United States Department of Labor
Employees' Compensation Appeals Board

P.C., Appellant	)	
and	)	**Docket No. 10-858**
	)	**Issued: December 20, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Littleton, CO, Employer	)	

Appearances:
Timothy Quinn, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 8, 2010 appellant filed a timely appeal from the August 13, 2009 merit decision of the Office of Workers' Compensation Programs determining 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 27, 2009 based on his capacity to earn wages as a collector.

FACTUAL HISTORY

The Office accepted that on April 18, 1975 appellant, then a 26-year-old distribution clerk, sustained a traumatic lumbosacral spondylolisthesis and a herniated L5 when he lifted a sack of magazines. Appellant underwent a lumbar laminectomy on September 3, 1975 and an L5-S1 decompression and fusion on March 8, 1989. Both surgeries were authorized by the Office.

The Office accepted a recurrence of total disability on July 31, 1976 but appellant later returned to light-duty work on a part-time basis. In 1986 the Postal Inspection Service placed him under investigation, discovering that he had participated in an indoor triathalon consisting of a 500-meter swim, stationary bicycle ride and two-mile run. Appellant was released to full-time employment and underwent vocational rehabilitation. On November 1, 1995 his compensation was reduced due to his ability to earn wages as a claims examiner. Appellant's claim was updated to include L4-5 spinal stenosis and facet arthrosis. From June 26 through September 22, 2003, postal inspectors again placed him under surveillance, observing him seeding his yard, repairing and driving a go-kart, repairing a lawnmower, lifting the lawnmower into his truck, pulling weeds and lifting various items into his truck. Appellant worked briefly for a private employer in late 2004. On March 2, 2005 Dr. Jeffrey Sabin, a Board-certified orthopedic surgeon serving as an Office referral physician, found that appellant no longer had residuals of his accepted employment injuries.

In an April 29, 2005 decision, the Office terminated appellant's compensation on the grounds that he ceased to have residuals of his employment injuries. In an April 18, 2006 decision, an Office hearing representative reversed the termination and remanded the case to the Office, noting that the statement of accepted facts (SOAF) provided to Dr. Sabin was lacking documentation of the Office's approval of the surgeries in the case.

An updated SOAF was prepared and appellant was referred for a second opinion examination on June 22, 2006 with Dr. Steven Nadler, a Board-certified orthopedic surgeon, who found that appellant continued to have residuals of the accepted employment injuries but also found that he was able to work on a full-time basis.

In a September 20, 2006 decision, the Office terminated appellant's compensation on the grounds that he abandoned suitable employment. In a December 21, 2006 decision, an Office hearing representative reversed the termination, noting that the Office did not follow appropriate procedures in finding that the position was abandoned. The Office reinstated appellant's compensation and referred him for vocational rehabilitation.

In May 2007 a rehabilitation specialist recommended, based on a labor market survey, that the Office find appellant capable of working on a full-time basis as a collector at a wage rate of $582.40 per week. The position was found to be reasonably available in appellant's commuting area.[1] On May 18, 2007 the Office proposed reducing appellant's compensation based on his capacity to earn wages as a collector.

In a June 18, 2007 decision, the Office finalized the wage-earning capacity determination.

Appellant requested a hearing before an Office hearing representative. He underwent approved L4-5 decompression and fusion surgery prior to the hearing. In a November 27, 2007 decision, the Office hearing representative found the case not in posture for a hearing, due to a conflict in the medical evidence between Dr. Nadler and Dr. Brian Beatty, an attending osteopath and Board-certified occupational medicine physician. Dr. Beatty made reference to a

[1] The collector position required lifting up to 20 pounds.

November 2006 functional capacity evaluation (FCE) and found appellant to have greater restrictions than Dr. Nadler did. The Office hearing representative found a conflict in the medical opinion regarding appellant's ability to work.

The Office referred appellant to Dr. John Douthit, an osteopath and Board-certified orthopedic surgeon, for an impartial medical examination and opinion on his ability to work. In a March 17, 2008 report, Dr. Douthit discussed the August 2007 surgery which occurred after the conflict in question was created. He also noted that Dr. Beatty's opinion was based upon a questionable FCE, as validity testing was not conducted secondary to appellant's complaints of pain. Dr. Douthit found that the FCE was "flawed and nave and … therefore, of no value when determining work restrictions." He reported findings of appellant's physical examination and reported limited objective findings. Dr. Douthit indicated that he concurred with Dr. Nadler that appellant could work with a 20-pound lifting restriction. He saw no objective evidence of appellant's inability to perform sedentary work and found "the preponderance of his complaints to be factitious and without objective substantiation."[2]

In a March 26, 2008 letter, the Office advised appellant of its proposal to reduce his compensation based on his capacity to earn wages as a collector. Appellant submitted an April 17, 2008 report in which Dr. Brian Reiss, an attending Board-certified orthopedic surgeon, stated that if he were able to do any formal work, it would at most be sedentary in nature and for a limited period of time. Dr. Reiss indicated that it was "very unlikely" that appellant could be employable. Appellant's counsel submitted a brief in which he asserted that the position of collector involved stress and posited that appellant had preexisting post-traumatic stress disorder (PTSD) which prevented him from working in such a position. Counsel argued that because Dr. Douthit's evaluation was the first to occur after appellant's August 2007 surgery, he actually served as an Office referral physician rather than as an impartial medical specialist. Appellant submitted a report in which an attending registered occupational therapist indicated that he could not work as a collector due to his FCE results, recent carpal tunnel surgery and PTSD condition. A Department of Veterans Affairs document dated April 9, 2003 outlined appellant's service-connected disabilities including PTSD with dysthymia (effective May 31, 2002), chondromalacia right knee with internal derangement (effective January 20, 1976), left patellar bone graft related to right knee chondromalacia (effective September 8, 1992), degenerative joint disease of the right knee (effective May 31, 2002) and arid tinea pedis (effective January 20, 1976).

