United States Department of Labor
Employees' Compensation Appeals Board

T.R., Appellant	)	
and	)	**Docket No. 08-2424**
	)	**Issued: June 23, 2009**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Baltimore, MD, Employer	)	

Appearances:
Michael Eisenberg, Esq., for the appellant
No appearance, for the Director

Oral Argument April 16, 2009

DECISION AND ORDER

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

JURISDICTION

On September 8, 2008 appellant filed an appeal from decisions of the Office of Workers' Compensation Programs dated February 22 and July 14, 2008. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office met its burden of proof to reduce appellant's compensation benefits based on his capacity to earn wages in the constructed position of contact clerk;[1] and (2) whether the Office properly denied modification of appellant's March 25, 2004 wage-earning capacity determination.

[1] It is noted that the job classification form contains a typographical error, identifying the selected position as contact clerk rather than contract clerk.

FACTUAL HISTORY

On March 17, 1999 appellant, then a 37-year-old custodial worker, sustained an employment-related back strain while bending to lift trash out of a trash barrel.[2] He had intermittent periods of disability through May 16, 1999 and returned to limited duty on May 17, 1999 with restrictions to avoid bending, twisting or lifting over 10 pounds and any other activities strenuous to the back. Appellant was employed in a permanent light-duty position through May 7, 2004 when the employing establishment eliminated his job. At that time appellant was returned to the periodic rolls.

In a May 6, 2004 attending physician's report, Dr. Chris Park, a Board-certified internist, diagnosed work-related intermittent lower back spasm and pain and advised that appellant had a 10-pound limitation on pushing, pulling and lifting with walking restricted to four hours a day secondary to back pain, and driving limited to less than one hour a day. On August 17, 2004 appellant was referred for vocational rehabilitation, and on October 11, 2004, his rehabilitation counselor, Tony Melanson, identified the positions of paralegal and contract clerk, finding that they were within the sedentary strength category, within appellant's work restrictions and qualifications, and reasonably available in the local labor market. Vocational training at the Baltimore City Community College was approved, beginning September 30, 2004 through December 31, 2005, for appellant to pursue an associate degree in paralegal studies.[3] On December 21, 2006 Mr. Melanson updated the job classification surveys for the positions of paralegal and contract clerk, and in January 2007, he began a job search. In a progress report for the period January 1 through April 1, 2007, Mr. Melanson noted that appellant had cancelled numerous appointments, had consistently not followed up on positive job leads and had not provided verification that he had completed his paralegal training. Appellant indicated that he was only interested in part-time work due to increased back pain. On March 31, 2007 Mr. Melanson again updated the job survey information for the paralegal and contract clerk positions.

By letter dated April 23, 2007, the Office proposed to reduce appellant's compensation benefits based on his capacity to earn wages as a contract clerk. It advised appellant that, if he disagreed with the proposed reduction, he should submit additional evidence or argument within 30 days. Through his congressional representative, appellant disagreed with the proposed reduction, stating that his medical condition had worsened. He submitted page two of a July 31, 2003 report from Dr. Maurice J. Berman, a general surgeon, who diagnosed bulging disc at L4-5 and herniated disc at L5-S1 with radiculopathy and provided an impairment evaluation.

By decision dated May 30, 2007, the Office reduced appellant's compensation benefits, effective June 10, 2007, based on his capacity to earn wages as a contract clerk. It credited the November 22, 2004 report of Dr. Kevin F. Hanley, a Board-certified orthopedic surgeon, who provided a second opinion evaluation for the Office and advised that appellant was capable of

[2] In a July 13, 1999 decision, the claim was denied. By decision dated October 4, 1999, an Office hearing representative reversed the denial and accepted that appellant sustained an employment-related back strain.

[3] At the time training was approved, appellant had completed three semesters of study. The training was paid by the Department of Veterans Affairs (VA). The date for completing his training was extended to July 31, 2006.

working a sedentary job for eight hours a day with permanent restrictions of two hours walking, standing, reaching and reaching above shoulder, twisting, pushing, pulling and lifting with a 10-pound weight restriction. On June 27, 2007 appellant requested a hearing, and submitted a May 27, 2007 report in which Dr. Berman advised that appellant's condition had deteriorated since his last examination, noting that he had more severe back spasms that kept him up at night and numbness in both legs. He reiterated his diagnoses and provided an impairment rating.[4] In a June 26, 2007 attending physician's report, Dr. Park diagnosed bulging and herniated discs by x-ray and advised that appellant was totally disabled for the period February 20 through June 26, 2007. By report dated September 7, 2007, Dr. Berman advised that appellant had difficulty standing, sitting, bending and lifting, and that examination of the lumbar spine demonstrated fibrosis of the lumbodorsal and sacrospinalis muscles bilaterally with decreased range of motion.

