United States Department of Labor
Employees' Compensation Appeals Board

B.M., Appellant	)	
and	)	**Docket No. 07-1839**
	)	**Issued: April 21, 2008**
DEPARTMENT OF THE NAVY, MARE ISLAND NAVAL SHIPYARD, Vallejo, CA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 25, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' March 23, 2007 merit decision by the hearing representative affirming the reduction of his compensation benefits to reflect his wage-earning capacity as a systems hardware analyst. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly reduced appellant's compensation effective March 19, 2006 based on its determination that the constructed position of systems hardware analyst represented his wage-earning capacity.

FACTUAL HISTORY

On June 8, 1989 appellant, then a 25-year-old electronics mechanic, sustained injury when his bicycle fork broke causing him to fall forward onto his left shoulder. The Office

accepted appellant's claim for left shoulder acromioclavicular (AC) separation, abrasion and hematoma in the left AC joint area, AC repair and an adjustment disorder with a depressed mood.

Appellant was referred for vocational rehabilitation and entered a program at New Directions Learnings Center, where he took computer courses in Introduction to PCs, Windows 98, MS Word, MS Excel and MS Power Point. He earned a grade of A in all his classes. Appellant graduated December 22, 2000. In his final student transcript, his instructor commented, "[Appellant] has completed his program with a high level of accuracy. We are confident that he will make a fine addition to the workforce in the near future." However, appellant failed the Microsoft examinations multiple times. In a March 28, 2002 letter responding to the Office, appellant blamed his failure to pass the tests on the Office not providing him the necessary tools and the difficulty he had driving to classes.

By letter dated February 13, 2003, the Office referred the case to Marci Winkler, a vocational consultant. In a labor market survey dated February 20, 2003, Ms. Winkler researched the suitability of several positions, including that of computer systems hardware analyst. She listed three entry level systems hardware analyst positions as possible positions for appellant. Ms. Winkler noted that the position of computer systems hardware analyst was described by the Department of Labor, *Dictionary of Occupational Titles* (DOT) as follows:

> "Analyzes data processing requirements to plan data processing system that will provide system capabilities required for projected workloads and plans layout and installation of new system or modification of existing system: Confers with data processing and project managers to obtain information on limitations and capabilities of system: Confers with data processing and project managers to obtain information on limitations and capabilities of existing system and capabilities required for data processing projects and projected workload. Evaluates factors such as number of departments serviced by data processing equipment, reporting formats required, volume of transactions, time requirements and cost constraints and need for security and access restrictions to determine hardware configurations. Analyzes information to determine, recommend and plan layout for types of computers and peripheral equipment, or modifications to existing equipment and system, that will provide capability for proposed project or workload, efficient operation and effective use of allotted space. May enter data into computer terminal to store, retrieve and manipulate data for analysis of system capabilities and requirements. May specify power supply requirements and configuration. May recommend purchase of equipment to control dust, temperature and humidity in area of system installation. May specialize in one area of system application or in one type of make of equipment. May train users to use new or modified equipment. May monitor functioning of equipment to ensure system operates in conformance with specifications."

She noted that it was a sedentary position and required graduation from an accredited training program or a bachelors degree.

On March 5, 2003 the Office issued a notice to appellant that it would adjust his compensation because he had failed, without good cause, to undergo vocational rehabilitation as directed. The Office found that appellant failed to cooperate in the job placement portion of the rehabilitation program. The Office reduced appellant's compensation effective March 23, 2003. Appellant requested an oral hearing. By decision dated December 4, 2003, the hearing representative reversed the March 5, 2003 decision. The hearing representative noted that the Office did not issue a prereduction notice or show that the selected position was within appellant's medical restrictions and was reasonably available to him. The hearing representative remanded the case for updated medical examinations, a determination of appellant's ability to drive to work and if he was unable to drive, whether appellant could utilize public transportation. The hearing representative reinstated appellant's compensation benefits.

By letter dated May 7, 2004, the Office referred appellant to Dr. John Randall Chu, a Board-certified orthopedic surgeon, for a second opinion. In a medical report dated June 17, 2004, Dr. Chu reviewed the history of the work injury, appellant's medical treatment and conducted a physical examination. He diagnosed left Grade 3 AC joint separation, status post distal clavicle excision and AC joint repair or Weaver-Dunn repair which were caused by the June 1989 accident. Dr. Chu opined that appellant continued to experience subjective pain in the surgical area. He noted that appellant's symptoms were not unusual for this type of procedure, as the surgery did not perfectly reconstruct the AC joint in either form or function. Dr. Chu reviewed the job description for computer systems hardware analyst. He noted that the position was sedentary in nature and did not involve significant position. Dr. Chu opined that appellant was physically capable of performing the position. He noted that he would permanently restrict appellant to lifting 20 pounds on an occasional basis and restrict reaching to an occasional basis and prohibit reaching above shoulder level. Dr. Chu further opined that appellant should not have specific driving restrictions. He noted that appellant primarily used his right hand for driving. Dr. Chu also noted that there was no medical reason why appellant could not take public transportation.

