United States Department of Labor
Employees' Compensation Appeals Board

T.M., Appellant	)	
and	)	**Docket No. 09-679**
	)	**Issued: October 22, 2009**
DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, U.S. PRISON LEAVENWORTH, Leavenworth, KS, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
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 January 12, 2009 appellant filed a timely appeal from an October 22, 2008 decision of the Office of Workers' Compensation Programs that found that he had the capacity to earn wages as a surveillance system monitor and a December 1, 2008 decision that denied his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office met its burden of proof to reduce appellant's wage-loss benefits based on his capacity to earn wages as a surveillance system monitor; and (2) whether the Office properly refused to reopen his claim for further review of the merits pursuant to 5 U.S.C. § 8128(a).

Appellant argues on appeal that the Office did not meet its burden of proof as it chose to select a remote opinion of an attending physician, who stopped treating him two years prior over the opinion of another treating physician.

FACTUAL HISTORY

On July 8, 1992 appellant, then a 35-year-old correctional officer, sprained his right ankle while responding to an alarm at work. He stopped work that day and returned on August 15, 1992. On September 8, 1992 the Office accepted that claim for right ankle sprain.[1] On April 22, 2003 appellant filed a claim, alleging that on April 18, 2003 he sustained a recurrence of disability, due to the 1992 injury. He stopped work on April 22, 2003. On April 30, 2003 Dr. Susan K. Bonar, a Board-certified orthopedic surgeon, performed a right ankle ligament repair. In a July 31, 2003 decision, the Office found that appellant did not sustain a recurrence of disability on April 18, 2003.[2] Appellant returned to work on September 29, 2003.

On November 24, 2003 appellant filed a Form CA-1, traumatic injury claim, alleging that on November 23, 2003 he sprained his right ankle when he slipped at work. He stopped work that day and returned on December 1, 2003.[3] On April 7, 2004 the Office accepted that appellant sustained a right ankle sprain.

By decision dated May 12, 2004, an Office hearing representative affirmed the July 31, 2003 decision.

In February 2005, appellant was referred to Dr. Edward J. Prostic, a Board-certified orthopedic surgeon, for a second opinion evaluation. By report dated March 21, 2005, Dr. Prostic reviewed the medical record, statement of accepted facts and his complaints of significant right ankle pain. He provided findings on physical examination and diagnosed osteoarthritis of the tibiotalar and subtalar joints of the right ankle. Dr. Prostic advised that the recommended surgery was appropriate. In an attached work capacity evaluation, he provided restrictions to his physical activity advising that he could walk and stand for two hours daily and could push, pull, lift, squat, kneel and climb less than one hour daily with a 20-pound weight restriction.

On June 17, 2005 Dr. Bonar performed a right ankle fusion, a right subtalar fusion and a posterior iliac crest bone graft. On September 6, 2005 she advised that appellant could return to work with the restriction of sit-down duties only. On October 21, 2005 Dr. Bonar advised that appellant should sit 95 percent of the time. On December 2, 2005 she advised that appellant could walk two hours daily and he returned to limited duty on February 12, 2006.

In a May 9, 2006 report, Dr. Greg A. Horton, Board-certified in orthopedic surgery, noted appellant's complaint of continued right ankle pain and mild swelling. He provided physical examination findings and reviewed computerized tomography (CT) scans, which he described as showing nonunion. Dr. Horton recommended a revision surgical procedure. On July 21, 2006 he performed right ankle fusion, subtalar fusion and bone graft. Appellant stopped work that day and returned to limited duty on August 27, 2006 with restrictions of nonweight-bearing. On

[1] The record indicates that appellant sustained a gunshot wound to his right ankle in the 1970s and had right ankle arthroscopic surgery on November 7, 1984.

[2] The 1992 right ankle injury was adjudicated by the Office under OWCP File No. xxxxxx310.

[3] The 2003 right ankle injury was adjudicated by the Office under OWCP File No. xxxxxx724.

