United States Department of Labor
Employees' Compensation Appeals Board

A.S., Appellant	)	
and	)	**Docket No. 07-1539**
	)	**Issued: December 7, 2007**
DEPARTMENT OF THE AIR FORCE, HILL AIR FORCE BASE, UT, 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
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 10, 2007 appellant filed an appeal from an April 5, 2007 merit decision of the Office of Workers' Compensation Programs finding that he had no loss of wage-earning capacity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly reduced appellant's compensation to zero effective July 1, 2006 on the grounds that his actual earnings as a clerk fairly and reasonably represented his wage-earning capacity.

FACTUAL HISTORY

On October 19, 2002 appellant, then a 31-year-old aircraft mechanical parts repairer, filed a Form CA-1, alleging that on October 3, 2002 he injured his back lifting a heavy aircraft part. He did not stop work and on December 18, 2002 the Office accepted that he sustained an employment-related thoracic strain. Appellant continued to work with lifting restrictions and, on

January 24, 2003, Dr. James M. Rhee, an attending Board-certified physiatrist, advised that appellant could return to work without restrictions. He continued to receive medical treatment including physical therapy and epidural steroid injections. On June 28, 2006 the employing establishment offered appellant a permanent position as a clerk. The physical requirements included no lifting greater than 10 to 15 pounds as tolerated and bending and stooping as tolerated.[1] Appellant accepted the position on July 1, 2006 and began working in that position on July 10, 2006.

A magnetic resonance imaging (MRI) scan of the lumbar spine on June 21, 2006 demonstrated degenerative changes at L4-5 and L5-S1. A July 26, 2006 MRI scan demonstrated a disc bulge at L4-5 and L5-S1. On July 27, August 3 and 14, 2006 appellant went to the emergency room for medication relief for chronic back pain. Dr. Kathy Alderson, a Board-certified neurologist, performed electromyography (EMG) of the left leg on August 10, 2006. She advised that it demonstrated two abnormalities, one a nonspecific predominantly demyelinating peripheral neuropathy which she opined could be seen in early diabetes or other metabolic condition. Dr. Alderson described the second abnormality as fairly marked spontaneous activity in the L5 lumbar paraspinous muscles which was suggestive of some local irritation. In an August 14, 2006 report, appellant's attending Board-certified physiatrist, Dr. Michael L. Clegg, advised that appellant's situation was getting very complex with multiple somatic complaints. He noted the abnormal EMG findings and opined that his MRI scans were fairly normal except for a small disc protrusion. Dr. Clegg noted appellant's past history of motor vehicle accidents and visits to the emergency room for pain medication. He concluded that it was "very difficult to ascribe one injury or one focal problem in his spine as the causative lesion for all his symptoms" and recommended an independent medical evaluation "on this very complicated case that makes no sense at this time." In a September 7, 2006 report, Dr. Clegg again noted that appellant had multiple medical problems and opined that they needed to be managed by one physician.

On September 11, 2006 appellant filed a recurrence claim. He stated that over the years his restrictions had become worse and that he was then unable to bend, stoop, reach or lift over 15 pounds and could not stand for long periods of time. Appellant requested that a disc protrusion at T3-4 and disc bulge/protrusions at L3-4, L4-5 and L5-S1 be accepted. On September 18, 2006 the Office accepted that he sustained a temporary aggravation of thoracic or thoracolumbar intervertebral disc and advised him that he had not sustained a recurrence of disability and should file a new claim for other conditions that he thought were employment related. The Office noted that appellant had been in multiple motor vehicle accidents and the medical evidence showed that he had cervical, lumbar and bilateral shoulder conditions which had not been accepted as employment related. In a September 28, 2006 report, Dr. Vera Carlson, Board-certified in family medicine, noted appellant's complaints of thoracic and lumbar pain since the October 2, 2002 employment injury which were aggravated by stooping forward, lifting in front and lifting things that were too heavy. She noted that since August 2005 he had had leg weakness and that after a March 2006 motor vehicle accident his back pain had increased.

