United States Department of Labor
Employees' Compensation Appeals Board

R.R., Appellant	)	
and	)	**Docket No. 07-269**
	)	**Issued: October 12, 2007**
DEPARTMENT OF HOMELAND SECURITY, U.S. CITIZENSHIP & IMMIGRATION SERVICES, Laredo, TX, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 6, 2006 appellant timely appealed the November 10, 2005 and August 23, 2006 merit decisions of the Office of Workers' Compensation Programs, which determined his wage-earning capacity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether the constructed position of maintenance superintendent represents appellant's wage-earning capacity; and (2) whether appellant established a basis for modification of the Office's September 1, 2004 wage-earning capacity determination.

FACTUAL HISTORY

Appellant, a 64-year-old former maintenance mechanic leader, injured his left knee at work on April 12, 2000. The Office initially accepted the claim for left knee sprain, but later expanded the claim to include left lateral meniscus tear. Appellant underwent Office-approved

surgery on September 1, 2000 and February 15, 2002. The Office paid appropriate wage-loss compensation beginning September 3, 2000.

On October 1, 2002 Dr. George W. Brindley, a Board-certified orthopedic surgeon, advised that appellant could perform full-time, limited-duty work.[1] The following month, the Office referred appellant for vocational rehabilitation services. In January 2003, Dr. Brindley referred appellant to Dr. Don A. Mackey, a Board-certified internist specializing in occupational medicine.

Dr. Mackey examined appellant on April 14, 2003 and diagnosed previous left knee internal derangement, with proximal tibial osteotomy and left knee degenerative joint disease. Appellant's permanent work restrictions included no kneeling, squatting or climbing ladders. He was permitted to climb three to five steps, but Dr. Mackey advised appellant to avoid stairs with more than five steps. Dr. Mackey also instructed appellant not to operate heavy equipment that required active clutch activities. Additionally, he told appellant to avoid working at heights and on scaffolding and to avoid running. Dr. Mackey further indicated that prolonged walking should be limited to no more than four hours during an eight-hour shift. Lastly, he advised that appellant should be allowed frequent breaks to stand and stretch.[2]

Dr. Brindley submitted an April 22, 2003 work capacity evaluation (Form OWCP-5c) based on Dr. Mackey's recent evaluation. According to Dr. Brindley, appellant could sit, stand, walk and twist up to four hours over the course of an eight-hour shift. Appellant was also permitted to operate a vehicle as long as it did not involve repetitive use of a clutch. Dr. Brindley imposed a 25-pound weight restriction with respect to pushing, pulling and lifting, but did not otherwise limit the amount of time appellant could perform those specific activities. He precluded squatting, kneeling, climbing and repetitive movements involving the wrists and elbows. Dr. Brindley indicated that appellant needed to take 5- to 15-minute breaks every 1 to 2 hours. Additionally, Dr. Brindley noted that he had previously been unaware that appellant had a prior wrist injury.[3]

Appellant underwent vocational testing on June 2, 2003, which revealed, among other things, an IQ of 101 and a reading comprehension level equivalent to that of a college graduate. On July 22, 2003 a rehabilitation plan was developed with the objective of securing employment as a maintenance superintendent, quality assurance inspector, recreational facility manager, preventative maintenance coordinator or housing project manager. No additional training was

[1] Dr. Brindley was the surgeon who operated on appellant's left knee on February 15, 2002. The limitations he imposed on October 1, 2002 included four hours lifting/carrying with a maximum of 50 pounds, four hours sitting, walking and reaching above shoulder, three hours bending/stooping, two hours standing and climbing, and no kneeling or twisting. Pushing/pulling was limited to four hours with a maximum of 53 pounds, intermittently. Dr. Brindley also indicated that appellant was permitted to drive a vehicle and operate machinery as long as it was automatic.

[2] Dr. Mackey also noted that appellant had reached maximum medical improvement and provided an impairment rating of 10 percent of the left lower extremity based on loss of range of motion in the knee. The Office would later recognize him as appellant's treating physician.

[3] Appellant previously filed a claim for an April 27, 1992 injury to his right hand (16-0207408).

deemed necessary to secure the identified positions, which offered a potential weekly salary ranging from $580.00 to $700.00. On July 25, 2003 appellant's treating physician, Dr. Mackey, reviewed and signed the various job classifications forms. Appellant agreed to the vocational rehabilitation plan on August 6, 2003 and the Office approved the plan on August 8, 2003. The plan included 90 days of job placement assistance.

