United States Department of Labor
Employees' Compensation Appeals Board

J.B., Appellant	)	
and	)	**Docket No. 10-934**
	)	**Issued: December 14, 2010**
DEPARTMENT OF THE NAVY, NAVY YARD, Philadelphia, PA, Employer	)	

Appearances:
Thomas R. Uliase, 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 February 19, 2010 appellant filed a timely appeal from the November 19, 2009 merit decision of the Office of Workers' Compensation Programs concerning wage-loss compensation after July 24, 2006. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[1]

ISSUE

The issue is whether appellant is entitled to wage-loss compensation for total disability after July 24, 2006.

[1] For Office decisions issued prior to November 19, 2008, a claimant had one year to file an appeal. An appeal of Office decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. *See* 20 C.F.R. §§ 501.2(c) and 501.3.

FACTUAL HISTORY

The Office accepted that on October 19, 1970 appellant, then a 40-year-old shipyard worker, sustained chondromalacia patella bilateral and synovitis of the left and right knees due to a fall at work. It authorized a right total synovectomy and patella debridement, left total synovectomy and patellar prosthesis and right partial synovectomy with patellar prosthesis. Appellant stopped work for intermittent periods before stopping work entirely in January 1972. He received compensation for total wage loss.

In a December 10, 1979 decision, the Office determined appellant's loss of wage-earning capacity as a marine draftsman. The restrictions of the sedentary position included no lifting over 10 pounds and working indoors. The record indicated that appellant had completed a course of training in drafting in December 1975 and the medical evidence showed that the position was within his medical restrictions. The Office found that appellant had a wage-earning capacity of 47 percent and it reduced appellant's compensation to reflect his loss of wage-earning capacity. Appellant elected to retire on disability retirement benefits.

Appellant's case was inactive for a number of years. In 2008 the Office received a December 8, 2005 report from Dr. Peter F. Sharkey, an attending Board-certified orthopedic surgeon, who stated that appellant presented with right knee problems. Appellant reported that he had been doing well following his patellar replacements until recently and noted that his left knee was fine. Dr. Sharkey provided a diagnosis of degenerative joint disease of the right knee and stated that right total knee replacement should be considered. On December 6, 2005 Dr. Matthew Pepe, an attending Board-certified orthopedic surgeon, reported that magnetic resonance imaging scan testing showed a loose body in the right suprapatellar pouch. He opined that appellant's symptoms were due to patellofemoral wear and loosening of the patellar component.

In an April 30, 2008 report, Dr. William DeLong, an attending Board-certified orthopedic surgeon, advised that he first saw the claimant on January 9, 2006. Following his 1970 work injury, appellant had treatment that included replacements of the undersurface of the patella bilaterally. Dr. DeLong stated that appellant's right knee was much worse than the left and, on January 24, 2006, he performed a right total knee arthroplasty. He noted that by March 20, 2006 appellant was minus 3 degrees of full extension, there was flexion to 105 degrees and the implant was in a good position without sign of loosening. Dr. DeLong asserted that the need for knee replacements was based in part on the original accident because it was the start of the degenerative process that evolved over the years and culminated in significant enough degenerative change to warrant a total knee replacement.

On May 15, 2008 appellant filed a claim for recurrence of disability indicating that as of January 24, 2006 he was again totally disabled due to the effects of his 1970 work injury.

Dr. Arnold T. Berman, an Office medical adviser, reviewed the record on September 10, 2008. He noted that appellant underwent operative procedures of both knees to alleviate the chondromalacia of the patella, an accepted condition. Appellant previously underwent patellar replacements with patellar prostheses, but total knee replacements were not done. Dr. Berman stated that there was associated osteoarthritis of both knees that had

developed and would have been expected to develop following many years of chondromalacia of the patella. He agreed with Dr. DeLong that appellant's knee replacements were required because of a degenerative process that evolved over the years. The Office medical adviser stated that the right total knee replacement Dr. DeLong performed on January 24, 2006 should be considered work related.

The Office approved appellant's claim for recurrence of disability. It subsequently sought a second opinion from Dr. Robert Draper, a Board-certified orthopedic surgeon, who examined appellant on November 10, 2008. In a November 14, 2008 report, Dr. Draper discussed appellant's history, medical records and examination findings. He opined that six months following the January 24, 2006 surgery, appellant would have been able to return to sedentary work with no lifting over 10 pounds.