September 5, 2006 Dr. Horton advised that appellant could only perform sedentary work. A functional capacity evaluation performed on February 13, 2007 advised that appellant could perform light to medium work but was limited regarding his right lower extremity due to poor balance, lack of equal bilateral weight-bearing and deviated gait. On February 27, 2007 Dr. Horton advised that appellant was at maximum medical improvement. He provided permanent restrictions of less than one hour walking and standing, pushing 80 pounds for less than one hour, pulling 60 pounds for less than one hour, lifting 10 pounds from floor for less than one hour, no squatting, kneeling or climbing, eight hours sitting and no driving at work. Dr. Horton concluded that appellant needed no further surgery and he would see appellant in the future if new problems were to arise.

Appellant was removed from the employing establishment effective April 30, 2007 and was placed on the compensation roll.

In a May 16, 2007 report prepared for appellant's attorney, Dr. Lynn A. Curtis, a Board-certified physiatrist, reviewed appellant's work history, some medical records and noted his complaint of 5/10 right ankle pain with the inability to walk more than 100 feet at a time. She performed physical examination, diagnosed chronic ankle pain and performed an impairment evaluation. Dr. Curtis advised that appellant could perform sedentary work for eight hours a day with restrictions that he sit for six hours, stand for two, be allowed to change position as needed, could lift 5 pounds frequently and 10 pounds occasionally but lift nothing from the floor and could not crawl, kneel or climb.

On May 29, 2007 appellant was referred to Gina Bankowski, a rehabilitation counselor, for vocational rehabilitation. By decision dated May 31, 2007, the Office vacated the July 31, 2003 decision denying his recurrence of disability claim. It authorized the April 30, 2003 surgery and disability from work for the period April 30 to August 31, 2003. The record reflects that reemployment efforts were unsuccessful.

On September 21, 2007 Ms. Bankowski identified the positions of surveillance system monitor and gambling cashier as within the sedentary strength category, with occasional lifting of 10 pounds and no climbing, kneeling, crawling or crouching. She advised that the positions were reasonably available in the local labor market at a weekly wage of $458.00 and $478.00 respectively. By letter dated September 5, 2008, the Office proposed to reduce appellant's wage-loss benefits based on his capacity to earn wages as a surveillance system monitor. Appellant, through his attorney, disagreed with the proposed reduction. In a September 17, 2008 note, Dr. Mark D. Strehlow, Board-certified in family medicine, stated that appellant had been on permanent disability for several years secondary to injuries to his right ankle and foot. He advised that appellant had severe chronic pain and was restricted in any capacity and from driving due to the use of chronic long-acting morphine pain medication.

By decision dated October 22, 2008, the Office reduced appellant's compensation benefits, effective October 26, 2008, based on his capacity to earn wages as a surveillance system monitor, based on the restrictions provided by Dr. Horton.

On November 23, 2008 appellant's attorney requested reconsideration, contending that the Office erred by selecting the opinion of one of appellant's attending physicians over the

other. Moreover, the selected position was not suitable. In a December 1, 2008 decision, the Office denied appellant's reconsideration request.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[4] 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.[5]

Section 8115 of the Federal Employees' Compensation Act[6] and the implementing federal regulations provide that 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 the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, the degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect his wage-earning capacity in his disabled condition.[7]

The Office must initially determine a claimant's medical condition and work restrictions before selecting an appropriate position that reflects his or her wage-earning capacity. The medical evidence upon which the Office relies must provide a detailed description of the condition.[8] Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.[9]

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 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 that 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.[10] Finally, application of the principles set forth in *Albert C. Shadrick*,[11] as codified in

[4] *James M. Frasher*, 53 ECAB 794 (2002).

[5] 20 C.F.R. §§ 10.402, 10.403; *John D. Jackson*, 55 ECAB 465 (2004).