By letter dated January 14, 2005, the Office referred appellant to Dr. Robert Hepps, a Board-certified psychiatrist, for a second opinion. In a report dated January 27, 2005, Dr. Hepps noted that appellant had a depressed mood and dysthymic disorder. Appellant's depression appeared to have been precipitated from the orthopedic injury at work and was currently manifested by a depressed mood, tearfulness, poor appetite, withdrawn behavior, low energy and feelings of hopelessness. Dr. Hepps noted that, at times, the pain caused appellant to feel like killing himself. He noted that although appellant may have preexisting disorders, they did not appear to be disabling. Dr. Hepps opined that appellant was capable, from a psychiatric perspective of performing the functions of a computer systems hardware analyst. He recommended anti-depressant medication but noted that appellant did not want to take any medicine.

By letter dated January 14, 2005, the Office also asked Dr. Jillian Daly, Ph.D., a clinical psychologist, for undated psychological testing. Dr. Daly noted that appellant was administered a Minnesota Multiphasic Personality Inventory-2 assessment. She did not personally meet appellant and did not conduct a clinical interview or review any medical records. After evaluating appellant's test results, she noted that individuals with similar performance to the assessment had major affective disorder, anxiety disorder, hypochondriasis, somatoform disorder

and conversion disorder. Dr. Daly noted that a diagnosis of personality disorder with paranoid and histrionic traits was also likely.

On March 31, 2005 the Office referred appellant for further vocational rehabilitation. The vocational rehabilitation counselor met appellant on April 12, 2005. Appellant indicated that he was not marketable within the computer field as he remembered very little from his training. He also indicated that he had not used a computer since the completion of his training and doubted that he would ever use one again. The counselor noted that appellant was adamant that he would not consider involvement in a vocational rehabilitation plan until such time as he was offered a modified or light-duty position as an electronics mechanic. In a letter dated June 9, 2005, the Office informed appellant that it had been advised that he had impeded the efforts of the rehabilitation counselor. It advised appellant that he had 30 days to respond to the letter and give good reason for his noncompliance and if he did not comply, the rehabilitation effort would be terminated and his benefits reduced.

In a letter dated July 4, 2005, appellant contended that he had not impeded the vocational rehabilitation counselor's efforts but had complied with all her requests. He argued that necessary computer funds were not provided for his program and the program "that was designed to help me overcome my lack of experience and fear of computers has instead caused me to dislike and avoid computers all the more."

In a labor market survey dated July 5, 2005, the vocational counselor evaluated the suitability of two positions: systems hardware analyst and user support analyst, she found the positions suitable for appellant as they were sedentary and within appellant's restrictions. In a July 29, 2005 memorandum, a rehabilitation specialist found that a viable labor market existed in the San Francisco Bay Area for the identified positions. These occupational groups were likely to continue to expand, as the services that these occupations provided were vital to the general functioning of a broad range of businesses across the full range of economic continuum. The placement opportunities for these occupations were found very positive.

In a July 29, 2005 letter, the Office advised appellant that the positions of system hardware analyst and user support analyst were within his work limitations. The Office informed appellant that he was expected to cooperate fully so that he may return to work in the specified job or one similar to it. Based on the vocational evaluation and survey of the local labor market, appellant had a wage-earning capacity of $25,000.00 to $30,000.00 per year. The Office informed appellant that he had 90 days to work with his vocational consultant and, at the end of the period, the Office would reduce his compensation.

In a vocational rehabilitation report dated September 1, 2005, the specialist indicated that a vocational rehabilitation plan for systems hardware specialist/computer systems analyst/user support analyst had been prepared on behalf of appellant and had been approved by the Office. However, as appellant maintained that he barely knew how to turn on a computer, the vocational rehabilitation specialist scheduled a lesson for appellant with the local library on basic computer operations. The consultant at the library confirmed that appellant would be instructed in exploring web sites on the internet, submitting his resume online and how to acquire an e-mail address. In an October 18, 2005 report, the consultant indicated that appellant's attitude towards

the job search had improved to a great extent, but he still did not feel that the vocational objective was appropriate.

