United States Department of Labor
Employees' Compensation Appeals Board

RONALD DILLINGHAM, Appellant	)	
and	)	**Docket No. 04-860**
	)	**Issued: December 1, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Oakland, CA, Employer	)	

Appearances:
Sylvia R. Johnson, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On February 13, 2004 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated November 12, 2003, which determined that his wage-earning capacity was represented by the selected position of protective signal operator. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue for determination is whether the Office properly reduced appellant's compensation effective May 6, 2003, based on his capacity to perform the duties of a protective signal operator.

FACTUAL HISTORY

On March 21, 1991 appellant, then a 45-year-old loading and sorting machine operator, filed a claim alleging injury as a result of coding mail. He experienced pain in his shoulders and neck, numbness in both hands and tingling in his elbow. The Office accepted appellant's claim

for bilateral carpal tunnel syndrome, cervical strain and right shoulder bursitis. Appellant underwent right and left carpal tunnel releases on December 6, 1991 and June 2, 1992 and an ulnar nerve transfer on August 25, 1998. He was paid appropriate compensation and medical benefits.

By letter dated June 4, 2001, the Office referred appellant to Dr. Thomas Schmitz, a Board-certified orthopedic surgeon, for a second opinion. In a medical report dated July 5, 2001, he diagnosed status post bilateral carpal tunnel releases and status post anterior transposition of the ulnar nerve, bilaterally, both medically connected with appellant's federal employment. Dr. Schmitz noted that appellant was currently permanent and stationary and that the weakness in his hands did not correlate with the strength testing. He concluded:

> "[Appellant's] physical limitations, based on the pertinent findings that I have found, include working for four hours per day. He should limit his repetitive movements of the wrists and elbow to one hour.... The patient admits he could push, pull and lift up to 15 pounds.

By letter dated July 25, 2001, appellant was referred to a vocational rehabilitation counselor. In a November 28, 2001 report, the vocational rehabilitation counselor identified two possible positions for appellant: protective signal operator and information clerk. The job description for the protective-signal operator, as taken from the Department of Labor's *Dictionary of Occupational Titles* (DOT), was listed as:

> "Reads and records coded signals received in central station of electrical protective signaling system. Interprets coded audible or visible signals received on alarm signal board by direct wire or register tape from subscribers' premises that indicate opening and closing of protected premises, progress of security guard, unlawful intrusions or fire. Reports irregular signals for corrective action. Reports alarms to police or fire department. Post changes of subscriber opening and closing schedules. Prepares daily alarm activity and subscriber service reports. May adjust central station equipment to ensure uninterrupted service. May dispatch security personnel to premises after receiving alarm."

By letter dated November 29, 2001, the Office notified appellant that it had determined that the positions of protective signal operator and information clerk were within his physical limitations. The Office noted that the medical evidence established that he was restricted in terms of lifting/pushing/pulling activities in excess of 10 pounds and in excess of 4 hours and was precluded from activities involving repetitive motions of the wrists and elbows. The Office noted that within these limitations, appellant could work half time. The Office noted that based on the rehabilitation counselor's survey of the local labor market, appellant would have a wage-earning capacity of $8,300.00 per year, based on working a half-time basis.

In a medical report dated January 4, 2002, Dr. David Wren, Jr., a treating orthopedic surgeon, noted that appellant remained at maximum medical improvement for residual bilateral

carpal tunnel syndrome and residual from bilateral ulnar nerve entrapment at the elbows. With regard to appellant's work status, Dr. Wren stated:

> "[Appellant] is able to return to work at the [employing establishment]. He is unable to work his usual and customary employment as a distribution clerk because of the work that is required of him. However, [appellant] is able to do modified work.... He is able to work eight hours a day. However, he has the following limitations: the patient is to avoid lifting and carrying in excess of 5 to 10 pounds, except on an occasional basis; he must avoid sustained and repetitive manipulation of his hands; he is to avoid keying on the computer or writing in excess of 20 minutes out of each hour; he is to avoid pulling and pushing in excess of 20 pounds or using both hands simultaneously.
>
> "The above modifications may have to be changed depending on [appellant's] experience once he is back to work. Therefore, he will follow-up in my office in about four weeks time to reevaluate his condition. At that time, the restrictions may be lifting in part or may become more stringent, depending on his physical condition."

In a labor market survey dated March 29, 2002, the vocational counselor contacted eight different employers and determined that there was a good labor market for individuals interested in working as a central monitor operator for security systems. She noted that numerous opportunities for employment existed within the area, that the employers would provide training and that pay began at $10.00 per hour and up to $12.00 per hour. The vocational counselor indicated that appellant had transferable skills in the clerical field as well as an associate degree and customer service experience.