In a March 29, 2008 report, Dr. Nancy Franzoso, a psychiatric consultant to the Department of Veterans Affairs, noted a diagnosis of post-traumatic stress disorder, chronic and moderate, secondary to Vietnam combat, and depressive disorder, secondary to PTSD. She indicated that appellant "is employable from a psychiatric standpoint, ideally in settings in which he has little or no contact with the public and very loose supervision...." In a December 18, 2008 report, Dr. Beatty indicated that appellant was "unable to work" but he did not explain this opinion.

In a February 27, 2009 decision, the Office finalized the reduction of compensation. It found that the weight of the medical opinion regarding appellant's ability to work rested with the

[2] Dr. Douthit completed a work restriction form indicating that appellant could work eight hours per day and push, pull or lift up to 20 pounds.

opinion of Dr. Douthit and noted that postinjury conditions, including PTSD in the present case, need not be considered in evaluation of a position for a constructed wage-earning capacity.

Appellant requested a hearing before an Office hearing representative. At the June 26, 2006 hearing, counsel argued that appellant's PTSD symptoms predated the 1975 work injury and was inconsistent with the position of collector. Appellant testified regarding his Vietnam service but he acknowledged that he did not seek psychiatric care for any psychiatric symptomatology prior to his 1975 work injury.

In an August 13, 2009 decision, the Office hearing representative affirmed the February 27, 2009 decision. She found that Dr. Douthit's well-rationalized opinion showed that appellant could work as a collector. As there was no evidence that appellant had preexisting PTSD, it was not necessary to consider the effect of this condition on his ability to work as a collector.

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] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[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] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[6] 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.[7] In determining wage-earning capacity based on a constructed position, consideration is given to the residuals of the employment injury and the effects of conditions which preexisted the employment injury.[8]

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

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

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

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

[7] *Id.*

[8] *See Jess D. Todd*, 34 ECAB 798, 804 (1983).

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

ANALYSIS

The Office found a conflict in medical opinion regarding appellant's ability to work between Dr. Nadler, a Board-certified orthopedic surgeon serving as an Office referral physician, and Dr. Beatty, an attending osteopath and Board-certified occupational medicine physician.[10] The Office properly referred appellant to Dr. Douthit, an osteopath and Board-certified orthopedic surgeon, for an impartial medical examination and opinion on his ability to work. In a well-rationalized March 17, 2008 report, Dr. Douthit determined that appellant could work eight hours per day and push, pull or lift up to 20 pounds. He saw no objective evidence of appellant's inability to perform sedentary work and found "the preponderance of his complaints to be factitious and without objective substantiation." The Board notes that the collector position requires lifting up to 20 pounds and finds that the duties of the job are within the work restrictions provided by Dr. Douthit.

Appellant did not submit sufficient evidence to show that he could not physically perform the collector position.[11] On appeal, counsel argued that the probative value of Dr. Douthit's opinion was lessened because the SOAF provided to him did not mention the August 2007 surgery. The Board notes that, while the SOAF did not mention the August 2007 surgery, Dr. Douthit discussed the surgery in detail in his report and therefore he had been adequately apprised of it. Counsel also contends that, because Dr. Douthit's evaluation was the first to occur after appellant's August 2007 surgery, he actually served as an Office referral physician rather than as an impartial medical specialist. However, a given claimant's medical condition will often change after the finding of a conflict in medical opinion; counsel did not adequately explain how the conflict, as to appellant's work capacity, was negated by the spinal fusion surgery. With respect to counsel's argument on appeal that Dr. Douthit should have considered the effect of appellant's PTSD on his ability to work, there is no medical evidence in the record

[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] Dr. Nadler found that appellant was able to work on a full-time basis. In contrast Dr. Beatty determined that appellant had greater work restrictions.

[11] Appellant submitted several reports of attending physicians that were produced after Dr. Douthit produced his report. In an April 17, 2008 report, Dr. Brian Reiss, an attending Board-certified orthopedic surgeon, indicated that it was "very unlikely" that appellant could work. Dr. Beatty indicated that appellant was "unable to work." Neither physician provided rationale for his opinion.

to establish that this condition preexisted his 1975 work injury.[12] The evidence shows that the Department of Veterans Affairs first identified and approved this condition in 2002.

Appellant's vocational rehabilitation counselor had determined that appellant was able to perform the position of collector and that state employment services showed the position was available in sufficient numbers so as to make it reasonably available within her commuting area.[13] The Office properly relied on the opinion of the rehabilitation counselor to find that appellant was vocationally capable of performing the collector position.

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 collector represented appellant's wage-earning capacity.[14] The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of collector and that such a position was reasonably available within the general labor market of appellant's commuting area. Therefore, the Office properly reduced appellant's compensation effective February 27, 2009 based on his capacity to earn wages as a collector.

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation effective February 27, 2009 based on his capacity to earn wages as a collector.

[12] *See supra* note 8.

[13] On appeal counsel argued that the vocational rehabilitation counselor's May 2007 determination was stale, but he did not provide sufficient support for this assertion.

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

ORDER

IT IS HEREBY ORDERED THAT the August 13, 2009 merit decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 20, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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