United States Department of Labor
Employees' Compensation Appeals Board

D.A., Appellant	)	
and	)	**Docket No. 07-402**
	)	**Issued: November 26, 2007**
DEPARTMENT OF DEFENSE, PUGET SOUND NAVAL SHIPYARD, Bremerton, WA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 27, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' October 18, 2006 decision modifying his wage-loss compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

ISSUE

The issue is whether the Office properly modified its June 5, 1997 wage-earning capacity determination.

FACTUAL HISTORY

This is the second appeal in this case. On March 19, 1984 appellant, then a 33-year-old equipment cleaner, sustained a right shoulder strain as he was reaching into a bilge to remove trash. On May 29, 1984 he strained his right shoulder when the elevator he was riding broke and he climbed over the gate to exit the elevator. The Office accepted appellant's claims for right shoulder strain, right chronic impingement syndrome of rotator cuff of right shoulder and

approved a partial acromioplasty which was performed on January 22, 1985. On July 16, 1986 the Office issued a schedule award for a 10 percent permanent impairment of the right upper extremity. Appellant continued to perform limited duty until October 30, 1987, when he was terminated from his position because there was no work available within his limitations. The Office commenced payment of compensation for total disability. By decision dated June 5, 1997, the Office reduced appellant's compensation benefits based on his wage-earning capacity as a salesclerk. This decision was affirmed by an Office hearing representative in a decision dated February 19, 1998 and affirmed by the Board on February 20, 2001.[1]

On July 16, 2003 Dr. Kenneth R. Koskella, a Board-certified orthopedic surgeon, performed an arthroscopy on appellant's right shoulder.

On December 5, 2003 Dr. Koskella noted that appellant was fixed and stable as of that date. Appellant had permanent work restrictions precluding working above shoulder level, lifting pushing or pulling more than 10 pounds with his right upper extremity and should avoid rapid or repetitive motions with his arm but not his hand.

In a report dated May 13, 2004, Dr. Edward D. Arrington, a Board-certified orthopedic surgeon to whom the Office referred appellant for a second opinion, diagnosed: (1) right shoulder strain, secondary to industrial injury of March 19, 1984, status post right anterolateral partial acromionectomy in January 1985, status post revision arthroscopy, subacromial decompression with debridement and labral tear and distal clavicle excision in July 2003; (2) right carpal tunnel syndrome by history, unrelated to the industrial injury; and (3) right tardy ulnar nerve palsy by history, unrelated to the industrial injury. He opined that appellant has reached maximum medical improvement for the right shoulder strain and disorder of the bursae and tendons of the right shoulder. Dr. Arrington indicated that appellant's current condition was related to his 1984 work injury by direct cause, but opined that he was capable of performing the duties of a salesclerk. On June 18, 2004 he listed appellant's limitation as follows: reaching, reaching above shoulder, pushing, pulling, lifting and climbing limited to zero to two hours. Dr. Arrington also limited appellant's pushing, pulling and lifting to zero to two hours and no more than 10 pounds. In an addendum dated July 12, 2004, he indicated that appellant must have breaks up to 10 minutes every 2 hours.

On July 28, 2004 the Office issued an additional schedule award, finding that appellant had a total of 20 percent permanent impairment of the right arm.

The Office found a conflict in medical opinion between Dr. Koskella and Dr. Arrington with regard to appellant's lifting restrictions and ability to perform the duties of a salesclerk. By letter dated September 16, 2004, the Office referred appellant to Dr Daniel Brzusek, a Board-certified physiatrist, for an impartial medical examination. In a medical report dated October 18, 2004, Dr. Brzusek listed his impressions as: (1) right shoulder sprain and strain as a result of initial injury of March 19, 1984 with subsequent aggravation of injury on May 28, 1984; (2) development of shoulder impingement syndrome as a result of industrial injury; (3) right anterolateral partial acromionectomy on January 12, 1985 as a result of shoulder impingement syndrome; (4) right arthroscopic subacromial decompression with debridement of labral tear,

[1] Docket No. 99-1176 (issued February 20, 2001).

right shoulder, on July 16, 2003; (5) right carpal tunnel syndrome, unrelated to industrial injury; and (6) right tardy ulnar palsy, right upper extremity, unrelated to industrial injury. He found that appellant was capable of performing the position of salesclerk with, modification. Dr. Brzusek restricted appellant on frequent lifting of 10 pounds and occasional lifting of 10 pounds. He noted that appellant could not reach above his shoulder and required modifications regarding setting up advertising or displays and arranging merchandise. Dr. Brzusek further stated: "Although I have not been given the job analysis for telephone solicitor, this gentleman's condition certainly fits well within the necessary requirements." He completed a work capacity evaluation indicating that appellant was limited to reaching zero to four hours below shoulder and prohibited from reaching above his shoulder or operating a motor vehicle. Dr. Brzusek placed limits on repetitive movements of the wrists and elbows of zero to four hours and limitations of pushing, pulling and lifting to 10 pounds zero to four hours. He noted that appellant could work eight hours a day within these restrictions.

In an August 30, 2005 report, Dr. Koskella indicated that appellant had long been fixed and stable. He recommended that appellant not climb ladders, but he thought that other jobs would be suitable.

