United States Department of Labor
Employees' Compensation Appeals Board

R.J., Appellant	)	
and	)	**Docket No. 09-557**
	)	**Issued: October 1, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Oakland, CA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 22, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' October 17, 2008 merit decision concerning his wage-earning capacity. 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 compensation on October 26, 2008 based on his capacity to earn wages as an information clerk.

FACTUAL HISTORY

The Office accepted that on April 24, 1999 appellant, then a 38-year-old casual clerk, sustained a lumbar strain, lumbar subluxation and herniated lumbar disc at L5-S1 due to lifting a heavy mail sack at work. Appellant stopped work on July 1, 1999 and has not returned. He initially received care from a chiropractor but in July 1999, he came under the care of Dr. Gerald Wahl, a Board-certified neurologist.

In October 2000, the Office referred appellant for vocational rehabilitation services. Appellant started training in March 2001, for the target positions of cashier, night auditor and audit clerk, each of which required occasional lifting up to 10 pounds and occasional walking and standing. He stopped training in November 2001 due to reported back pain. Dr. Wahl recommended back surgery, but appellant chose not to undergo such a procedure.

In May 2007, the Office referred appellant to Dr. Robert S. Ferretti, a Board-certified orthopedic surgeon.[1] In a June 27, 2007 report, Dr. Ferretti reviewed appellant's medical history including the treatment he received since his April 11, 1999 work injury. On examination, appellant was able to walk on his heels and toes and fully squat without any difficulty. His back had a normal contour with no muscular spasm, list or scoliosis. On digital palpation of appellant's back, Dr. Ferretti reported no areas of tenderness, including sciatic notches. During active forward flexion of appellant's back, he was able to touch his fingertips to the floor and recover the erect position normally without complaint. Dr. Ferretti noted that the remainder of the active range of motion testing was full without complaint, deep tendon reflexes of the legs were present and equal bilaterally and there was no muscular atrophy, motor weakness or sensory deficit of the legs. Girths of the thighs and calves are equal at the same points bilaterally.

Dr. Ferretti advised that appellant continued to have subjective residuals of his April 11, 1999 work injury, including "poorly described periods of low back and pelvic region pain and brief diffuse numb sensation of the left lower extremity, unrelated to any particular activity." He noted that there were no objectives findings of spinal nerve root involvement[2] or any other neurological abnormality and indicated that the remainder of the physical examination findings regarding the low back and legs were unremarkable. Dr. Ferretti found that appellant was capable of working eight hours per day with permanent restrictions, including lifting up to 20 pounds for four hours per day, pushing or pulling up to 30 pounds for four hours per day, twisting, bending or stooping for four hours per day and squatting or climbing for two hours per day.[3] He indicated that appellant did not have any preexisting conditions that caused disability.

In July 2007, the Office again referred appellant for vocational rehabilitation services. In a November 20, 2007 decision, it suspended appellant's compensation for not cooperating with vocational rehabilitation efforts. In a January 22, 2008 letter, appellant advised the Office that he was willing to cooperate with vocational rehabilitation efforts and the Office reinstated his compensation.[4] He began working as a parking lot attendant for a private employer but was subsequently fired when a background check disclosed that he had a conviction for assault with a

[1] At the time of the referral, the record had been devoid of new medical reports from attending physicians for about a year and a half.

[2] Dr. Ferretti noted that diagnostic testing showed broad-based bulging or herniation at L5-S1 without neurological structure compression.

[3] Dr. Ferretti stated that he had reviewed the job descriptions for the cashier and audit clerk positions and posited that appellant could perform these positions on a full-time basis.

[4] Around this time, appellant obtained documentation of his resident alien status which allowed him to work legally in the United States.

deadly weapon. Appellant's vocational rehabilitation counselor then pursued positions for which his conviction would not be a barrier. Appellant did not receive any further offers for a job.

In October 2007, appellant's vocational rehabilitation counselor determined that based upon appellant's experience, education, medical restrictions, and a labor market survey, he was able to work as an information clerk. The position was sedentary in nature and involved answering inquiries from visitors and coworkers. It required occasional lifting of up to 10 pounds, but did not require climbing, kneeling or crouching. A labor market survey revealed that the position was reasonably available in appellant's commuting area and that the average salary was $420.00 per week.[5]

In a January 22, 2008 letter, the Office advised appellant that the information clerk position was suitable to his restrictions and that he would receive 90 days of placement assistance to help him locate work in such a position. Appellant's compensation would be reduced based upon the salary of the position at the end of these services. He did not obtain employment during this 90-day period.

In an August 7, 2008 letter, the Office advised appellant of its proposed reduction of his compensation based on his ability to work as an information clerk. It provided appellant with 30 days to provide evidence and argument if he disagreed with this proposed action. He did not submit any evidence or argument.

In an October 17, 2008 decision, the Office reduced appellant's compensation as of October 26, 2008 based on his capacity to earn wages as an information clerk.[6]

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[7] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[8]

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

[5] Appellant's vocational rehabilitation counselor provided an opinion that appellant's criminal record would not serve as a bar to working as an information clerk.

[6] The Office applied the principles set forth in *Albert C. Shadrick*, 5 ECAB 376 (1953), to determine the percentage of appellant's loss of wage-earning capacity.

