, the vocational rehabilitation counselor determined that, physically, appellant could perform light duty and vocationally, he was suited, based on his experience and testing results, to a list of positions, which were attached. These positions included a clerk for an insurance agent, a telephone solicitor and a cashier 2.[1] The position of clerk for an insurance agent was listed as requiring three to six months of training but the description noted that the employer would train.

By report dated November 14, 2000, Dr. Hegg noted that appellant was again seen with an arthritic knee flare-up. He noted that he last saw appellant approaching one year earlier. Disability was not discussed.

[1] The positions of mine supervisor and mine inspector, two of appellant's former jobs, were also examined, but were light activity instead of sedentary in activity.

In a report dated February 4, 2001, the rehabilitation counselor indicated that appellant stated that he was retired and did not plan to return to work, that he did not want vocational rehabilitation nor did he want to participate in his rehabilitation plan or the job search. Therefore, the rehabilitation counselor prepared the pertinent reports indicating that appellant was vocationally qualified to work as an insurance agent clerk, where the employer would train and where he had previously done office work related to his mine safety and health inspector positions and that he was medically qualified for this sedentary position, which fit his medical activity restrictions as specified by Dr. Bachwitt. The rehabilitation specialist consulted the State Job Works Center and documented that the position of insurance agent clerk was being performed in sufficient numbers in appellant's area so as to make it reasonably available to him.

By report dated September 12, 2001, Dr. Hegg indicated that appellant was seen complaining of left knee pain and that he was treated by injection.

On October 10, 2001 appellant underwent an elective cardioversion for recurrent atrial fibrillation, which was unresponsive to medical therapy.

On November 26, 2001 the Office issued appellant a notice of proposed reduction of compensation based on appellant's ability to perform the constructed position of insurance agency clerk. The Office determined that the position of insurance agent clerk was vocationally and medically suitable for appellant's partially disabled conditions and was reasonably available within appellant's commuting area. Appellant was given 30 days within which to submit further evidence if he disagreed with the proposed reduction.

On December 17, 2001 the Office received a letter dated December 14, 2001, in which appellant claimed that, with his problems and prior heart surgeries and gallbladder surgery, he could not work as he was trying to just survive. In support appellant submitted a December 10, 2001 report from Dr. Jeffrey, which noted that appellant continued to have low back pain and unfortunately required a redo coronary bypass grafting in June 2001. Dr. Jeffrey noted since that time appellant had been in intermittent atrial fibrillation requiring chronic Coumadin therapy and that he continued to have diminished sensation and hyper anesthesia of the lower extremities bilaterally and was unlikely to improve.

On December 26, 2001 the Office received further cardiac-related medical evidence. On June 25, 2001 appellant underwent cardiac catheterization with coronary angiogram, which was reported as revealing severe coronary artery disease, totally occluded saphenous vein grafts and a severely diseased saphenous graft to the posterior descending artery, mildly impaired ventricular systolic function, elevated right heart pressures suggestive of constrictive pericarditis and a probable atrial septal defect. An echocardiogram performed on October 31, 2001 was reported as revealing right-sided chamber enlargement with mild tricuspid regurgitation, mitral annular calcification, enlarged left atrium and moderate mitral regurgitation, low-normal left ventricular systolic function, aortic sclerosis without stenosis and a small posterior pericardial effusion. On December 3, 2001 appellant again underwent an elective cardioversion for recurrent atrial fibrillation, which was unresponsive to medical therapy. On December 7, 2001 appellant was seen by Dr. Hegg for another left knee injection. He noted that appellant's work-related osteoarthritis had flared.

By decision dated January 3, 2002, the Office finalized the proposed reduction of compensation finding that the constructed position of an insurance agent clerk represented appellant's wage-earning capacity. The Office noted that the job's physical requirements were that it was a sedentary position with occasional lifting less than 10 pounds, no stooping, climbing, balancing, kneeling, crouching, or crawling occasional reaching, fingering and handling, no ability to feel but the ability to talk and hear and were in accordance with Dr. Bachwitt's recommendations. The Office also noted that neither Dr. Hegg nor Dr. Jeffrey addressed appellant's ability to perform any type of work.