When Dr. Mackey reexamined appellant on November 6, 2003, he advised that appellant's restrictions remained the same.

Appellant actively participated in the job search process, but by mid-November 2003 he had not secured employment and the Office concluded its vocational rehabilitation efforts. The rehabilitation counselor submitted a final report on November 20, 2003.

On September 1, 2004 the Office determined that the constructed position of maintenance superintendent, with weekly wages of $700.00, represented appellant's wage-earning capacity.[4] Therefore, the Office reduced appellant's wage-loss compensation effective September 5, 2004.[5]

Appellant requested an oral hearing, which was held on July 26, 2005. He submitted a July 20, 2005 report from Susan Brooks, a rehabilitation consultant. Ms. Brooks reviewed Dr. Brindley's October 1, 2002 work restrictions. She also reviewed a May 22, 2003 work capacity evaluation (Form OWCP-5c) from Dr. Terry J. Beal, a Board-certified orthopedic surgeon, who referenced a right hand injury and noted his concurrence with Dr. Brindley's findings. In her July 20, 2005 report, Ms. Brooks indicated that appellant did not have any transferable skills to any occupations given the work restrictions placed on him by his treating physician. She also stated that the jobs identified for appellant in the rehabilitation plan far exceeded his prior work experience and level of education.[6] Ms. Brooks further stated that even if appellant retained the functional capacity to perform sedentary work, there had been no reported openings for the identified jobs in appellant's geographical area.

Appellant also submitted an October 26, 2004 letter from his prior employer verifying that the positions appellant held from June 1984 to January 2000 were nonsupervisory in nature.

By decision dated November 10, 2005, the Office hearing representative affirmed the September 1, 2004 wage-earning capacity determination.

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[4] The Office issued a notice of proposed reduction of compensation on July 16, 2004. In a letter dated August 19, 2004, appellant noted his disagreement with the proposed reduction of compensation. He questioned, among other things, the prevailing wages and the availability of work as a maintenance superintendent. Apart from the labor market data provided by the Office's rehabilitation counselor, the claims examiner obtained additional information regarding wage rate and availability of the selected position. According to data provided by the Bureau of Labor Statistics, there were 420 individuals in the Killeen-Temple, TX labor market who were employed in the selected position as of the 2nd quarter of calendar year 2003. The mean annual salary for the selected position was $46,048.00, which represented a weekly wage of $885.53.

[5] Wage-loss compensation was reduced to zero because the weekly wages of the constructed position ($700.00) exceeded the current weekly wages of appellant's date-of-injury position ($658.61).

[6] Ms. Brooks' transferable skills analysis was based on a review of the duties appellant performed as a maintenance mechanic leader with the employing establishment during calendar year 2000.

On March 16, 2006 appellant sought modification of the Office's decision regarding his wage-earning capacity. Appellant alleged a number of errors on the part of the Office in finding that the position of maintenance superintendent represented his wage-earning capacity. He argued that the position was not reasonably available in his commuting area. Appellant also alleged that he did not have the requisite educational background or prior supervisory experience to work as maintenance superintendent. Additionally, he challenged the Office's finding that he could earn $700.00 a week as a maintenance superintendent. Appellant submitted evidence indicating that the starting salary for this position in the Killeen-Temple, TX labor market was approximately $560.00 a week. Lastly, he argued that the rehabilitation counselor's various reports included a number of false statements and misrepresentations.

In an August 23, 2006 decision, the Office found that the $700.00 weekly wage previously identified as an "entry-level" salary, was in fact the median wage for a maintenance superintendent in appellant's labor market. But because appellant's prior work experience justified the $700.00 weekly wage, the Office found that the September 1, 2004 decision reducing appellant's compensation to zero was appropriate. The Office, therefore, concluded that appellant had not established a basis for modifying the prior wage-earning capacity determination.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[7] An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.[8]

Under 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 or her wage-earning capacity.[9] If the actual earnings do not fairly and reasonably represent the employee's wage-earning capacity or if the employee has no actual wages, the wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, the employee's 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.[10]

The Office must initially determine appellant's medical condition and work restrictions before selecting an appropriate position that reflects appellant's vocational wage-earning capacity. The medical evidence the Office relies on must provide a detailed description of

[7] *James B. Christenson*, 47 ECAB 775, 778 (1996); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

[8] 20 C.F.R. §§ 10.402, 10.403 (2007); *see Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

[9] 5 U.S.C. § 8115(a) (2000).