[1] The duties of the position were to receive and direct telephone calls or visitors, process incoming mail, maintain files and post updates to manuals on policies, directives and memoranda, prepare and maintain office forms of various types, and perform routine, miscellaneous clerical work including copying and faxing.

Examination demonstrated bilaterally paraspinal muscle spasm in the thoracic region and no vertebral spine tenderness of the lower back. Dr. Carlson diagnosed thoracic disc displacement and anxiety disorder. By letter dated October 24, 2006, appellant reiterated that he wanted his lumbar spine condition accepted.[2] On October 27, 2006 he again went to the emergency room for pain control.

Appellant stopped work on November 2, 2006 and received donated leave through November 28, 2006. In reports dated November 6, 2006, Dr. Michael C. Housley, Board-certified in family medicine, advised that he had previously seen appellant for multiple visits in a four-week period in October and November 2002 and since that time he became a medical vagabond, visiting multiple medical professionals with numerous scans of the lumbar and thoracic spine and multiple emergency visits. He stated that appellant's appointment that day was to obtain a work restriction document or release from work, noting a one-week history of unbearable pain. On examination of the back, palpation produced a moderate amount of discomfort over the cervical, thoracic and lumbar areas with exquisite discomfort to palpation over the paraspinals, mainly between the shoulder blades and to a lesser extent in the neck and lumbar areas. Dr. Housley opined that "first and foremost [he] needs a medical home and that his behavior of medical vagrancy is actually adding to his problem and being counterproductive in attempts to solve his medical dilemma," stating that appellant needed a physician with expertise in back pain or a chronic pain doctor who would coordinate his medical care and also recommended a complete psychiatric evaluation. He advised that appellant could return to modified duty with no bending or twisting at the waist, no use of the arms above shoulder level, no lifting beyond 5 to 10 pounds and no driving or working around machinery. Dr. Housley also recommended that appellant should be allowed to sit, stand and move about periodically, concluding that the restrictions were mainly based on his medical history rather than objective findings. On December 12, 2006 appellant underwent a functional capacity evaluation that demonstrated lifting tolerances of 10 to 13 pounds occasionally, with no frequent or overhead lifting. He could carry 10 pounds for 30 feet, push 20 pounds for 30 feet, and pull 5 pounds for 30 feet. On an occasional basis, appellant could write, perform low level activities, twist, climb stairs and ladders. On an occasional basis of short duration, he could reach forward and above the shoulder. Appellant was unable to bend or stoop. Sitting was limited to 2 hours continuously and 6 hours daily with dynamic standing of 1.5 hours continuously and 5 hours daily. On December 17, 2006 appellant again visited the emergency room with symptoms of nausea and vomiting.

On January 12, 2007 appellant filed a Form CA-7, claim for compensation, for the period November 29, 2006 through January 12, 2007. By letter dated January 22, 2007, the Office informed appellant of the type of evidence needed to develop this claim, and in reports dated December 29, 2006 and February 9, 2007, Dr. Carlson diagnosed thoracic sprain and degeneration of thoracolumbar intervertebral disc and discussed appellant's pain medications. By decision dated March 1, 2007, the Office denied the claim on the grounds that the medical

[2] On October 31, 2006 appellant filed an occupational disease claim, alleging that employment factors caused radiating low back problems. The claim was adjudicated by the Office under file number 122041428, and by decision dated February 5, 2006, the Office denied the claim on the grounds that the medical evidence did not establish that appellant's low back condition was employment related. Appellant has not filed an appeal with the Board of this decision. The instant case was adjudicated under file number 122012238.

evidence did not establish that he was totally disabled for the period November 29, 2006 through January 12, 2007.[3]

