United States Department of Labor
Employees' Compensation Appeals Board

W.C., Appellant	)	
and	)	**Docket No. 09-1292**
	)	**Issued: December 28, 2009**
DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, Andersonville, GA, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 20, 2009 appellant filed a timely appeal from the February 10, 2009 merit decision of the Office of Workers' Compensation Programs concerning his wage-earning capacity. Pursuant to 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 February 15, 2009 based on his capacity to earn wages as a car rental deliverer.

FACTUAL HISTORY

The Office accepted that on February 8, 2007 appellant, then a 58-year-old maintenance worker, sustained a left shoulder rotator cuff tear, subacromial impingement and acromioclavicular joint arthritis, due to carrying and handling a ladder at work. He stopped work on May 28, 2007. On May 29, 2007 Dr. Ashok S. Reddy, an attending Board-certified

orthopedic surgeon, performed arthroscopic surgery on appellant's left shoulder which was authorized by the Office.[1] Appellant did not return to work and he received wage-loss compensation for periods of disability.

Appellant's progress after his surgery was followed by Dr. Reddy. On November 9, 2007 Dr. Reddy found that appellant had good range of motion of his left shoulder and noted that rotator cuff, supraspinatus and external rotators strength was Grade 4/5 throughout. He indicated that appellant could not perform his regular job for the employing establishment but could perform limited-duty work. Dr. Reddy recommended that appellant undergo a functional capacity evaluation.

A functional capacity evaluation was performed on December 6, 2007 and the evaluator found that appellant could perform medium-level tasks for eight hours per day, including lifting 40 pounds in a low-level lift, 30 pounds in a mid-level lift and 20 pounds in an overhead lift. On December 14, 2007 Dr. Reddy advised that appellant could return to limited-duty work for eight hours per day with no overhead lifting greater than 20 pounds.

In March 2008, appellant began participating in a vocational rehabilitation program. In June 2008 the vocational rehabilitation counselor determined that, based on his experience, education, medical restrictions and labor market survey, appellant was employable as a rental car deliverer.[2] The rehabilitation counselor found that appellant would not need additional training to carry out the position in that his past work experience had adequately prepared him. Based on a labor market survey, the rehabilitation counselor found that the rental car deliverer position was performed in sufficient numbers within appellant's commuting area to be considered reasonably available. The average salary for the position was $360.00 per week. The position involved delivering rental cars to customers after performing such tasks as cleaning the cars and adding gasoline. The physical requirements of the position included occasionally exerting force to 20 pounds, frequently exerting force to 10 pounds and engaging in standing, walking, pushing and pulling.

In a July 29, 2008 letter, the Office advised appellant that the rental car deliverer position was suitable to his restrictions and that he would receive 90 days of placement assistance to help him locate work in such a position. The letter notified appellant that his compensation would be reduced based upon the salary of this position at the end of these services. Appellant was not placed in a position after 90 days of placement assistance. The rehabilitation counselor reported that appellant felt that his physical condition precluded him from performing any work.

In a December 8, 2009 letter, the Office advised appellant that it proposed to reduce his compensation based on his capacity to earn wages as a car rental deliverer. It provided him 30 days to submit evidence and argument challenging the proposed reduction of compensation.

[1] Dr. Reddy performed a limited glenohumeral debridement of a labral tear, subacromial decompression with bursectomy, ligament release and acromioplasty and arthroscopic resection of the acromioclavicular joint and distal clavicle.

[2] The rehabilitation counselor noted that the employing establishment reported that it had no work for appellant at his prior worksite.

Appellant did not submit any evidence and argument challenging the proposed reduction of compensation within the allotted time period.

In a February 10, 2009 decision, the Office reduced appellant's compensation effective February 15, 2009 based on his capacity to earn wages as a car rental deliverer.[3]

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.[4] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[5]

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.[6] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[7] 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.[8]

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by the Office or 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 labor market, that fits that 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 open labor market should be made through contact with the state employment service or other applicable service. Finally, application of the principles set forth in

[3] The Office calculated the reduction in appellant's compensation by considering such factors as the pay of the car rental deliverer position and the current pay of his date-of-injury job.

[4] *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

[5] *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

[6] *See Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

[7] *Albert L. Poe*, 37 ECAB 684, 690 (1986), *David Smith*, 34 ECAB 409, 411 (1982).

[8] *Id.*

the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.[9]

ANALYSIS

The Office accepted that appellant sustained several left shoulder conditions, including a rotator cuff tear, subacromial impingement and acromioclavicular joint arthritis, due to carrying and handling a ladder at work. On May 29, 2007 Dr. Reddy, an attending Board-certified orthopedic surgeon, performed arthroscopic surgery on appellant's left shoulder.

The Office received information from Dr. Reddy indicating that appellant was not totally disabled for work and had a partial capacity to perform work for eight hours per day subject to specified work restrictions. On December 14, 2007 Dr. Reddy indicated that appellant could return to limited-duty work for eight hours per day with no overhead lifting greater than 20 pounds. Appellant's vocational rehabilitation counselor then determined that appellant was able to perform the position of car rental deliverer and that state employment services showed the position was available in sufficient numbers so as to make it reasonably available within appellant's commuting area. The physical requirements of the position included occasionally exerting force to 20 pounds, frequently exerting force to 10 pounds and engaging in standing, walking, pushing and pulling. The Office properly relied on the opinion of the rehabilitation counselor that appellant was vocationally capable of performing the car rental deliverer position.

A review of the medical evidence reveals that appellant is physically capable of performing the car rental deliverer position. The work restrictions recommended by Dr. Reddy would allow appellant to perform the physical requirements of the position.[10] Despite being provided an opportunity to do so, appellant did not submit any evidence or argument showing that he could not vocationally or physically perform the car rental deliverer position.

The Board finds that the Office considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment, age and employment qualifications, in determining that the position of car rental deliverer represented his wage-earning capacity.[11] The weight of the evidence of record establishes that he had the requisite physical ability, skill and experience to perform the position of car rental deliverer and that such a position was reasonably available within the general labor market of his commuting area. Therefore, the Office properly reduced appellant's compensation effective February 15, 2009 based on his capacity to earn wages as a car rental deliverer.[12]

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[9] *See Dennis D. Owen*, 44 ECAB 475, 479-80 (1993); *Wilson L. Clow, Jr.*, 44 ECAB 157, 171-75 (1992); *Albert C. Shadrick*, 5 ECAB 376 (1953).

[10] There is no indication in the job description that the car deliverer position requires lifting more than 20 pounds overhead.

[11] *See Clayton Varner*, 37 ECAB 248, 256 (1985).

[12] The Board notes that the Office properly calculated the reduction in appellant's compensation by considering such factors as the pay of the car rental deliverer position and the current pay of his date-of-injury job. *See supra* note 9.

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation effective February 15, 2009 based on his capacity to earn wages as a car rental deliverer.

ORDER

IT IS HEREBY ORDERED THAT the February 10, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 28, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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