[7] *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

[8] *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

availability of suitable employment and other factors and circumstances which may affect his wage-earning capacity in his disabled condition.[9] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[10] The job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives.[11]

When the Office makes a medical 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 or 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 labor 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 the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.[12]

In determining wage-earning capacity based on a constructed position, consideration is given to the residuals of the employment injury and the effects of conditions which preexisted the employment injury.[13] In determining wage-earning capacity based on a constructed position, consideration is not given to conditions which arise subsequent to the employment injury.[14] The fact that an employee has been unsuccessful in obtaining work in the selected position does not establish that the work is not reasonably available in his commuting area.[15]

ANALYSIS

The Office accepted that on April 24, 1999 appellant sustained a lumbar strain, lumbar subluxation and herniated lumbar disc at L5-S1 due to lifting a heavy mail sack at work. Appellant stopped work on July 1, 1999 and did not return. In an October 17, 2008 decision, the Office reduced his compensation effective October 26, 2008 based on his capacity to earn wages as an information clerk.

---

[9] *See Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

[10] *Albert L. Poe*, 37 ECAB 684, 690 (1986), *David Smith*, 34 ECAB 409, 411 (1982).

[11] *Id.*

[12] *See Dennis D. Owen*, 44 ECAB 475, 479-80 (1993); *Wilson L. Clow, Jr.*, 44 ECAB 157, 171-75 (1992); *Albert C. Shadrick supra* note 6.

[13] *See Jess D. Todd*, 34 ECAB 798, 804 (1983).

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

[15] *See Leo A. Chartier*, 32 ECAB 652, 657 (1981).

The Office received information from Dr. Ferretti, an attending Board-certified orthopedic surgeon, who served as an Office referral physician, advising that appellant could work within specified restrictions.[16] In a June 27, 2007 report, Dr. Ferretti noted that appellant had some subjective complaints and indicated that he was capable of working eight hours per day with permanent restrictions, including lifting up to 20 pounds for four hours per day, pushing or pulling up to 30 pounds for four hours per day, twisting, bending or stooping for four hours per day and squatting or climbing for two hours per day.[17] He indicated that appellant did not have any preexisting conditions that caused disability. Dr. Ferretti explained his opinion by stating that, although appellant showed a herniated L5-S1 disc on diagnostic testing, there was no evidence of neurogical involvement. He further noted that appellant had essentially normal findings in his back and legs on physical examination. Appellant's back had a normal contour with no muscular spasm, list or scoliosis and he had good range of motion of the legs without muscular atrophy or sensory or strength loss.[18]

In October 2007, appellant's vocational rehabilitation counselor determined that based upon appellant's experience, education, medical restrictions and a labor market survey, he was able to work as an information clerk. The position was sedentary in nature and involved answering inquiries from visitors and coworkers. It required occasional lifting of up to 10 pounds, but did not require climbing, kneeling or crouching. A labor market survey revealed that the position was reasonably available in appellant's commuting area and that the average salary was $420.00 per week.

The Board finds that the well-rationalized opinion of Dr. Ferretti establishes that appellant was able to perform the information clerk position. The job duties and physical requirements of the position are well within the work restrictions outlined by Dr. Ferretti. There is no medical evidence establishing that appellant remains totally disabled or unable to physically perform the information clerk position. His vocational rehabilitation counselor properly determined that he was able to perform the position of information clerk position and that state employment services showed the position was available in sufficient numbers so as to make it reasonably available within his commuting area. The Office properly relied on the opinion of the rehabilitation counselor that appellant was vocationally capable of performing the information clerk position.[19] Appellant did not submit any evidence or argument showing that he could not vocationally or physically perform the information clerk position.

[16] At the time of the referral to Dr. Ferretti, the record had been devoid of new medical reports from attending physicians for about a year and a half.

[17] Dr. Ferretti also stated that appellant could work as a cashier or audit clerk, positions which had physical duties similar to those of the information clerk position.

[18] On digital palpation of appellant's back, he reported no areas of tenderness, including sciatic notches. During active forward flexion of his back, he was able to touch his fingertips to the floor and recover the erect position normally without complaint.

[19] Appellant's vocational rehabilitation counselor provided an opinion that appellant's criminal record would not serve as a bar to working as an information clerk. There is no evidence of record showing that it would in fact serve as a bar.

The Office considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment, age and employment qualifications, in determining that the position of information clerk represented appellant's wage-earning capacity.[20] The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of information clerk and that such a position was reasonably available within the general labor market of his commuting area.[21] Therefore, the Office properly reduced appellant's compensation effective October 26, 2008 based on his capacity to earn wages as an information clerk.

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation effective October 26, 2008 based on his capacity to earn wages as an information clerk.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' October 17, 2008 decision is affirmed.

Issued: October 1, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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

[20] *See Clayton Varner*, 37 ECAB 248, 256 (1985).

[21] On appeal, appellant suggested that the adjustment of his compensation was improper because he remained unemployed. However, the Board has held fact that an employee has been unsuccessful in obtaining work in the selected position does not establish that the work is not reasonably available in his commuting area. *See supra* note 15.