By letter dated January 8, 2002, appellant requested an oral hearing on the reduction of his compensation.

In support of his request, appellant submitted a May 22, 2002 report from Dr. Hegg, which noted that appellant's knee had become more arthritic and was bothering him more.

Appellant also submitted a May 9, 2002 report from Dr. R.L. Short, a Board-certified osteopath specializing in family practice, who examined appellant that date. Dr. Short reviewed appellant's factual and medical history, reported his physical examination results, reviewed the medical reports submitted and calculated appellant's permanent impairment according to the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. Dr. Short diagnosed acute/chronic lumbar strain with herniated lumbar discs at L4-5 and L5-S1, status post L4-5 and L5-S1 laminectomies with discectomies, left knee strain with subsequent tear of the medial and lateral meniscus and status post total medial meniscectomy and partial lateral meniscectomy from the right knee with significant joint space narrowing. He opined that appellant had reached maximum medical improvement and was totally and permanently disabled from work based upon the injuries received to the low back and the left knee on April 13, 1990. Dr. Short also stated: "these injuries would have disabled him without even considering his cardiovascular status at this time."

On May 22, 2002 Dr. Hegg examined appellant and noted that his knee was becoming more arthritic and more painful.

Appellant's hearing was held on July 31, 2002, at which he testified. Following the hearing, appellant during October 2002, was treated by Dr. Hegg for a series of Synvisc injections in his knee.

By decision dated January 13, 2003, the Office hearing representative affirmed the reduction of appellant's compensation based on a constructed loss of wage-earning capacity decision, finding that the rehabilitation specialist properly selected the position of insurance agent clerk and properly determined the prevailing wage.

LEGAL PRECEDENT

Once the Office determines that an employee is totally disabled as a result of an employment injury, it has the burden of justifying a subsequent reduction in compensation

benefits.[2] As part of its burden, the Office must show that the employee is physically capable of performing the duties of the job selected as representative of his or her wage-earning capacity.[3]

Section 8115 of the Act,[4] titled "Determination of wage-earning capacity" states in pertinent part:

> "In determining compensation for partial disability, … [i]f the actual earnings of the employee do not fairly and reasonably represent his wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity as appears reasonable under the circumstances is determined with due regard to--
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> (1) the nature of his injury;
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> (2) the degree of physical impairment;
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> (3) his usual employment;
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> (4) his age;
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> (5) his qualifications for other employment;
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> (6) the availability of suitable employment; and
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> (7) other factors or circumstances, which may affect his wage-earning capacity in his disabled condition."

These same factors are to be considered in determining wage-earning capacity based on a constructed position.[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 physical impairment, his or her usual employment, the employee's age and vocational qualifications and the availability of suitable employment.[6] Additionally, 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

[2] *Harold S. McGough*, 36 ECAB 332 (1984).

[3] Section 8115(a) of the Federal Employees' Compensation Act (5 U.S.C. § 8115(a)) requires that, in determining wage-earning capacity, due regard be given to the nature of the injury and the degree of physical impairment.

[4] 5 U.S.C. § 8115.

[5] Federal (FECA) Procedure Manual, Part 2 -- Claims; *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(a) (December 1993).

[6] *See generally,* 5 U.S.C. § 8115(a); A. Larson *The Law of Workers' Compensation* § 81.01 (2002). *See also Betty F. Wade,* 37 ECAB 556 (1986).

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 on the open labor market.[7]

Where vocational rehabilitation is unsuccessful, the rehabilitation counselor will prepare a final report, which lists jobs, which are medically and vocationally suitable for the employee and proceed with information from a labor market survey to determine the availability and wage rate of the position.[8] After determining vocational suitability of the constructed position, the Office must determine the medical suitability, taking into regard medical conditions due to the accepted employment injuries and any preexisting medical conditions, but not medical conditions that arose subsequent to the work-related injury.[9] The Office properly did so in this case.