In an undated report received by the Office on March 6, 2007, Dr. Carlson stated that, due to the accepted conditions of thoracic sprain and degeneration of the thoracic or thoracolumbar intervertebral disc, appellant was not able to perform his regular job duties as a clerk because he could not reach and stoop to answer the telephone, could not open mail because it required the use of his arms in unsupported motions, could not maintain policy manuals and could not prepare and maintain office forms because these duties required reaching, stooping and unsupported hand and arm use, because they required retrieving and researching manuals out in front of the body and that general office duties such as copying, faxing and monitoring stock levels of office supplies required use of the hands and arms out in front of the body with reaching and stooping movements. She noted that appellant's position was sedentary and that each duty by itself was not demanding, but that, due to his thoracic condition, it was impossible for him to perform the duties. Dr. Carlson opined that these movements caused muscle spasms and disabling and radiating pain due to thoracic disc degeneration which was compounded by the hourly and daily workweek. She noted that, while the functional capacity evaluation indicated that he could perform sedentary work, it did not address his pain medication which caused severe nausea and vomiting which made it impossible for him to leave his house, let alone go to work. Dr. Carlson concluded that appellant's thoracic spine was continuing to degenerate requiring him to lie down for extended periods and that "during this period he is unable to perform any of the duties listed with his absence from work." In a progress note dated March 12, 2007, she noted appellant's continued complaints of radiating pain and reiterated the diagnoses.

In an April 5, 2007 decision, the Office reduced appellant's compensation to zero based on its determination that his actual earnings as a clerk, effective July 1, 2006, fairly and reasonably represented his wage-earning capacity. The Office noted that his wages as a clerk equaled or exceeded those held on the date of injury, October 3, 2002.

LEGAL PRECEDENT

Section 8115(a) of the Federal Employees' Compensation Act[4] provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity.[5] 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.[6] The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision,[7] has been codified at 20 C.F.R. § 10.403. The Office calculates an

[3] Appellant has not filed an appeal with the Board from this decision.

[4] 5 U.S.C. §§ 8101-8193.

[5] 5 U.S.C. § 8115(a); *Loni J. Cleveland*, 52 ECAB 171 (2000).

[6] *Lottie M. Williams*, 56 ECAB ____ (Docket No. 04-1001, issued February 3, 2005).

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

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.[8] Office procedures provide that the Office can make a retroactive wage-earning capacity determination if the claimant worked in the position for at least 60 days, the position fairly and reasonably represented his or her wage-earning capacity and the work stoppage did not occur because of any change in his injury-related condition affecting the ability to work.[9]

ANALYSIS

The Office accepted that appellant sustained a thoracic strain and temporary aggravation of thoracic or thoracolumbar intervertebral disc caused by an employment injury on October 3, 2002. Appellant continued to work and on July 10, 2006 began a permanent restricted-duty position as a clerk. He stopped work on November 2, 2006 and received donated leave through November 28, 2006. Appellant thus worked more than 60 days, and there is no evidence that the position was seasonal, temporary or make-shift work designed for his particular needs.[10] As there is no evidence that appellant's wages in the clerk position did not fairly and reasonably represent his wage-earning capacity, they must be accepted as the best measure of his wage-earning capacity.[11]

Appellant, however, stated that he had to stop work due to a worsening of his condition because he was unable to bend, stoop, reach or lift over 15 pounds and could not stand for long periods of time. In that regard, he filed a claim for compensation for the period November 29, 2006 through January 12, 2007, and by decision dated March 1, 2007, the Office denied this claim. If a work stoppage occurs because of a change in an injury-related condition affecting the ability to work, it is improper for the Office to make a retroactive wage-earning capacity determination.[12] The Board finds that in this case the evidence of record does not support that appellant stopped work for this reason.

The physical requirements of the sedentary clerk position were no lifting greater than 10 to 15 pounds and bending and stooping as tolerated. Dr. Alderson interpreted an August 10, 2006 left leg EMG as demonstrating demyelinating peripheral neuropathy which could be early diabetes or another metabolic condition. The second abnormality found on the EMG was suggestive of some local irritation at L5. Neither of these abnormalities pertain to the accepted thoracic or thoracolumbar spine condition. In an August 14, 2006 report, an attending physiatrist, Dr. Clegg noted appellant's complaints of pain and history of motor vehicle accidents. He opined that it was difficult to ascribe one injury or one focal problem in his spine as the cause of all his symptoms. In a September 28, 2006 report, Dr. Carlson noted appellant's

---

[8] 20 C.F.R. § 10.403(c).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (July 1997); *Selden H. Swartz*, 55 ECAB 272 (2004).