[10] *Id.; Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

appellant's condition.[11] Additionally, a wage-earning capacity determination must be based on a reasonably current medical evaluation.[12]

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, *Dictionary of Occupational Titles* (DOT), or otherwise available in the open labor 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 open labor market should be made through contact with the state employment service or other applicable service.[13] Finally, application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.[14]

ANALYSIS

The maintenance superintendent position is classified as light duty, which requires occasional lifting of 20 pounds and frequent lifting of 10 pounds. There is no climbing, balancing, stooping, kneeling, crouching or crawling. The position also requires frequent reaching, handling and fingering. The Board finds that the physical demands of the job do not conflict with the April 14, 2003 work restrictions imposed by appellant's treating physician. According to Dr. Mackey, appellant should avoid kneeling, squatting or climbing ladders. Appellant was also advised to avoid climbing stairs with more than five steps. Dr. Mackey also indicated that prolonged walking should be limited to four hours during an eight-hour shift and he recommended frequent breaks to stand and stretch. He further advised appellant to avoid running and working at heights or on scaffolding. Additional restrictions included a ban on operating heavy equipment that required active clutch activities.[15]

On July 25, 2003 Dr. Mackey reviewed the maintenance superintendent classification and he signed the document without expressing any disagreement as to appellant's ability to perform the position. While Ms. Brooks, appellant's personal rehabilitation consultant, indicated that appellant could not physically perform any of the identified positions, she apparently did not review Dr. Mackey's April 14, 2003 work restrictions. Accordingly, Ms. Brooks' July 20, 2005 report is of limited probative value. The Board finds that the Office demonstrated that the selected position is medically suitable.

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[11] *Samuel J. Russo*, 28 ECAB 43 (1976).

[12] *Carl C. Green, Jr.*, 47 ECAB 737, 746 (1996).

[13] The job selected for determining wage-earning capacity must be a position that is reasonably available in the general labor market in the commuting area in which the employee lives. *David L. Scott*, 55 ECAB 330, 335 n.9 (2004). Lack of current job openings does not equate to a finding that the position was not performed in sufficient numbers to be considered reasonably available. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(c) (December 1995).

[14] *Albert C. Shadrick*, 5 ECAB 376 (1953); 20 C.F.R. § 10.403(d).

[15] These restrictions remained in effect as of November 6, 2003.

The Board also finds that the maintenance superintendent position is vocationally suitable. According to DOT No. 189.167-046, the selected position involves, in relevant part, the following responsibilities:

> Directs and coordinates, through subordinate supervisory personnel, activities of workers engaged in repair, maintenance, and installation of machines, tools, and equipment, and in maintenance of buildings, grounds, and utility systems of mill, industrial plant, or other establishment[.] Reviews job orders to determine work priorities. Schedules repair, maintenance, and installation of machines, tools, and equipment to ensure continuous production operations. Coordinates activities of workers fabricating or modifying machines, tools, or equipment.… Directs maintenance activities on utility systems…. Develops preventive maintenance program…. Inspects operating machines and equipment…. Directs training and indoctrination of workers to improve work performance and acquaint workers with company policies and procedures. Confers with management, engineering, and quality control personnel to resolve maintenance problems…. May perform supervisory functions in establishments where subordinate supervisory personnel are not utilized. May prepare department budget and monitor expenditure of funds in budget.

The specific vocational preparation (SVP) requirement for the position is designated as level 8, which is over 4 years up to and including 10 years. The general educational development (GED) requirement for the position is level 5 for reasoning, mathematics and language skills. Level 5 is generally equated with college-level ability. However, formal education is not the only means by which to achieve this level of competency. It may also be obtained from experience and self-study. In the present case, both the vocational testing administered on June 2, 2003 and appellant's prior work experience demonstrate that the Maintenance Superintendent position is vocationally suitable. Although appellant argued that he lacked the necessary work experience and educational background, his 12-page "Detailed Work History," which covered more than 27 years of employment, indicates otherwise.

The rehabilitation counselor indicated that appellant met the SVP criteria for the job based on a work history that included 20 years experience in the military and 17 years in civil service positions. He described appellant's prior experience as involving installing, maintaining, repairing and replacing equipment and materials in a variety of technical service areas such as electrical, appliance, carpentry, plumbing, painting, concrete, welding, HVAC, boiler, recreational equipment, commercial kitchen and telephone systems. The rehabilitation counselor also noted that appellant had at least five-year's supervisory experience in the U.S. Navy. With respect to meeting the GED requirements, the rehabilitation counselor explained that appellant's high school education, along with his supervisory experience in the U.S. Navy and other training he received while enlisted were sufficient. Appellant's military service records support the rehabilitation counselor's finding.

