United States Department of Labor
Employees' Compensation Appeals Board

JARRED FLYNN, Appellant	)	
and	)	**Docket No. 05-634**
	)	**Issued: August 10, 2005**
DEPARTMENT OF THE NAVY, PUGET SOUND NAVAL SHIPYARD, Bremerton, WA, Employer	)	

Appearances:
John E. Goodwin, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge

JURISDICTION

On January 18, 2005 appellant filed an appeal of a decision of the Office of Workers' Compensation Programs dated November 5, 2004, reducing his compensation based on his ability to earn wages in the selected position of parking lot attendant. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether the Office properly reduced appellant's compensation to reflect a capacity to earn wages in the selected position of parking lot attendant. On appeal he asserted that he could not perform this job as he was unable to drive a motor vehicle as required due to prescribed narcotic medications. Appellant also asserted that the Office deliberately used labor market survey data from cities more than 60 miles from his residence in Bremerton, WV, as parking lot attendant jobs in Bremerton were "not performed in sufficient numbers so as to be considered reasonably available."

FACTUAL HISTORY

The Office accepted that on June 22, 1978, appellant, then a 36-year-old machinist, sustained an acute lumbosacral ligamentous sprain while entering a narrow passageway. The Office also accepted that on May 15, 1980 he sustained a herniated L5-S1 disc with an L5-S1 discectomy performed on June 9, 1980. After a period of intermittent absences, he stopped work on March 18, 1991 and did not return to work. Appellant received wage-loss compensation on the periodic rolls. He received treatment for the accepted lumbar injuries through June 1998.[1] The Office terminated appellant's wage-loss compensation effective June 21, 1998 on the grounds that his work-related disability had ceased on or before that date.[2]

In a December 20, 1999 report, Dr. Preston J. Phillips, an attending Board-certified orthopedic surgeon, requested authorization for surgical decompression at L2-4 as well as L5-S1. Following medical development, the Office issued a November 16, 2001 decision approving the requested surgery at L5-S1, but denying the procedure from L2-4 as there was insufficient medical evidence that any pathology at L2-4 was related to the accepted injuries.

In an October 18, 2001 report, Dr. Jongsoo Park, an attending Board-certified neurosurgeon of professorial rank, commented that appellant reported taking "350 milligrams of MS Contin bid [twice a day]," an "astronomical amount" of pain medication.

On June 6, 2002 Dr. St. Elmo Newton, III, an attending Board-certified orthopedic surgeon, performed a fusion and decompression at L5-S1 with facet screws, right iliac bone graft and implanted stimulator at L5. He also performed a decompressive laminectomy at L2-3 and L3-4. Dr. Newton submitted progress notes describing slow improvement in appellant's right-sided radiculopathy. He continued to prescribe narcotic medication, including MS Contin.[3] The Office accepted that the L5-S1 surgery was related to the accepted injuries and paid wage-loss compensation from June 6, 2002 onward. His case was placed on the periodic rolls as of July 14, 2002.[4]

In a May 26, 2003 work capacity evaluation, Dr. Newton found appellant able to perform part-time light duty, with intermittent sitting, walking and standing, limited twisting, no squatting, kneeling or climbing, no pushing, pulling and lifting limited to 20 pounds. The Office referred him for vocational rehabilitation services on January 9, 2004 and appointed Kathleen Wilson as appellant's vocational rehabilitation counselor. The Office approved a vocational rehabilitation plan from April 12 to July 11, 2004 with goals of reemployment in the private

[1] A June 9, 1998 magnetic resonance imaging (MRI) scan showed progressive stenosis from L3-4, degenerative disc disease at L5-S1 and stable foraminal narrowing at L5-S1.

[2] Appellant sustained cervical and lumbar strains in a November 11, 1999 motor vehicle accident in which he was the driver.

[3] In a February 12, 2003 letter and chart note, Dr Newton stated that according to an Office case manager, appellant had "been talking about suicide." He recommended psychiatric care. Appellant underwent psychological testing in February 2003. There is no claim of record for an emotional condition.

[4] Appellant received medical management filed nurse services from September 2002 through March 2003.

sector as a security guard, outside deliverer or parking lot attendant. Appellant underwent vocational testing and a skills analysis.

In an April 12, 2004 report, Dr. Newton noted a spontaneous increase in appellant's right-sided lumbar pain with radiculopathy into the posterior right thigh. On examination he found a "moderate scoliosis" and moderate lumbar spasm. Dr. Newton administered an epidural injection. In a May 12, 2004 chart note, he opined that appellant "could be getting some L4 disc problems above his fusion." He administered additional epidural injections.

In a June 14, 2004 report, Ms. Wilson noted that on May 25, 2004 appellant wanted to meet with her so she "could see the effects that the MS Contin and Flexeril were having on him." She refused as "nothing in his file … stated that he was unable to work due to his back condition." Appellant asserted in a June 27, 2004 letter, that he should not drive as he was "currently taking three prescriptions" causing "drowsiness and or dizziness."

In a July 16, 2004 closure report, Ms. Wilson stated that the 90-day placement program had not resulted in employment. She found that the position of parking lot attendant[5] was within appellant's medical limitations and vocational abilities. The position was classified as light duty with occasional lifting up to 20 pounds. The job required "[p]ark[ing] automobiles for customers in parking lot or storage garage," taking or issuing tickets to customers and directing them to parking spaces. On July 15, 2004 Ms. Wilson provided job listings for parking lot attendant positions in King County, Pierce County, Tacoma, Auburn, Seattle and Port Angeles. These positions required either a valid driver's license or lifting in excess of 20 pounds. She did not provide listings for appellant's residence in Bremerton, located in Kitsap County.

