United States Department of Labor
Employees' Compensation Appeals Board

C.K., Appellant	)	
and	)	**Docket No. 10-1066**
	)	**Issued: February 15, 2011**
DEPARTMENT OF HOMELAND SECURITY, IMMIGRATION & CUSTOMS ENFORCEMENT, Los Angeles, 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 March 8, 2010 appellant filed a timely appeal from a February 19, 2010 merit decision of the Office of Workers' Compensation Programs regarding a wage-earning capacity determination. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether the Office properly determined that the selected position of contract administrator properly represented appellant's wage-earning capacity as of February 26, 2009.

On appeal, appellant asserts that the Office did not meet its burden of proof to reduce his compensation, as the selected position was not medically suitable, that he remains totally disabled for work and did not receive 90 days of job placement assistance. He also contends that the Office improperly reduced his compensation before issuing a final decision, did not provide salary information for the selected position and did not issue a cost-of-living (COLA) increase in 2009.

FACTUAL HISTORY

The Office accepted that on August 22, 2005, appellant, then a 34-year-old assistant chief counsel, sustained herniated discs at L4-5 and L5-S1 and consequential erectile dysfunction when he lifted a heavy box. It also accepted that on January 17, 2007 he sustained lumbar and cervical spine strains, a lumbosacral sprain and aggravation of a displaced lumbar disc without myelopathy when he fell over a crate of files and struck his neck.[1] Appellant stopped work on January 17, 2007 and did not return. He received compensation on the periodic rolls beginning April 14, 2007.[2]

Appellant was treated by Dr. Hamid Rahman, an attending Board-certified orthopedic surgeon, who submitted reports from January 17 to March 7, 2007 diagnosing an acute cervical strain/sprain and aggravation of L4-5 and L5-S1 disc herniations. Dr. Rahman took appellant off work and referred him to a pain management specialist for epidural injections.

On August 27, 2007 the Office obtained a second opinion from Dr. Bunsri T. Sophon, a Board-certified orthopedic surgeon, who reviewed the medical record and statement of accepted facts provided by the Office. On examination, Dr. Sophon found restricted lumbar motion, full cervical motion, no paraspinal tenderness and negative straight leg raising tests bilaterally. He diagnosed a lumbosacral sprain, herniated L5-S1 disc with stenosis and a resolved cervical sprain. Dr. Sophon explained that although appellant needed an L5-S1 discectomy and fusion, he had no neurologic impairments. Therefore, he could safely perform sedentary work while awaiting surgery. Dr. Sophon found appellant able to work eight hours a day with lifting limited to 10 pounds and a 15-minute break each hour.

In a September 13, 2007 letter, the Office afforded Dr. Rahman 30 days to review Dr. Sophon's report and address whether he concurred. Dr. Rahman did not respond. On October 26, 2007 the Office advised appellant that Dr. Sophon would be accorded the weight of the medical evidence.

Dr. Rahman submitted a December 5, 2007 report reiterating that appellant remained totally disabled. He recommended an L4-5 discectomy and fusion. The Office approved Dr. Rahman's request for surgery.

As the medical evidence indicated that appellant was not totally disabled for work, the Office referred him for vocational rehabilitation. Based on a review of appellant's education and work experience, a vocational rehabilitation counselor identified the positions of attorney (U.S. Department of Labor's, *Dictionary of Occupational Titles* # 110.107-010) and contract administrator (DOT# 162.117-014) as employment goals. Both positions were classified as sedentary. Labor market surveys showed available jobs in both occupations in appellant's commuting area.

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[1] The August 22, 2005 injury was originally accepted under a separate claim. On March 7, 2008 the Office doubled the August 22, 2005 and January 17, 2007 claims under File No. xxxxxx072.

[2] The record contains a January 17, 2008 decision finding a $3,064.72 overpayment of compensation and waiving its recovery. This decision is not before the Board on the present appeal.

In a May 9, 2008 supplemental report, Dr. Sophon explained that by "15-minute break," he meant that appellant should be allowed to change positions every 15 minutes, not that he had to stop work for 15 minutes each hour.

On June 4, 2008 the Office approved a 90-day job placement plan. Appellant signed the plan on June 13, 2008. On June 27, 2008 he was arrested and incarcerated due to alleged professional misconduct. Appellant was released to home detention on July 18, 2008 then remanded to custody on August 18, 2008. The vocational counselor met with him at his home during periods of home detention. The vocational counselor provided attorney and contract administrator job contacts through October 6, 2008.

