United States Department of Labor
Employees' Compensation Appeals Board

KENNETH R. LOVELACE, Appellant	)	
and	)	**Docket No. 05-1100**
	)	**Issued: October 5, 2005**
DEPARTMENT OF THE AIR FORCE, TINKER AIR FORCE BASE, OK, Employer	)	

Appearances:
Kenneth R. Lovelace, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 18, 2005 appellant filed a timely appeal of an August 27, 2004 merit decision of a hearing representative of the Office of Workers' Compensation Programs that reduced his compensation based on his capacity to earn wages as a customer service representative. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUE

The issue is whether the Office properly reduced appellant's compensation based on his capacity to earn wages as a customer service representative.

FACTUAL HISTORY

On July 23, 1990 appellant, then a 44-year-old aircraft engine repairer, filed a claim for compensation for a traumatic injury to his left wrist sustained on July 18, 1990 when he hit the back of his hand on a rivet machine. The Office accepted that he sustained a contusion and a chip fracture of the left wrist. The Office paid appellant compensation beginning July 8, 1991 when the employing establishment stopped his pay and placed him on indefinite enforced leave

due to his inability to perform the duties of his position. Appellant's application for disability retirement was approved effective November 19, 1991.

On August 18, 1994 appellant returned to work at the employing establishment as a supply clerk. By decision dated November 7, 1994, the Office found that this position fairly and reasonably represented his wage-earning capacity and terminated his compensation on the basis that he had no loss of wage-earning capacity. On August 29, 1995 the Office issued appellant a schedule award for an 18 percent permanent impairment of the left hand.

On August 17, 1995 appellant's temporary position as a supply clerk ended after one year and the employing establishment terminated his employment. Appellant filed a claim for compensation beginning August 18, 1995 and the Office resumed payment of compensation for temporary total disability.

On July 31, 2000 the Office referred appellant, his medical records and a statement of accepted facts to Dr. Richard A. Ruffin, who is Board-certified in orthopedic surgery and in hand surgery, for a functional capacity evaluation and a second opinion on his condition and his ability to work. In an August 3, 2000 report, Dr. J. Patrick Evans, appellant's attending Board-certified orthopedic surgeon since August 14, 1990,[1] stated that appellant continued to wear splints on both wrists, and had restricted motion and some loss of strength. Dr. Evans concluded that appellant "continues to be disabled as the result of the injury and the condition of his wrists currently. In my opinion this is all related to his occupational injury of July 18, 1990." A functional capacity evaluation done for Dr. Ruffin by a physical therapist on August 28, 2000 concluded that he could perform light to medium work. In an August 31, 2000 report, he stated that x-rays of appellant's left wrist showed minimal degenerative changes, if any. Dr. Ruffin concluded that appellant's left wrist contusion had long since resolved, that the left wrist fracture was not seen on x-rays and was not disabling, and that he could not perform the position of aircraft engine repairer "probably more related to his deconditioning rather than the actual left wrist contusion or left wrist fracture." His August 31, 2000 work tolerance limitations form indicated that appellant could work 8 hours per day, with 3 hours of repetitive movements of the wrists and elbows, 4 hours of pushing or pulling up to 50 pounds, and 4 hours of lifting up to 25 pounds.

Beginning June 2001 the Office sponsored appellant's vocational rehabilitation in computer information technology at Rose State College. Appellant withdrew from the spring semester of 2002, took courses there during that summer and began course work in September 2002 at Oklahoma City Metro Tech with a new career goal as a computer support specialist. On April 28, 2003 appellant requested a transfer back to Rose State College, but the Office denied this request, stating that he had completed two years of training and would require another one and one-half years to obtain an associate degree there. Appellant did not enroll for summer 2003 courses at Oklahoma City Metro Tech.

In a January 29, 2003 report, Dr. Evans stated: "I repeated his x-rays on his left wrist and these show minor degenerative change. He is really about the same."

[1] Prior to that date, appellant's left wrist injury was treated by Dr. Evans' associates.

