United States Department of Labor
Employees' Compensation Appeals Board

L.M., Appellant	)	
and	)	**Docket No. 10-949**
	)	**Issued: December 1, 2010**
DEPARTMENT OF THE ARMY, CORPS OF ENGINEERS, New Orleans, LA, 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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 24, 2010 appellant filed a timely appeal from September 16, 2009 and February 1, 2010 merit decisions of the Office of Workers' Compensation Programs reducing his compensation benefits to zero. 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 to zero based on its finding that his actual earnings as a limited-duty machinist fairly and reasonably represented his wage-earning capacity.

FACTUAL HISTORY

On July 23, 2001 appellant, then a 51-year-old machinist, filed a claim alleging that on July 16, 2001 he sustained an injury to his low back in the performance of duty. The Office accepted the claim for lumbar strain, an aggravation of lumbar degenerative disc disease, other acquired deformities of the left ankle and foot and unequal leg length. It authorized a

September 24, 2001 laminectomoy at L4-5 and S1, a decompression at L5-S1 and facet rhizotomy at L4-5 and L5-S1. The Office placed appellant on the periodic rolls effective February 9, 2002.

Appellant retuned to work on April 15, 2002.[1] On May 8, 2008 he underwent an L5 to S1 intertransverse posterolateral arthodesis with instrumentation L5 to S1, arthodesis at L5-S1 a laminectomy at L5 and S1 and laminectomy and discectomy at L5.

On December 10, 2008 Dr. Louis Provenza, an attending Board-certified neurosurgeon, found that appellant remained disabled from work. On January 20, 2009 Dr. Byron Thomas Jeffcoat, a Board-certified orthopedic surgeon and Office referral physician, diagnosed a disc herniation at L5-S1 due to the accepted work injury with continued weakness of the left foot. He opined that appellant could work full time with restrictions. In an accompanying work restriction evaluation, Dr. Jeffcoat found that he could lift no more than 35 pounds occasionally or 25 pounds continuously.

The Office determined that a conflict arose between Dr. Jeffcoat and Dr. Provenza regarding appellant's disability and work restrictions. On February 25, 2009 it referred him to Dr. Gordon P. Nutik, a Board-certified orthopedic surgeon, for an impartial medical examination.

On March 11, 2009 the employing establishment offered appellant a limited-duty position with retained pay performing clerical duties for 10 hours a day 4 days a week. The position was titled a "Set of Light Duties." The physical requirements did not require lifting over 35 pounds. Appellant accepted the job on March 12, 2009. He verbally accepted the position and began working on May 2, 2009.

On March 24, 2009 Dr. Nutik diagnosed status post a large disc herniation at L5-S1 with left foot drop. He found that appellant could work full time in a light-duty capacity frequently changing positions between sitting and standing. In an accompanying work restriction evaluation, Dr. Nutik provided physical restrictions of sitting eight hours a day, walking, standing and reaching four hours a day, bending, squatting and kneeling one hour a day and lifting, pushing and pulling up to 20 pounds three hours a day.

On August 20, 2009 the employing establishment offered appellant the position of light-duty machinist with no lifting over 20 pounds. The position required light machinist and clerical duties for 10 hours a day Monday through Thursday. On August 24, 2009 appellant accepted "under pressure and coercion…." In an accompanying statement, he expressed concern regarding whether he could perform physical labor 10 hours a day.

By decision dated September 16, 2009, the Office reduced appellant's compensation to zero based on its finding that his actual earnings as a light-duty machinist effective March 2,

[1] By decision dated August 14, 2006, the Office found that appellant did not establish a recurrence of disability on April 17, 2006. On November 2, 2006 the Office reopened his claim for medical care but denied modification of its finding that he did not establish a recurrence of disability.

2009 fairly and reasonably represented his wage-earning capacity.[2] On September 26, 2009 appellant requested a review of the written record.

In a May 6, 2009 form letter, received by the Office on October 7, 2009, Dr. Nutik indicated "yes" on a form sent from the employing establishment that appellant could work 10-hour days occasionally pushing, pulling and lifting up to 20 pounds.