In a December 3, 2008 letter, the Office advised appellant that he was eligible for total disability compensation for six months following his surgery, until July 24, 2006. After that date, he could elect either compensation based on his loss of wage-earning capacity or retirement benefits. The Office subsequently issued appellant a payment for total disability compensation covering the period January 24 to July 24, 2006. It reinstated his compensation at the rate representing his loss of wage-earning capacity.

In an April 27, 2009 decision, the Office denied appellant's claim for total disability compensation subsequent to July 24, 2006.

A video hearing was held with an Office hearing representative on September 8, 2009. Appellant testified that he had not been able to drive for five years and that he had difficulty with walking. He asserted that his January 2006 surgery did not help his right knee and stated that he continued to have persistent pain. Appellant claimed that he could not perform the marine draftsman job because he was old, had poor vision and could not stand or sit for long periods. His attorney contended that, after accepting that appellant was totally disabled, the Office had the burden to establish that he was no longer totally disabled. Counsel claimed that appellant should have been paid at a recurrent pay rate when he became totally disabled in January 2006. He also asserted that appellant could not perform the marine draftsman job.

In a November 19, 2009 decision, an Office hearing representative affirmed the April 27, 2009 decision.

LEGAL PRECEDENT

For each period of disability claimed, the employee has the burden of proof of establishing that he was disabled as a result of the accepted employment injury.[2] 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.[3]

[2] *See Sandra D. Pruitt*, 57 ECAB 126 (2005).

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

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 availability of suitable employment and other factors and circumstances which may affect his wage-earning capacity in his disabled condition.[4] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[5] 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.[6] 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.[7]

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.[8]

Section 8101(4) of the Act defines "monthly pay" for purposes of computing compensation benefits as follows: "[T]he monthly pay at the time of injury, or the monthly pay at the time disability begins, or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater...."[9]

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

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

[6] *Id.*

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

[8] *See Dennis D. Owen*, 44 ECAB 475, 479-80 (1993); *Wilson L. Clow, Jr.*, 44 ECAB 157, 171-75 (1992); *Albert C. Shadrick*, 5 ECAB 376 (1953). Once a loss of wage-earning capacity is determined, a modification of such a determination is not warranted unless there is a material change in the nature and extent of the employment-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was in fact erroneous. The burden of proof is on the party attempting to show that the award should be modified. *George W. Coleman*, 38 ECAB 782, 788 (1987); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

[9] 5 U.S.C. § 8101(4).

ANALYSIS

In the present case, the Office followed the requisite procedures to determine that appellant had the wage-earning capacity of a marine draftsman. It adjusted his compensation accordingly in a December 10, 1979 decision. Appellant did not present any evidence showing that this wage-earning capacity determination was erroneous.[10] The record reflects that he later developed a need for right knee replacement surgery. The Office approved the procedure which took place on January 24, 2006 and determined that, by July 24, 2006, appellant had recovered sufficiently to return to his loss of wage-earning capacity.

The Office found that appellant was entitled to compensation for total disability only for six months following his surgery. It advised him that the medical evidence demonstrated that he was not totally disabled after that time. Counsel contends that the Office has the burden to establish that appellant did not have total disability after July 24, 2006; however, it only accepted total disability for a short period due to surgery. There is no medical evidence showing that appellant was totally disabled after July 24, 2006. Dr. DeLong, the attending Board-certified orthopedic surgeon who performed the surgery, indicated that within two months of the surgery appellant was doing very well. In a November 14, 2008 report, Dr. Draper, a Board-certified orthopedic surgeon who served as an Office referral physician, advised that six months following the January 24, 2006 surgery, appellant would have been able to return to sedentary work with no lifting over 10 pounds.

The medical evidence of record supports that appellant was no longer totally disabled after July 24, 2006 but was capable of performing duties that conformed to those of the marine draftsman position.[11]

CONCLUSION

The Board finds that appellant is not entitled to wage-loss compensation for total disability after July 24, 2006.

[10] Counsel argued before the Office and on appeal that appellant could not perform the marine draftsman position, but there is no medical evidence that appellant could not perform the limited physical requirements of the position or that the position was vocationally unsuitable.

[11] Counsel argued that appellant should receive a recurrent pay rate. However, he did not present evidence showing that the recurrence in question began more than six months after appellant resumed regular full-time federal employment. *See supra* note 9. Appellant did not present any argument that the wage-earning capacity determination should have been modified. Moreover, his temporary disability caused by the January 2006 surgery would not represent a material change in his employment-related condition. *See supra* note 8.

ORDER

IT IS HEREBY ORDERED THAT that the November 19, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 14, 2010
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