[10] *J.C.*, 58 ECAB ____ (Docket No. 07-1165, issued September 21, 2007).

[11] *See Loni J. Cleveland, supra* note 5.

[12] *Selden H. Swartz, supra* note 9.

complaints of thoracic and lumbar pain since his October 2002 employment injury. She, however, also noted an increase in symptoms since a March 2006 motor vehicle accident. While Dr. Carlson diagnosed thoracic disc displacement and anxiety disorder, she provided no opinion regarding appellant's ability to work.

The medical evidence contemporaneous with appellant's work stoppage on November 2, 2006 is a report by Dr. Housley dated November 6, 2006 in which he noted a one-week history of unbearable pain and made findings of discomfort on examination of the back. Dr. Housley advised that appellant needed a physician with expertise in back pain or a chronic pain doctor who would coordinate his medical care and also recommended a complete psychiatric evaluation. He advised that appellant could return to modified duty with no bending or twisting at the waist, no use of the arms above shoulder level, no lifting beyond 5 to 10 pounds and no driving or working around machinery. Dr. Housley also recommended that appellant should be allowed to sit, stand and move about periodically, concluding that the restrictions were mainly based on his medical history rather than objective findings. Therefore, at the time appellant stopped work on November 2, 2006, there was no medical evidence of record to show that a change in the employment-related conditions affected his ability to work.

Furthermore, the December 12, 2006 functional capacity evaluation provides support that appellant's work stoppage was not due to his employment-related conditions as this evaluation found that he could perform lifting of 10 to 13 pounds occasionally, could carry 10 pounds for 30 feet, push 20 pounds for 30 feet and pull 5 pounds for 30 feet. Appellant could write, perform low level activities, twist, climb stairs and ladders on an occasional basis and could reach forward and above the shoulder on an occasional basis of short duration. He was unable to bend or stoop. Sitting was limited to 2 hours continuously and 6 hours daily with dynamic standing of 1.5 hours continuously and 5 hours daily. These abilities comport with the requirements of the clerk position. In reports dated December 29, 2006 and February 9, 2007, Dr. Carlson merely reiterated her diagnoses and discussed appellant's pain medications. While she submitted an undated report to the Office on March 6, 2007 in which she advised that appellant could not perform the duties of a clerk due to his medication and because these movements caused muscle spasms and disabling and radiating pain due to thoracic disc degeneration which was compounded by the hourly and daily workweek, she did not address his condition in November 2006. Dr. Carlson did not address the impact of his motor vehicle accidents or the lumbar condition, which has not been accepted as employment related, on his ability to perform the clerk position.

The Board finds that appellant's performance of this position in excess of 60 days is persuasive evidence that the position represents his wage-earning capacity, and finds the opinion of Dr. Housley, two days after appellant stopped work, more probative regarding whether there was a change in appellant's injury-related condition that affected his ability to work. The Office therefore could retroactively determine that appellant's actual earnings as a clerk fairly and reasonably represented his wage-earning capacity.[13] The Board also notes that this is not a case where there is a pending claim for compensation from the time of the work stoppage,[14] as, by its

[13] *Supra* note 9.

[14] *See Juan D. Dejesus*, 54 ECAB 721 (2003).

March 1, 2007 decision, the Office had adjudicated appellant's CA-7 claim for total disability beginning November 29, 2006, the day his donated leave expired.

As appellant's actual earnings in the position of clerk fairly and reasonably represent his wage-earning capacity, the Board must determine whether the Office properly calculated his wage-earning capacity based on his actual earnings. As appellant's weekly earnings as a clerk of $845.63 exceeded the current weekly wages of his position on the date of injury or $763.36, the Board finds that the Office properly determined that appellant had no loss of wage-earning capacity based on his actual earnings.

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation to zero percent effective July 1, 2006 on the grounds that his actual earnings as a clerk fairly and reasonably represented his wage-earning capacity.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 5, 2007 is affirmed.

Issued: December 7, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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