On June 23, 2003 the private rehabilitation counselor selected the position of customer service representative -- call center[2] as representative of his wage-earning capacity. The counselor noted that the position was considered sedentary with no lifting over 10 pounds, and that specific vocational preparation for this position was 6 months to 1 year, and that appellant had completed 87 hours of junior college courses and two semesters of computer/networking training at a vocational technical school, and had courses in typing, keyboarding, accounting, marketing and computers. The counselor ascertained through contact with the state employment service representative that this position was reasonably available on a full-time basis in appellant's commuting area at a pay rate of $318.00 per week.

On October 1, 2003 the Office proposed to reduce appellant's compensation based on his capacity to earn wages as a customer service representative -- call center at $318.00 per week. In an October 28, 2003 response, appellant stated that he had not been properly assisted by the rehabilitation counselor assigned to his vocational rehabilitation and that he had not been allowed to complete his training. By decision dated November 3, 2003, the Office reduced appellant's compensation on the basis that the position of customer service representative fairly and reasonably represented his wage-earning capacity.

Appellant requested a hearing, which was held on May 24, 2004. By decision dated August 27, 2004, an Office hearing representative found that the Office properly reduced appellant's compensation, as the selected position was appropriate to his physical condition and vocational capabilities and reasonably available in his commuting area.

LEGAL PRECEDENT

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] An injured employee who cannot return to the position held at the time of the injury or earn equivalent wages due to the work-related injury, but who is not totally disabled for all gainful employment, is considered partially disabled, and is paid compensation based on the difference between the employee's pay rate and his or her wage-earning capacity.[4]

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.[5]

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[2] Department of Labor, *Dictionary of Occupational Titles* # 239.362-04.

[3] *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

[4] 20 C.F.R. §§ 10.402, 10.403.

[5] 5 U.S.C. § 8115(a).

The Office's determination that an employee is physically capable of performing a position deemed suitable, but not actually held, must be based on a reasonably current medical evaluation.[6] The Office's procedure manual states that if the medical evidence is not clear and unequivocal, the Office will seek medical advice from its medical adviser, the treating physician, or a second opinion specialist as appropriate.[7]

ANALYSIS

As a result of his July 18, 1990 employment injury to his left wrist, appellant was unable to return to his position as an aircraft engine repairer. After paying appellant compensation for temporary total disability for eight of the previous nine years, the Office referred him to Dr. Ruffin, a Board-certified orthopedic surgeon, for an evaluation of his condition and his ability to work. The work tolerance limitations set forth by Dr. Ruffin on August 31, 2000 do not exceed the physical requirements of the position of service center representative that was selected by the Office as representative of appellant's wage-earning capacity.

These work tolerance limitations, however, were over three years old when the Office proposed to reduce appellant's compensation on October 28, 2003. This is not a reasonably current medical evaluation and Dr. Ruffin did not address whether the limitations were permanent. Appellant's treating physician, Dr. Evans, also a Board-certified orthopedic surgeon, examined him on August 3, 2000, less than one month before Dr. Ruffin did and concluded that he remained disabled. In a January 29, 2003 report, Dr. Evans stated that appellant was "really about the same."

At the time of the Office's reduction of appellant's compensation, the medical evidence was not clear and unequivocal. The Office could have clarified the medical evidence by asking Dr. Evans if he could perform the selected position of customer service representative, or by obtaining current work tolerance limitations from Dr. Ruffin or another second opinion specialist. As the medical evidence is not sufficient to establish that appellant could perform the duties of the selected position at the time it reduced his compensation, the Office did not meet its burden of proof.

CONCLUSION

The Board finds that the Office did not meet its burden of proof to reduce appellant's compensation, as it did not establish that he was capable of performing the selected position of customer service representative at the time of the reduction of compensation.

[6] *Carl C. Green, Jr.*, 47 ECAB 737 (1996); *Keith Hanselman*, 42 ECAB 680 (1991); *Anthony Pestana*, 39 ECAB 980 (1988).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8d (December 1995).

ORDER

IT IS HEREBY ORDERED THAT the August 27, 2004 decision of the Office of Workers' Compensation Programs is reversed.

Issued: October 5, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

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