In an August 13, 2008 report, Dr. Rahman noted that appellant was still awaiting lumbar surgery and remained disabled for work.

An October 2008 labor market survey showed that contract administrator positions were available in appellant's commuting area with average wages of $1,646.00 a week. The Office closed the vocational rehabilitation effort on October 27, 2008. On October 30, 2008 an Office medical adviser reviewed attorney and contract administrator position descriptions and opined that appellant was medically able to perform either job.[3]

By notice dated January 27, 2009, the Office proposed to reduce appellant's compensation benefits based on his ability to earn $1,646.00 a week in the selected position of contract administrator. It noted that the physical requirements of the position were within Dr. Sophon's restrictions and were approved by the Office medical adviser. A labor market survey showed that positions were reasonably available in appellant's commuting area. The Office afforded him 30 days to submit additional evidence or argument. On January 29, 2009 appellant contended that he remained totally disabled, did not receive 90 days of placement assistance and that such jobs were not available in his commuting area. He also contended that the proposed reduction was in retaliation for his arrest.

By decision dated February 26, 2009, the Office reduced appellant's compensation effective that day under section 8106 and 8115 of the Federal Employees' Compensation Act, based on his ability to earn $1,646.00 a week in the selected position of contract administrator.[4] It found that the position was medically suitable according to Dr. Sophon and an Office medical adviser. The Office further found that appellant received 90 days of job placement assistance and that the reduction in benefits was unrelated to his arrest.

In a March 2, 2009 letter, appellant requested a review of the written record. He contended that the Office did not specify the dollar amount of his projected wages, there was a typographical error in Dr. Sophon's supplemental report, an Office medical adviser did not approve the position, he did not receive 90 days of placement assistance, there were no available

[3] The Office issued a f proposed reduction of compensation on November 12, 2008 based on projected earnings of $2,041.00 a week as an attorney. It did not issue a decision finalizing this notice.

[4] Using the formula set forth in *Albert C. Shadrick*, 5 ECAB 376 (1953), the Office calculated that appellant had a 28 percent loss of wage-earning capacity.

contract administrator jobs and that Dr. Rahman's opinion should be accorded the weight of the medical evidence.

By decision dated and finalized July 13, 2009, the Office affirmed the February 26, 2009 decision reducing appellant's compensation. It found that he could earn $1,646.00 a week, that the typographical error did not diminish the value of Dr. Sophon's report, that the Office medical adviser approved the contract administrator position, that the vocational rehabilitation counselor remained available to him throughout his incarceration, and that jobs were reasonably available in his commuting area.

On September 7, 2009 appellant requested reconsideration. He asserted that the Office reduced his compensation before issuing a final decision and did not grant him a COLA in 2009.[5]

By decision dated February 19, 2010, the Office denied modification of its prior decision. It found that it did not prematurely reduce appellant's compensation and that there was no COLA adjustment authorized for fiscal 2009.

LEGAL PRECEDENT

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction of benefits.[6] Under section 8115 (a) of the Act[7] 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. If the actual earnings do not fairly and reasonably represent his or her wage-earning capacity, or if the employee has no actual earnings, his or her wage-earning capacity is determined with due regards to the nature of the injury, the degree of physical impairment, his or her 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.[8]

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's *Dictionary of Occupational Titles* or otherwise available in the open 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 labor market should be made through contact with the state employment service or other applicable service. Finally, application of the

[5] By decision dated September 28, 2009, the Office suspended appellant's compensation as he failed to return an affidavit of earnings and employment (Form CA-1032). After appellant returned to completed form, the Office reinstated compensation retroactively.

[6] *David W. Green*, 43 ECAB 883 (1992).

[7] 5 U.S.C. §§ 8101-8193, 8115(a).

[8] *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

principles set forth in *Albert C. Shadrick*,[9] will result in the percentage of the employee's loss of wage-earning capacity.[10]

ANALYSIS

Appellant received compensation for total disability beginning on April 14, 2007 due to accepted lumbar and cervical spine strains, a lumbosacral strain and aggravation of a displaced lumbar disc. Dr. Rahman, an attending Board-certified orthopedic surgeon, took him off work based on his determination of total disability. The Office obtained a second opinion from Dr. Sophon, a Board-certified orthopedic surgeon, finding appellant able to perform full-time sedentary work as of August 27, 2007. He imposed restrictions against lifting more than 10 pounds and recommended changing positions every 15 minutes. The Office provided Dr. Rahman an opportunity to comment on Dr. Sophon's report, but he did not respond. The Board finds that the weight of medical opinion is represented by Dr. Sophon and establishes that appellant was no longer totally disabled for work.