Once loss of wage-earning capacity is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.[10] The burden of proof is on the party attempting to show the award should be modified.[11]

ANALYSIS

In this case, the Office properly referred the case to an Office rehabilitation specialist in wage-earning capacity, who selected a position in the Department of Labor's *Dictionary of Occupational Titles* to fit appellant's medical capabilities. The specialist selected the position of general insurance agent clerk and found that appellant was able to perform this position and that such work was reasonably available within appellant's commuting area. The Office verified, through contact with the state employment service, the prevailing wage rate and the reasonable availability of this position within the location of appellant's residence. The Office also verified the current wage rate for the position of mine safety and health inspector, the position appellant held at the time of his employment injury. Thereafter the Office followed its implementing regulations in applying the *Shadrick*[12] formula and properly determined appellant's loss in wage-earning capacity.[13]

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

[8] *Dorothy Jett*, 52 ECAB 246 (2001); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims; *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8 (December 1993).

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

[10] *Charles D. Thompson*, 35 ECAB 220 (1983); *Elmer Strong*, 17 ECAB 226 (1965).

[11] *Jack E. Rohrabaugh*, 38 ECAB 186 (1986).

[12] *Albert C. Shadrick*, 5 ECAB 376 (1953).

[13] *See* 20 C.F.R. § 10.403(c).

In this case, the Office obtained a clear statement of appellant's disability and work restrictions from Dr. Bachwitt. His own treating physicians did not offer any opinion as to whether or not appellant was disabled or what his working restrictions might be. However, the Office second opinion examiner Dr. Bachwitt completed a thorough examination of appellant and opined: "I feel that [appellant] could do sedentary and light work. I would defer higher demand categories to a qualified vocational expert with appropriate validity testing. I do not find this [appellant] to be permanently and totally disabled and is employable from an orthopedic standpoint." Dr. Bachwitt completed a Form OWCP-5 work capacity evaluation indicating that appellant could sit, stand and walk for 4 to 6 hours per day and could reach, twist, push, pull and lift for 2 to 3 hours per day with a limit of 10 to 20 pounds. He stated that appellant could perform sedentary to light work from an orthopedic standpoint, but that appellant's heart disease should be considered in finalizing his functional capacity evaluation. As no other rationalized medical opinion as to appellant's disability status and physical work restrictions was submitted, the opinion of the second opinion examiner constitutes the weight of the medical opinion evidence and established that appellant was only partially disabled and could perform some work with restrictions.

Appellant declined to participate in vocational rehabilitation and insisted that he remained totally disabled from not only his accepted employment-related injuries but also from his cardiac problems occurring after his employment injuries. However, injuries and conditions arising after the employment injuries are not to be used in determining constructed wage-earning capacity.[14]

The Office rehabilitation specialist properly consulted the *Dictionary of Occupational Titles* and determined several positions, which met the physical restrictions articulated by Dr. Bachwitt and selected the position of insurance agent clerk as being consistent with appellant's vocational abilities. He determined that it was vocationally and medically suitable to appellant's partially disabled condition and was reasonably available to appellant. The Office concurred, as appellant's cardiac-related difficulties could not be considered in a constructed wage-earning capacity situation as they occurred after his employment injuries. The medical evidence submitted after the wage-earning capacity determination found that appellant was totally disabled due to his employment injuries, but it did not provide any medical rationale as to how these conditions, which had been quiescent intermittently for periods in excess of one year, could now disable him from sedentary employment. Due to this lack of rationale, Dr. Short's opinion is of diminished probative value and is, therefore, insufficient to overturn appellant's previously calculated wage-earning capacity.

With no highly probative and rationalized evidence supporting that appellant was totally disabled as of January 3, 2002, due solely to his accepted employment injuries, he has not met his burden to modify the previous wage-earning capacity.

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

CONCLUSION

Under the circumstances described above, the Board finds that the Office met its burden of proof to modify appellant's compensation benefits and properly reduced appellant's compensation to reflect his loss in wage-earning capacity.

ORDER

IT IS HEREBY ORDERED THAT the January 13, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 3, 2004
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member