In a November 10, 2005 updated labor market survey, the specialist noted that, in preparing her report, she only used positions that were sedentary in nature and within appellant's physical capabilities. Although appellant had been out of the school program since 2001, the assisted reemployment option was available to employers interested in hiring appellant. The employer that hired appellant would be reimbursed in consideration of the amount and/or length of training that was required. The specialist indicated that, due to this incentive, that she found various systems hardware analyst positions available and suitable for appellant. She noted a position with Travis Credit Union in Vacaville, California with wages of $27.00 to $30.00 per hour. This position required data processing experience or completed coursework and/or HP certification in lieu of experience. A position with Robert Half Technology in San Francisco, California with wages of $20.00 to $30.00 per hour was an entry level position and graduation from a technical school was required. A position with GIS in Fairfield, California paid $22.00 to $25.00 per hour and required knowledge typically acquired through completion of a bachelors degree or technical training and 2 to 3 years of related experience or equivalent education and/or experience. A position with QualxServ in Fairfield, California would pay $25.00 to $28.00 per hour. The counselor noted that this company responded to appellant's posted résumé and that he would qualify for this position, but that the company ultimately chose a different candidate, although it noted that it would keep appellant's résumé on file as there were frequent openings for this position. Finally, there was a position available with SBC Communications paying $30,000.00 to $40,000.00 per year. This position was considered entry-level and required a B.S. degree in computer science or completion of an equivalent type program. Although related experience was preferred, it was not required.

On February 8, 2006 the Office proposed to reduce appellant's compensation for wage loss, noting that the medical and factual evidence established that he was no longer totally disabled but had the capacity to earn wages as a systems hardware analyst at the rate of $867.36 per week.

By decision dated March 13, 2006, the Office adjusted appellant's compensation benefits effective March 19, 2006 based upon its determination that the position of systems hardware represented his wage-earning capacity. The Office noted that appellant's weekly pay rate when injured was $626.00 and that the current pay rate for job and step when injured was $1,139.46. The Office found that appellant was capable of earning $867.36 per week, that the adjusted wage-earning capacity per week was $475.76, that the percentage of new wage-earning capacity was 76 percent, that the loss in wage-earning capacity amount per week was $150.24, leaving appellant with a compensation rate of $112.68 or $167.75 per week when increased by applicable cost-of-living adjustments. The Office calculated that this resulted in a new compensation rate every four weeks of $671.00, less health benefits premium of $240.72, for a net compensation every four weeks of $430.28 beginning on March 19, 2006.

On April 1, 2006 appellant requested a hearing. At the January 26, 2007 hearing he argued that he did not believe that he could do the job as systems hardware analyst. Appellant noted that he could not get interviews for these positions due to the fact that the positions required a college degree and 3 to 5 years of experience. He alleged that the training he received

through vocational rehabilitation was worthless. Appellant argued that the jobs were outside of a reasonable commuting area, contending that most of the jobs were between 45 minutes and 1 hour to 15 minutes from his home. After 20 minutes of driving, his shoulder would cause him to have phantom heart attacks by squeezing his nerves and that he would also have other symptoms after driving. Appellant contended that he was not given adequate time to respond to the proposed reduction of benefits and that the employing establishment had not made a reasonable effort to find him a light-duty job.

By decision dated March 23, 2007, the hearing representative affirmed the Office's decision of March 13, 2006.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[1] An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.[2]

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 or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent the employee's wage-earning capacity or if the employee has no actual wages, the wage-earning capacity is determined with due regard too the nature of the injury, the degree of physical impairment, the employee's usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect his wage-earning capacity in her disabled condition.[3]

The Office must initially determine appellant's medical condition and work restrictions before selecting an appropriate position that reflects his vocational wage-earning capacity. The Board has stated that the medical evidence upon which the Office relies must provide a detailed description of appellant's condition.[4] Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.[5]

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, DOT or otherwise available in the open

[1] *James B. Christenson*, 47 ECAB 775, 778 (1996); *Patricia A. Keller*, 45 ECAB 278 (1993); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

[2] 20 C.F.R. §§ 10.402, 10.403 (2002).

[3] 5 U.S.C. § 8115(a); *see Dorothy Lams*, 47 ECAB 584 (1996).