The Office referred appellant for vocational rehabilitation services in March 2008. The vocational rehabilitation counselor performed a skills inventory and selected the position of contract administrator as representative of appellant's wage-earning capacity. The contract administrator position was classified as sedentary, with lifting up to 10 pounds. These physical requirements are within the restrictions set forth by Dr. Sophon and affirmed by an Office medical adviser. The vocational counselor found the job requirements commensurate with appellant's education and experience. The vocational counselor determined the prevailing wage rate of contract administrator position and its availability in the open labor market. The vocational counselor also conducted a 90-day placement program. On February 26, 2009 the Office reduced appellant's compensation based on his ability to earn $1,646.00 a week as a contract administrator. Appellant requested reconsideration, contending that the Office failed to issue a COLA adjustment and improperly reduced his compensation. By decision dated February 19, 2010, the Office affirmed its February 26, 2009 decision reducing his compensation.

The Board finds that the Office considered the proper factors, such as availability of contract administrator positions and appellant's physical limitations, in determining the position properly represented his wage-earning capacity. Dr. Sophon and an Office medical adviser found the contract administrator position medically suitable. The vocational rehabilitation counselor found that jobs were reasonably available in appellant's commuting area. Also, the Office followed the established procedures under the *Shadrick* decision in calculating his employment-related loss of wage-earning capacity. Appellant did not contend that the Office erred in its mathematical calculations of his wage-earning capacity. The Board has reviewed these calculations and finds them to be correct.

Appellant did not submit sufficient rationalized medical evidence indicating that he was not capable of working eight hours a day as a contract administrator. The Board finds that the

[9] 5 ECAB 376 (1953).

[10] *James A. Birt*, 51 ECAB 291 (2000); *Francisco Bermudez*, 51 ECAB 506 (2000).

Office properly found that he was medically and vocationally capable of working eight hours a day as a contract administrator. Thus, the Office's February 19, 2010 decision properly affirmed the reduction of appellant's compensation based on his ability to earn wages in the selected position of contract administrator.

On appeal, appellant contends that the selected position was not suitable work as Dr. Rahman found him totally disabled. Dr. Rahman was given the opportunity to address, Dr. Sophon's opinion that appellant could perform full-time sedentary work within specified restrictions. He did not provide a response or sufficient medical rationale for keeping appellant off work. Dr. Rahman stated that appellant was temporarily totally disabled without explanation.[11] Dr. Sophon explained that because the herniated lumbar discs caused no neurologic deficits, appellant could safely perform sedentary duty. Dr. Rahman's opinion is insufficiently rationalized to create a conflict with Dr. Sophon. The Office properly accorded Dr. Sophon's opinion the weight of the medical evidence. Additionally, the Office obtained an October 30, 2008 report from an Office medical adviser finding that the selected contract administrator position was within appellant's medical restrictions. The Board finds that the medical record establishes that the selected position was suitable work.[12]

Appellant asserts that the Office did not provide salary information for the selected position; but the record contains April and October 2008 labor market surveys showing that contract administrators in his commuting area earned an average of $1,646.00 a week. His contention in this regard is without merit.

Appellant argued that he did not receive 90 days of job placement assistance. However, the vocational rehabilitation counselor provided placement services from June 4 to October 27, 2008, mailing his job contacts and meeting with him at his home. As the record demonstrates that appellant received 90 days of placement assistance, his contention is not supported by the record.

Appellant contends that the Office improperly reduced his compensation before issuing a final decision. However, the Office did not reduce his compensation until February 26, 2009, the date of the final decision. Appellant asserts that the Office failed to issue him a COLA in 2009. As noted, the Office advised in its February 19, 2010 decision that there was no COLA adjustment in 2009. Appellant has not established any failure by the Office to issue a COLA increase in this case.

CONCLUSION

The Board finds that the selected position of contract administrator properly represented appellant's wage-earning capacity as of February 26, 2009.

[11] *Deborah L. Beatty*, 54 ECAB 340 (2003).

[12] *N.J.*, 59 ECAB 171 (2007).

ORDER

IT IS HEREBY ORDERED THAT the February 19, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 15, 2011
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