At the hearing, held on December 4, 2007, appellant testified that he had received his associate's degree and was now depressed and frustrated but was no longer seeing a psychiatrist. He stated that he was still attending college, pursuing a bachelor's degree, taking one class on Mondays and Wednesdays, and two classes on Tuesdays and Thursdays. Appellant described his daily activities, and stated that he feared confrontations with the employing establishment over his limitations, alleging that he could not do the lifting and filing required of paralegal work and had a 30 percent service-connected disability.

In a December 22, 2007 report, Dr. Berman advised that appellant's condition was unchanged since his September 7, 2007 examination. By letter dated January 7, 2008, the employing establishment noted that appellant had declined a job offer as a telephone operator as recently as July 19, 2007 and had requested that his name be removed from the priority placement list. On January 11, 2008 appellant, through his attorney, advised that appellant's physical, psychological and educational limitations prevented his return to work and argued that he was still entitled to compensation benefits.[5]

In January 2008 the Office again referred appellant to Dr. Hanley, and in a February 8, 2008 report, the physician advised that the only objective finding on physical examination was calf measurement of 17 inches on the right and 16-3/4 on the left, suggestive of low grade S1 radiculopathy. Dr. Hanley diagnosed a chronic lumbosacral sprain/strain with small herniated disc at L5-S1 and advised that appellant was capable of working with the restrictions he had previously outlined.

By decision dated February 22, 2008, an Office hearing representative found that the position of contract clerk was within appellant's medical restrictions and affirmed the May 30, 2007 decision.[6] On April 4, 2008 appellant, through his attorney, requested reconsideration,

[4] There is no medical evidence of record between Dr. Hanley's November 22, 2004 report and the May 27, 2007 report of Dr. Berman.

[5] The employing establishment referenced an October 18, 2006 report from Dr. Park that is not found in the case record.

[6] By decision dated March 13, 2008, appellant was granted a schedule award for a four percent permanent impairment of the left lower extremity. He did not file an appeal of this decision with the Board. An overpayment in compensation in the amount of $690.14 was written off.

arguing that appellant attended college on a three-quarters student schedule that was not vigorous and that appellant was limited to less than one hour of driving daily. He submitted a January 16, 2008 report from Gary Street, R.N. M.S., a clinical nurse specialist with the VA, who advised that appellant was seen monthly for treatment of depression related to stress. In a January 23, 2008 report, Dr. Susan Boyd, a Board-certified psychiatrist, advised that she was treating appellant at the VA for major depression.

In a July 14, 2008 decision, the Office denied modification of the prior decision.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[7] 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.[8]

Section 8115 of the Federal Employees' Compensation Act[9] and Office regulations provide that 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 the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, the degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect his wage-earning capacity in his disabled condition.[10]

The Office must initially determine a claimant's medical condition and work restrictions before selecting an appropriate position that reflects his or her wage-earning capacity. The medical evidence upon which the Office relies must provide a detailed description of the condition.[11] Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.[12]

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 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 that employee's capabilities with regard to his or her physical limitations, education, age and prior experience.

[7] *James M. Frasher*, 53 ECAB 794 (2002).

[8] 20 C.F.R. §§ 10.402, 10.403; *John D. Jackson*, 55 ECAB 465 (2004).

[9] 5 U.S.C. §§ 8101-8193.

[10] *Id.* at § 8115; 20 C.F.R. § 10.520; *John D. Jackson, supra* note 8.

[11] *William H. Woods*, 51 ECAB 619 (2000).

[12] *John D. Jackson, supra* note 8.

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.[13] Finally, application of the principles set forth in *Albert C. Shadrick*[14] will result in the percentage of the employee's loss of wage-earning capacity.[15]

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 postinjury or subsequently acquired conditions. 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.[16]

ANALYSIS -- ISSUE 1

The medical evidence as characterized by Dr. Hanley's reports established that appellant was no longer totally disabled. The Office referred appellant for vocational rehabilitation in August 2004 and training in the field of paralegal studies was authorized. The vocational rehabilitation counselor, Mr. Melanson identified two positions, paralegal and contract clerk, that he felt fit appellant's capabilities and the Office determined that appellant had the capacity to earn wages as a contract clerk.

The Board finds that the Office met its burden of proof in reducing appellant's wage-earning capacity based on his ability to earn wages as a contract clerk. The relevant medical evidence includes Dr. Hanley's November 22, 2004 and February 8, 2008 reports in which he advised that appellant could perform sedentary duties for eight hours a day with permanent restrictions of two hours walking, standing, reaching and reaching above shoulder, twisting, pushing, pulling and lifting with a 10-pound weight restriction. While appellant disagreed with the proposed reduction in wage-loss compensation and submitted reports from Dr. Berman dated July 31, 2003, May 27, September 7 and December 22, 2007, he did not comment on appellant's ability to work.

Dr. Park advised in May 2004 that appellant could drive for less than one hour a day. The contract clerk position, however, does not contain any duties that would require appellant to drive. Dr. Hanley did not restrict driving at all, and appellant submitted no contemporaneous medical evidence to show that his driving was restricted. He also did not show that alternative forms of transportation were unavailable.[17] In his June 26, 2007 report, Dr. Park advised that appellant was totally disabled for the period February 20 through June 26, 2007. He, however,

[13] *James M. Frasher, supra* note 7.