[4] *See William H. Woods*, 51 ECAB 619 (2000); *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

[5] *Carl C. Green, Jr.*, 47 ECAB 737, 746 (1996).

market, that fit the employee's capabilities with regard to his 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 principles set forth in *Albert C. Shadrick*[6] and codified by regulation at 20 C.F.R. § 10.403[7] should be applied. Subsection(d) of the regulations provides that the employee's wage-earning capacity in terms of percentage is obtained by dividing the employee's actual earnings or the pay rate of the position selected by the Office, by the current pay rate for the job held at the time of the injury.[8]

In determining an employee's wage-earning capacity based on a position deemed suitable but not actually held, the Office must consider the degree of physical impairment, including impairments resulting from both injury-related and preexisting conditions, but not impairments resulting from post-injury or subsequently acquired conditions.[9] Any incapacity to perform the duties of the selected position resulting from subsequently acquired conditions is immaterial to the loss of wage-earning capacity that can be attributed to the accepted employment injury and for which appellant may receive compensation. Additionally, the job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives.[10]

ANALYSIS

On February 8, 2006 the Office proposed to reduce appellant's compensation benefits effective March 19, 2006 based upon its determination that appellant was no longer totally disabled. It advised that he had the capacity to earn wages as a systems hardware analyst at the rate of $867.36 per week. By decision dated March 13, 2006, the Office reduced appellant's compensation effective March 19, 2006. The Board finds that the Office properly reduced appellant's compensation based on his capacity to perform the duties of a systems hardware analyst.

Dr. Chu evaluated appellant and, on June 17, 2004, reviewed his work history, medical history and set forth findings or physical examination. He noted that although appellant continued to have subjective pain in the surgical area, he was capable of performing the position of computer systems hardware analyst. Dr. Chu noted that the position was sedentary in nature and did not involve significant physical activities. He also noted that appellant did not have specific driving restrictions, as his injury was to his left shoulder and he primarily uses his right hand for driving. Dr. Hepps, a psychiatrist, noted that appellant had a depressed mood and dysthymic disorder that appeared to have been precipitated from the orthopedic injury at work. He opined that appellant was capable on a psychiatric basis of performing the functions of a

[6] 5 ECAB 376 (1953).

[7] 20 C.F.R. § 10.403.

[8] *Id*. at § 10.403(d).

[9] *James Henderson, Jr.*, 51 ECAB 268 (2000).

[10] *Id.*

computer systems hardware analyst. Accordingly, the medical evidence clearly establishes that there are no physical or emotional bars to appellant working as a computer systems hardware analyst.

The position of computer systems hardware analyst is also vocationally suitable to appellant. Appellant received vocational rehabilitation through the Office. Appellant graduated from a computer program at New Directions Learning Center where he earned high marks. Furthermore, the Office expressed its willingness to use an assisted reemployment option, wherein if appellant was hired, it would reimburse the employer for his training. The Office found several jobs that were suitable for appellant based on his vocational training and experience. Although the position at GIS may not have been suitable as it required a Bachelor's degree or technical training and 2 to 3 years of experience, the vocational counselor presented other positions that were suitable. The positions at Travis Credit Union and Robert Half Technology were entry level positions that would accept graduation from a technical school. Although appellant did not get the position at Qualxserve, they did keep his résumé on file as he was suited to the position. Appellant's contentions that he does not have a Bachelor's degree or experience would not be an issue in any of these jobs. Accordingly, appellant was qualified vocationally for these positions.

Appellant's remaining arguments are without merit. There is no evidence that the Office did not provide proper funds for his success in the computer program. The record reflects that appellant passed his courses with all "A's." The vocational counselor found that these positions were within reasonable commuting distance to appellant's home. Appellant's contention that he could not drive an hour to a job due to his medical condition is unsupported by medical evidence. In fact, Dr. Chu specifically stated that appellant had no driving restrictions. Furthermore, appellant's contention that the proposed reduction of benefits was issued less than 30 days prior to the decision terminating benefits is without merit; the Office issued the proposed decision reducing appellant's benefits on February 8, 2006; the decision reducing benefits was issued on March 13, 2006.

The Board finds that the Office properly determined appellant's loss of wage-earning capacity in accordance with the formula developed in *Shadrick*[11] and codified at section 10.403 of the Office's regulations.[12] The Office indicated that his salary on June 18, 1989, the date of injury, was $626.00 per week; that the current adjusted pay rate for his job on the date of injury was $1,139.46; and that he was currently capable of earning $867.36 per week as a computer systems hardware analyst. The Office then determined that appellant had a 75 percent wage-earning capacity, which resulted in an adjusted wage-earning capacity of $475.76 per week. The Office concluded that, based upon a 75 percent rate, appellant's new compensation rate was $112.68, increased by cost-of-living adjustment to $167.75 per week and that his net compensation for each four-week period would be $671.00. The Board finds that the Office correctly applied the *Shadrick* formula and therefore properly found that the position of medical billing clerk reflected appellant's wage-earning capacity.

[11] *Supra* note 6.

[12] 20 C.F.R. § 10.403.

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation effective March 19, 2006 based on its determination that the constructed position of systems hardware analyst represented his wage-earning capacity.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 23, 2007 is affirmed.

Issued: April 21, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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