[6] 5 U.S.C. §§ 8101-8193.

[7] *Id*. at § 8115; 20 C.F.R. § 10.520; *John D. Jackson, supra* note 5.

[8] *William H. Woods*, 51 ECAB 619 (2000).

[9] *John D. Jackson, supra* note 5.

[10] *James M. Frasher, supra* note 4.

[11] 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.403.

section 10.403 of the Office's regulations,[12] will result in the percentage of the employee's loss of wage-earning capacity.[13]

In determining an employee's wage-earning capacity based on a position deemed suitable, but not actually held, the Office must consider the degree of physical impairment, including impairments resulting from both injury related and preexisting conditions, but not impairments resulting from post injury or subsequently acquired conditions. Any incapacity to perform the duties of the selected position resulting from subsequently acquired conditions is immaterial to the loss of wage-earning capacity that can be attributed to the accepted employment injury and for which appellant may receive compensation.[14]

ANALYSIS -- ISSUE 1

Dr. Horton's February 27, 2007 report and Dr. Curtis' May 16, 2007 report established that appellant was no longer totally disabled due to his accepted condition. The Office properly referred appellant for vocational rehabilitation counseling in May 2007.[15] Because appellant was unable to secure employment, on September 21, 2007 Ms. Bankowski, the vocational rehabilitation counselor, identified two positions that were within his capabilities. The Office determined that he had the capacity to earn wages as a surveillance system monitor, based on Dr. Horton's reports.

The Board finds that the Office met its burden of proof in reducing appellant's wage-earning capacity based on his ability to earn wages as a surveillance system monitor. On February 27, 2007 Dr. Horton advised that appellant was at maximum medical improvement and could work eight hours a day with permanent restrictions of less than one hour walking and standing, pushing 80 pounds less than one hour; pulling 60 pounds less than one hour, lifting 10 pounds from floor less than one hour, no squatting, kneeling or climbing, eight hours sitting and no driving at work. In a May 16, 2007 report, Dr. Curtis essentially agreed with the restrictions provided by Dr. Horton. She found that appellant could perform sedentary work for eight hours a day with restrictions that he sit for six hours, stand for two, be allowed to change position as needed, could lift 5 pounds frequently and 10 pounds occasionally but lift nothing from the floor but could not crawl, kneel or climb.

In a September 21, 2007 report, the Office vocational rehabilitation counselor determined that appellant was able to perform the position of a surveillance system monitor. She provided a job description and advised that it required sedentary strength and with occasional lifting of 10 pounds and no climbing, kneeling, crawling or crouching. The Office vocational rehabilitation counselor noted that the position was available in sufficient numbers so as to make it reasonably

[12] 20 C.F.R. § 10.403.

[13] *James M. Frasher, supra* note 4.

[14] *John D. Jackson, supra* note 5.

[15] 5 U.S.C. § 8104(a); *see Ruth E. Leavy*, 55 ECAB 294 (2004).

available within appellant's commuting area and that the weekly wage of the position was $458.00.

The Board finds that appellant did not submit sufficient medical evidence to establish that he was not able to perform the surveillance system monitor position. The brief September 17, 2008 note of Dr. Strehlow did not provide a rationalized opinion on whether appellant could perform the surveillance system monitor position. Dr. Strehlow noted that appellant had chronic pain and recommended that he not work or drive due to his medication. He did not provide a rationalized explanation addressing the duties of the constructed position; and merely stated that appellant was restricted due to ankle pain and medication. In assessing medical evidence, the number of physicians supporting one position or another is not controlling. The weight of such evidence is determined by its reliability, its probative value and its convincing quality. The factors that comprise the evaluation of medical evidence include the opportunity for and the thoroughness of physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion. The opinion of a physician must be of reasonable medical certainty and must be supported by medical rationale explaining causal relationship.[16] Dr. Strehlow did not provide an opinion setting forth or addressing any findings on examination of why appellant could not work at the constructed position. The weight of the medical evidence, therefore, rests with the opinions of Drs. Horton and Curtis.