[14] 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.403.

[15] *James M. Frasher, supra* note 7.

[16] *John D. Jackson, supra* note 8.

[17] *R.H.*, 58 ECAB ___ (Docket No. 07-74, issued August 16, 2007).

provided no explanation to support this conclusion. A medical report is of limited probative value on a given medical question if it is unsupported by medical rationale.[18]

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 contract clerk represented his wage-earning capacity.[19] The evidence of record establishes that he had the requisite physical ability, skill and experience to perform the position and that such a position was reasonably available within the general labor market of his commuting area. The Office therefore properly determined that the position of contract clerk reflected appellant's wage-earning capacity, and using the *Shadrick* formula,[20] properly reduced his compensation effective June 10, 2007.[21]

LEGAL PRECEDENT -- ISSUE 2

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.[22] The Office's procedure manual provides that, "[i]f a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss. In this instance the [claims examiner] will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity."[23] Once the wage-earning capacity of an injured employee is determined, 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.[24] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[25]

In addition, Chapter 2.814.11 of the Office's procedure manual contains provisions regarding the modification of a formal loss of wage-earning capacity. The relevant part provides that a formal loss of wage-earning capacity will be modified when: (1) the original rating was in error; (2) the claimant's medical condition has changed; or (3) the claimant has been vocationally rehabilitated. Office procedures further provide that the party seeking modification of a formal

[18] *T.F.*, 58 ECAB ___ (Docket No. 06-1186, issued October 19, 2006).

[19] *James M. Frasher, supra* note 7.

[20] *Supra* note 14.

[21] *James Smith*, 53 ECAB 188 (2001).

[22] *Katherine T. Kreger*, 55 ECAB 633 (2004).

[23] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

[24] *Stanley B. Plotkin*, 51 ECAB 700 (2000).

[25] *Id.*

loss of wage-earning capacity decision has the burden to prove that one of these criteria has been met. If the Office is seeking modification, it must establish that the original rating was in error, that the injury-related condition has improved or that the claimant has been vocationally rehabilitated.[26] The Office is not precluded from adjudicating a limited period of employment-related disability when a formal wage-earning capacity determination has been issued.[27]

ANALYSIS -- ISSUE 2

The Board finds that appellant did not submit sufficient evidence to show that the Office's May 30, 2007 wage-earning capacity determination was erroneous.[28] There is no evidence of record that the decision was in error or that appellant was retrained or otherwise vocationally rehabilitated, and the medical evidence submitted is insufficient to show that there was a material change in the nature and extent of the injury-related condition.

On April 4, 2008 appellant requested reconsideration and submitted a January 16, 2008 report from Gary Street, R.N. M.S., a clinical nurse. Section 8101(2) of the Act provides that "physician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law.[29] Lay individuals such as physician's assistants, nurses, social workers, and physical therapists are not competent to render a medical opinion under the Act.[30] Mr. Street's report, therefore, does not constitute competent medical evidence. Appellant also submitted a January 23, 2008 report from Dr. Susan Boyd, a Board-certified psychiatrist, who merely advised that she was treating appellant at the VA for major depression and did not discuss his limitations or his ability to perform the duties of the constructed contract clerk position. Hence, Dr. Boyd's report is of little probative value on the issue of whether appellant's condition had changed such that he could no longer perform the duties of the selected contract clerk position.[31] Thus, appellant did not establish that it was improper for the Office to deny modification of its determination that he had the wage-earning capacity of the selected position of contract clerk.[32]

CONCLUSION

The Board finds that by its May 30, 2007 decision, the Office properly reduced appellant's compensation benefits based on his capacity to earn wages in the constructed position

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[26] *See* Federal (FECA) Procedure Manual, *supra* note 3 at Chapter 2.814.11 (June 1996).

[27] *Sandra D. Pruitt*, 57 ECAB 126 (2005).

[28] *Katherine T. Kreger*, *supra* note 22; *Sharon C. Clement*, 55 ECAB 552 (2004); Federal (FECA) Procedure Manual, *supra* note 26.

[29] *Roy L. Humphrey*, 57 ECAB 238 (2005).

[30] *See David P. Sawchuk*, 57 ECAB 316 (2006).

[31] *See Darletha Coleman*, 55 ECAB 143 (2003).

[32] *D.S.*, 58 ECAB ___ (Docket Nos. 06-1408 & 06-2061, issued March 1, 2007).

of contract clerk and properly denied modification of the May 30, 2007 wage-earning capacity determination.[33]

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated July 14 and February 22, 2008 be affirmed.

Issued: June 23, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

[33] The Board notes that appellant filed additional evidence subsequent to the oral argument held on April 16, 2009. The Board cannot consider this evidence, however, as its review of the case is limited to the evidence of record that was before the Office at the time it rendered its final decision. 20 C.F.R. § 501.2(c)(1); *J.T.*, 59 ECAB ___ (Docket No. 07-1898, issued January 7, 2008).