By notice dated August 27, 2004, the Office advised appellant that it proposed to reduce his wage-loss compensation by his projected earnings as a parking lot attendant of $312.80 a week. The Office determined that he had a 74 percent loss of wage-earning capacity based on the formula set forth in *Albert C. Shadrick*.[6] The Office afforded appellant 30 days in which to submit additional evidence regarding his capacity to earn wage as a parking lot attendant.

In response, appellant submitted a September 23, 2004 note from Dr. Michael J. Benoit, an attending Board-certified family practitioner, which stated that appellant was "on large doses of narcotics and other medications that interfere with his level of consciousness. He should not be driving with these medications." Appellant also submitted additional lumbar imaging studies and Dr. Newton's August 24, 2004 recommendation for additional nerve block injections.

By decision dated September 30, 2004, the Office finalized the proposed reduction of compensation, reducing his wage-loss compensation effective September 29, 2004 based on his projected earnings in the selected position of customer service representative. The Office found that the position was "medically and vocationally suitable." The Office further found that the additional evidence submitted was insufficient to alter the reduction of compensation as his

[5] U.S. Department of Labor, *Dictionary of Occupational Titles* #915.473-010.

[6] 5 ECAB 376 (1953).

physician did not assert that appellant was incapable of "perform[ing] the position of customer service representative."

In an October 3, 2004 letter, appellant asserted that he was physically incapable of performing the duties of a customer service representative, which were different than those of a parking lot attendant. On October 27, 2004 he requested an oral hearing.[7]

By decision dated November 5, 2004, the Office rescinded its September 30, 2004 decision and reduced appellant's wage-loss compensation effective November 28, 2004, to reflect his potential earnings in the selected position of parking lot attendant. The Office found that the evidence submitted was insufficient to alter the proposed reduction as his physician did not assert that he was unable to perform the job. Also, "the availability of this position was based within the commuting area from" appellant's Bremerton residence.

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.[8] Under section 8115(a), 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 regard 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.[9]

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

[7] In a November 5, 2004 letter, the Office advised appellant that in its September 30, 2004 decision, it erroneously used the job title and wages of Customer Service Representative and not Parking Lot Attendant. The Office explained that due to this error, it rescinded the September 30, 2004 decision by the attached decision dated November 5, 2004 and that appropriate adjustments would be made to his compensation for the period November 3 to 27, 2004.

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

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

principles set forth in *Albert C. Shadrick*,[10] will result in the percentage of the employee's loss of wage-earning capacity.[11]

ANALYSIS

The Office accepted that appellant sustained a lumbar strain on a June 22, 1978 and a herniated L5-S1 disc on May 15, 1980. Following vocational rehabilitation and a 90-day placement plan, the Office issued a November 5, 2004 decision reducing his wage-loss compensation based on the selected position of parking lot attendant. The Board finds that this reduction was improper as the medical evidence indicates that appellant was unable to drive, an essential element of the selected position.

Appellant asserted that he was unable to drive due to narcotic medications prescribed by his physicians to control pain related to the accepted L5-S1 injuries. Dr. Park, an attending Board-certified neurosurgeon, noted in an October 18, 2001 report, that he was taking "an astronomical amount" of MS Contin, a narcotic. Dr. Newton, an attending Board-certified orthopedic surgeon, prescribed MS Contin for postoperative pain from June 2002 onward. During the vocational rehabilitation placement plan, appellant attempted to bring his concerns to the attention of Ms. Wilson, his vocational rehabilitation counselor. On June 14, 2004 he asked to meet with her so that she could see how the MS Contin and Flexeril affected him. Ms. Wilson refused to meet with appellant as "nothing in his file stated he was unable to work due to his back condition. He then submitted a June 27, 2004 letter asserting that he should not drive due to drowsiness and dizziness caused by prescribed medications.

Despite appellant's contention that he could not drive due to prescribed narcotics, Ms. Wilson identified the position of parking lot attendant as representative of his wage-earning capacity. This job required him to drive in order to park "automobiles for customers in parking lot or storage garage." Following issuance of a notice of proposed reduction of compensation on August 27, 2004, appellant submitted medical evidence regarding his inability to drive. In a September 23, 2004 note, Dr. Benoit, an attending Board-certified family practitioner, stated that he "should not be driving" as he was "on large doses of narcotics and other medications that interfere with appellant's level of consciousness." The Office then issued the November 5, 2004 decision reducing appellant's wage-loss compensation based on his ability to earn wages in the selected position of parking lot attendant.

The Board finds that Dr. Benoit's September 23, 2004 note is sufficient medical evidence to establish that appellant was unable to drive, an essential requirement of the parking lot attendant position. Thus, the Board finds that the Office did not properly consider his medical

[10] 5 ECAB 376 (1953).

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

limitations in determining his ability to perform the selected position.[12] Therefore, the Office did not meet its burden of proof in reducing appellant's wage-loss compensation based on the selected position of parking lot attendant.[13]

CONCLUSION

The Board finds that the Office did not properly reduce appellant's compensation based on his capacity to earn wages as a parking lot attendant. On return of the case the Office shall reinstate appropriate compensation and determine the amount of compensation due and owing to appellant from November 28, 2004 onward.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 5, 2004 is reversed.

Issued: August 10, 2005
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

[12] *John D. Jackson*, 55 ECAB ___ (Docket No. 03-2281, issued April 8, 2004).

[13] As the Office's November 5, 2004 decision must be reversed as the selected position was medically inappropriate, the Board will not address appellant's contentions regarding the availability of the selected position in his commuting area.