By decision dated February 1, 2010, the hearing representative affirmed the September 16, 2009 decision.

On appeal, appellant challenged the employing establishment's wording of his restrictions in its May 6, 2009 letter to Dr. Nutik.

LEGAL PRECEDENT

Section 8115(a) of the Federal Employees' Compensation Act[3] provide that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by her actual earnings if his actual earnings fairly and reasonably represent her wage-earning capacity.[4] Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such a measure.[5] The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision,[6] has been codified at 20 C.F.R. § 10.403. The Office calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the current pay rate for the date-of-injury job.[7] Office procedures provide that a determination regarding whether actual earnings fairly and reasonably represent wage-earning capacity should be made after an employee has been working in a given position for more than 60 days.[8]

ANALYSIS

The Office accepted that appellant sustained lumbar strain and an aggravation of lumbar degenerative disc disease a degeneration of the lumbar intervetebral disc, other acquired

[2] By decision dated August 12, 2009, the Office denied appellant's claim for a schedule award as the evidence did not demonstrate that he was at maximum medical improvement.

[3] 5 U.S.C. §§ 8101-8193.

[4] *Id*. at § 8115(a); *Loni J. Cleveland*, 52 ECAB 171 (2000).

[5] *A.P.*, 58 ECAB 198 (2006); *Lottie M. Williams*, 56 ECAB 302 (2005).

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

[7] 20 C.F.R. § 10.403(c).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (July 1997).

deformities of the left ankle and foot and unequal leg length. Appellant underwent multiple back surgeries.

On March 12, 2004 appellant accepted a position performing a set of light duties at the employing establishment lifting 35 pounds or less. The work was generally clerical in nature.

The Office determined that a conflict in medical opinion existed between appellant's attending physician, Dr. Provenza, who found that he was disabled from employment and Dr. Jeffcoat, the second opinion examiner, who determined that he could work full-time with restrictions. In a report dated March 24, 2009 Dr. Nutik, the impartial medical examiner, found that appellant could work eight hours a day with restrictions. On August 20, 2009 the employing establishment offered him a limited-duty machinist job consisting of light machinist and clerical duties for 10 hours a day four days a week. Appellant accepted the position on August 24, 2009.

By decision dated September 16, 2009, the Office reduced appellant's compensation to zero after finding that his actual earnings as a light-duty machinist fairly and reasonably represented his wage-earning capacity. It determined that his earnings met or exceeded those of his date-of-injury position and thus he had no loss of wage-earning capacity. The Office further found that appellant successfully performed the modified machinist position for 60 days. However, appellant accepted the position on August 24, 2009, less than 60 days before the Office's decision. As noted, Office procedures provide that a determination regarding whether actual earnings fairly and reasonably represent wage-earning capacity should be made after an employee has been working in a given position for more than 60 days.[9] Appellant worked for the employing establishment beginning March 2, 2009 performing a series of light-duty assignments but that position had different physical requirements and job duties. He began working 10 hours a day performing the duties of a modified machinist on August 24, 2009. Consequently, appellant did not perform the same job for 60 days prior to the Office' wage-earning capacity determination. The Board, therefore, finds that the Office failed to follow its established procedures as it did not show that appellant performed the position of light-duty machinist consistently for 60 days.[10] Thus, the Office failed to meet its burden of proof.

CONCLUSION

The Board finds that the Office improperly reduced appellant's compensation to zero based on its finding that his actual earnings as a limited-duty machinist fairly and reasonably represented his wage-earning capacity.

[9] *Id*.

[10] *Amalia Stys* (Docket No. 96-521, issued June 9, 1998) (where the Board found that, as the claimant was terminated after 56 days of employment, she did not have 60 days of actual wages from which the Office could derive a fair and reasonable representation of her wage-earning capacity).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 1, 2010 and September 16, 2009 are reversed.

Issued: December 1, 2010
Washington, DC

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

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

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