Appellant's personal rehabilitation consultant, Ms. Brooks, did not believe that he met the SVP and GED requirements for the maintenance superintendent position. However, her July 20, 2005 report was based upon a limited review of appellant's prior work history. In fact, her report only referenced the duties appellant performed as a maintenance mechanic leader with

the employing establishment. As such, her findings do not undermine the rehabilitation counselor's conclusion that the maintenance superintendent position is vocationally suitable.

The record indicates that the selected position paid a weekly salary of $700.00 and the job was reasonably available in the Killeen-Temple, TX labor market.[16] The claims examiner's own research revealed a higher, mean weekly wage of $885.53 and more than 400 individuals employed in that capacity as of the second quarter of 2003. The record also revealed that the current weekly pay of appellant's date-of-injury job was $658.61.

The Office considered the proper factors, including the availability of suitable employment, appellant's age and physical limitations, his usual employment and his qualifications, in determining that the position of maintenance superintendent represented appellant's wage-earning capacity.[17] As the record establishes that appellant had the requisite physical ability, skill and experience to perform the position of maintenance superintendent and the position was reasonably available within the general labor market of appellant's commuting area, the Board concludes that the Office properly determined that the constructed position represented appellant's wage-earning capacity. Because appellant was capable of earning $700.00 per week as a maintenance superintendent, the Office properly reduced his wage-loss compensation to zero in accordance with the *Shadrick* formula.[18]

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was erroneous.[19] The burden of proof is on the party seeking modification of the wage-earning capacity determination.[20]

The arguments appellant raised in his March 16, 2006 modification request were essentially the same arguments he previously raised with the claims examiner prior to the issuance of the September 1, 2004 wage-earning capacity determination and which he later reiterated before the Branch of Hearings & Review. Appellant did not claim that he had been retrained or otherwise vocationally rehabilitated nor did he allege that there had been a material change in the nature and extent of his injury-related condition. As such, the only remaining basis for modification is for appellant to demonstrate that the original determination was erroneous.

Appellant previously argued that the $700.00 weekly salary relied upon by the Office was too high, however, with his modification request he submitted new evidence indicating that the starting salary for the maintenance superintendent position was approximately $560.00 a week.

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[16] In a December 14, 2004 letter to the Branch of Hearings & Review, appellant indicated that his home in Kempner, TX was approximately 18 miles from Killeen, TX and approximately 40 miles from Temple, TX.

[17] *See Dorothy Jett*, 52 ECAB 246 (2001).

[18] *Albert C. Shadrick, supra* note 14; 20 C.F.R. § 10.403(c), (d).

[19] *Tamra McCauley*, 51 ECAB 375, 377 (2000).

[20] *Id.*

In its latest decision dated August 23, 2006, the Office characterized the $700.00 weekly wage as a "median" wage, rather than an "entry-level" wage.[21] Despite the change in nomenclature, appellant has not demonstrated that the wage-rate information provided by the rehabilitation counselor and relied upon by the Office was in fact erroneous.

Appellant provided wage-rate information that covered only a three-month period in 2003. In contrast, the rehabilitation counselor's July 21, 2003 job classification report indicated that his wage-rate information was derived, in part, from statistical data covering a broader period, from 2001 to 2003. Appellant's wage-rate data does not establish that the rehabilitation counselor's data was incorrect. The Office rehabilitation specialist reviewed the rehabilitation counselor's findings and approved the rehabilitation plan on August 8, 2003. The Office properly relied on the information provided by the rehabilitation specialist.[22] Accordingly, appellant failed to establish a basis for modification of the September 1, 2004 wage-earning capacity determination.

CONCLUSION

The Office properly determined that the constructed position of maintenance superintendent represented appellant's wage-earning capacity. The Board further finds that appellant failed to establish a basis for modifying the Office's September 1, 2004 wage-earning capacity determination.

[21] The Board notes that the rehabilitation counselor did not characterize the $700.00 weekly salary as an entry-level wage. This characterization first appeared in the July 16, 2004 notice of proposed reduction of compensation.

[22] Because the rehabilitation specialist is an expert in the field of vocational rehabilitation, the claims examiner may rely on his or her opinion. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(b)(2) (December 1995).

ORDER

IT IS HEREBY ORDERED THAT the August 23, 2006 and November 10, 2005 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 12, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board