On February 16, 2006 the Office notified appellant of a proposed reduction in compensation based on her ability to earn wages as a salesclerk. By decision dated April 5, 2006, the Office reduced appellant's compensation benefits effective February 16, 2006 based on his ability to work as a salesperson.

In a decision dated August 21, 2006, an Office hearing representative reversed the finding that appellant's wage-earning capacity was represented by the position of a salesclerk.

In an August 27, 2006 labor market survey, the vocational counselor described the position of telephone solicitor. She noted that the position involved keying data from order card into computer using a keyboard. The vocational counselor demands were listed as sedentary in nature, with occasional lifting of up to 10 pounds, or exerting negligible force in pushing or pulling. The position involves sitting most of time, but may involve walking or standing for brief periods of time. Occasional reaching and handling are required and frequent fingering is required. The vocational counselor noted that appellant would qualify for median wages which would be $11.51 per hour or $460.40 per week. She noted that there are approximately 27 to 33 average annual job openings of this type within appellant's reasonable commuting area and therefore the job is performed in sufficient numbers in the commuting labor market area so as to be considered reasonably available.

On September 15, 2006 the Office issued a notice of proposed reduction of appellant's compensation to reflect that the position of telephone solicitor is medically and vocationally suitable and fairly represented his wage-earning capacity. Appellant responded that telephone solicitation was illegal in the state of Washington.

By decision dated October 18, 2006, the Office reduced appellant's wage-loss compensation effective that day based on his ability to earn wages in the constructed position of telephone solicitor. The Office found that appellant had a 65 percent loss of wage-earning

capacity. The Office found that the position was within his medical and vocational capacity and was reasonably available in the commuting area.

LEGAL PRECEDENT

Once the wage-earning capacity of an injured employee is properly determined, it remains undisturbed regardless of actual earnings or lack of earnings. A modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was in fact erroneous. The burden is on the Office to establish that there has been a change so as to effect the employee's capability to earn wages in the job determined to represent his earning capacity. Compensation for loss of wage-earning capacity is based upon the loss of capacity to earn and not actual wages lost.[2]

Once the criteria for establishing modification has been met, 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 principles set forth in *Albert C. Shadrick*,[3] will result in the percentage of the employee's loss of wage-earning capacity.[4]

ANALYSIS

In its decision dated June 5, 1997, the Office determined that appellant's wage-earning capacity was represented by the position of salesclerk. This determination was affirmed by the hearing representative and this Board.

On July 16, 2003 appellant underwent additional arthroscopy on his right shoulder with limitations impacting his capacity for work. By decision dated April 5, 2006, the Office reduced appellant's compensation benefits effective February 16, 2006 based on his ability to work as a salesclerk. However, on August 21, 2006, an Office hearing representative reversed this decision. Accordingly, as there was a material change in the nature and extent of appellant's injury-related condition, the Office considered modification of the prior wage-earning capacity determination. In an August 27, 2006 survey, the vocational counselor determined that the position of telephone solicitor was suitable for appellant.

The Board finds that the special weight of the medical evidence clearly establishes that appellant is no longer totally disabled from work.[5] Dr. Brzusek was the impartial medical examiner selected to resolve the conflict in medical opinion between Dr. Koskella, appellant's

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[2] *Ronald M. Yokota*, 33 ECAB 1629; *see also Marie A. Gonzeles*, 55 ECAB 395 (2004).

[3] 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.403(d)(c).

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

[5] In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight. *Solomon Polen*, 51 ECAB 341, 343 (2000); *see also Kathryn Haggerty*, 45 ECAB 383 (1994).

attending physician, and Dr. Arrington, an Office referral physician. Dr. Brzusek found that appellant could work eight hours a day with restrictions of lifting below the shoulder zero to four hours, pushing, pulling and lifting 10 pounds for zero to four hours and repetitive motions of his wrists and elbow limited to zero to four hours. As vocational rehabilitation efforts were not successful, the vocational rehabilitation counselor evaluated certain constructed positions with regard to appellant's limitations. She found that appellant was capable of performing work as a telephone solicitor. This position was described as sedentary in nature with occasional lifting of up to 10 pounds. This position was noted by Dr. Brzusek and conforms to the limitations specified by the impartial medical specialist. The vocational rehabilitation counselor noted that negligible force would be utilized pushing and pulling. She did note that occasional reaching and handling would be required. The counselor noted that these positions were available in sufficient numbers in appellant's commuting area. Finally, she stated that appellant would qualify for median wages for this position, which would be $460.40 per week. Based on these calculations, the Office issued an October 18, 2006 decision modifying appellant's compensation based on his ability to earn $460.40 per week as a telephone solicitor.

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

Appellant alleges that telephone solicitation is illegal in the State of Washington. He has provided no proof to support his allegation. Furthermore, his allegations of illegality are refuted by the fact that there are numerous telephone solicitor jobs available within his commuting area.

CONCLUSION

The Board finds that the Office properly modified appellant's wage-earning capacity as was determined in the Office's decision of June 5, 1997.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 18, 2006 is affirmed.

Issued: November 26, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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