Appellant contends that the reports relied on by the Office were stale. The Office will often develop rehabilitation plans following the receipt of work restrictions from an attending physician in an effort to return the employee to gainful employment. When such efforts fail, a constructed wage-earning capacity determination is developed. Such efforts do not necessarily lend themselves to discrete time periods and must depend on the particular needs of the injured employee.[17] On February 27, 2007 Dr. Horton advised that appellant was at maximum medical improvement and provided permanent work restrictions. On May 16, 2007 Dr. Curtis reiterated that appellant was not totally disabled. Their medical reports stand in sharp contrast to the one paragraph note from Dr. Strehlow. The Board finds that the weight of the medical evidence rests with the opinions of Drs. Horton and Curtis. Their reports establish that appellant had the requisite physical ability, skill and experience to perform the position of surveillance system monitor.[18] As 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 security desk personnel represented his wage-earning capacity,[19] the evidence of record establishes that he had the requisite physical ability, skill and experience to perform the position of surveillance system monitor and that such a position was reasonably available within the general labor market of his commuting area. The Office, therefore, properly determined that the position of surveillance system monitor reflected

[16] *K.W.*, 59 ECAB ____ (Docket No. 07-1669, issued December 13, 2007).

[17] *M.A.*, 59 ECAB ____ (Docket No. 07-349, issued July 10, 2008).

[18] *Id.*

[19] *James M. Frasher, supra* note 4.

appellant's wage-earning capacity and using the *Shadrick* formula,[20] properly reduced his compensation effective October 26, 2008.[21]

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.[22] Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).[23] This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.[24] Section 10.608(b) provides that, when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[25]

ANALYSIS -- ISSUE 2

On reconsideration, appellant argued that the Office erred in selecting the opinion of one of his physicians over the other and that the selected position was not suitable. As noted in the December 1, 2008 Office decision denying merit review, he had presented this argument in an October 3, 2008 letter in response to the notice of proposed reduction. Evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case.[26] Consequently, appellant was not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).[27]

---

[20] *Albert C. Shadrick, supra* note 11. In this case, the Office determined that appellant's salary on April 30, 2007, the date his disability recurred, was $1,088.73 per week, that the current adjusted pay rate for his job was $1,119.70 per week and that he was currently capable of earning $458.00 per week as a surveillance system monitor. It, then determined that appellant had a 41 percent wage-earning capacity, which resulted in an adjusted wage-earning capacity of $446.38 per week. The Office concluded that, based on a 75 percent rate, appellant's new compensation rate was $481.71 with cost-of-living adjustment and that his net compensation for each four-week period would be $1,927.05.

[21] *James Smith*, 53 ECAB 188 (2001).

[22] 5 U.S.C. § 8128(a).

[23] 20 C.F.R. § 10.608(a).

[24] *Id.* at § 10.608(b)(1) and (2).

[25] *Id*. at § 10.608(b).

[26] *M.E.*, 58 ECAB ___ (Docket No. 07-1189, issued September 20, 2007).

[27] 20 C.F.R. § 10.606(b)(2).

With respect to the third above-noted requirement under section 10.606(b)(2), appellant submitted no additional evidence with his November 23, 2008 reconsideration request. The Office, therefore, properly denied his reconsideration request by its December 1, 2008 decision. As appellant did not submit relevant and pertinent new evidence not previously considered by the Office, it properly denied his reconsideration request.[28]

CONCLUSION

The Board finds that the Office met its burden of proof in reducing appellant's wage-earning capacity based on his ability to earn wages in the constructed position of surveillance system monitor and properly refused to reopen his claim for further consideration of the merits pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 1 and October 22, 2008 be affirmed.

Issued: October 22, 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

[28] *See Johnnie B. Causey*, 57 ECAB 359 (2006).