On August 1, 2002 the Office referred appellant to Dr Jerrold Sherman, a Board-orthopedic surgeon, for a second opinion examination. In a report dated August 21, 2002, he diagnosed cervical disc bulging but no neurologic or mechanical deficit and status post bilateral carpal tunnel releases and ulnar nerve transpositions without neurologic or mechanical deficit. Dr. Sherman concluded that appellant's neck and upper extremity conditions were directly caused by his work activity. He indicated that no further medical treatment was indicated. Dr. Sherman noted that appellant should not be required to do repetitive hand grasping, repetitive lifting of weights heavier than 10 pounds or the occasional lifting of weights heavier than 20 pounds and that he should not be required to do long downward gazing activities. He concluded:

> "[Appellant] is able to do the work activity of a [p]rotective [s]ignal [o]perator and [i]nformation [c]lerk. He is able to do sedentary type work activity for eight hours per day five days per week. Sedentary work would not be expected to aggravate his neck or post surgical nerve entrapment syndrome."

In response to a query by the Office, on August 20, 2002, Dr. Wren indicated that based on the information he received about the positions of protective signal operator and information clerk, appellant would be able to perform either of these jobs on a full-time basis. He indicated that appellant's restrictions remained no lifting and carrying over 10 to 15 pounds repetitively,

no pulling and pushing over 20 pounds with either hand and no repetitive power gripping with either hand.

By decision dated September 4, 2002, the Office issued a notice of proposed reduction of compensation. The Office found that appellant was capable of working as a protective signal operator and that this represented his wage-earning capacity. The Office indicated that appellant's wage-earning capacity loss was $404.71. The Office based this on appellant's pay rate when the compensable injury recurred of $793.53, the current pay rate for the job and step when injured of $821.63 and that appellant was capable of earning $400.00 per week. On November 27, 2002 the Office finalized the wage-earning capacity determination as of May 6, 2003, the day after his schedule award ends.

By letter dated December 13, 2002, appellant requested a hearing.

In a report dated June 4, 2003, Dr. Wren indicated that he reviewed the two offered positions and concluded that appellant was able to perform the proposed duties. However, he indicated that appellant preferred to return to work for the employing establishment and stated that it was his recommendation that appellant return to work at the employing establishment in a position that was within the restrictions as outlined by his treating physicians and various consultants. In a July 29, 2002 report, Dr. Wren again urged that appellant be employed by the employing establishment in a limited-duty position.

At the hearing, held on August 21, 2003, appellant's representative contended that the position description of record was obsolete and that appellant would have to do extensive typing and repetitive movements in this position. Appellant contended that the *Dictionary of Occupational Titles* system had been replaced by the O*net system and that he could not perform the duties of the updated position. He submitted an excerpt from the web site for the Office of Administrative Law Judges which indicated that the *Dictionary of Occupational Titles* system had been replaced by the O*net system. She also submitted were comparisons of *Dictionary of Occupational Titles* job titles and their O*net counterparts.

In a medical report dated October 27, 2003, Dr. Wren reviewed the requirements of the positions as a reception and information clerk, meter reader, production clerk, dispatcher and police fire and ambulance service operator. He concluded that these positions required extensive use of appellant's upper extremities, including a lot of computer keyboarding and that he recommended that appellant not pursue these jobs.

In a decision dated November 12, 2003, the hearing representative affirmed the Office's decision and found that the position of protective signal operator fairly and reasonably represented appellant's wage-earning capacity.

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.[1] The

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

Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[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 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-earnings 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. If the actual earnings do not fairly and reasonably represent wage-earning capacity or if the employee has no actual earnings, his wage-earnings 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.[3] The job selected for determining wage-earning capacity must be reasonably available in the general labor market in the commuting area in which the employee lives.[4]

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 for a position, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open labor market, that fits 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 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 wage-earning capacity. This has been codified by the regulations in 20 C.F.R. § 10.403(c).

ANALYSIS

The Board finds that the Office properly reduced appellant's compensation effective May 6, 2003, based on his capacity to perform the duties of a protective signal operator. The vocational counselor selected the position of protective signal operator from the *Dictionary of Occupational Titles*. The counselor indicated that there were many positions available in appellant's commuting area and that most indicated that they would provide training. The vocational counselor further noted that appellant had transferable skills in the clerical field as well as an AA degree and customer service experience. Dr. Wren, appellant's treating physician, reviewed the position description for this job and determined that it would be within his physical

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

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

[4] *Id.* The commuting area is to be determined by the employee's ability to get to and from the work site. *See Glen L. Sinclair*, 36 ECAB 664, 669 (1985).

abilities and would comply with the restrictions as set by Dr. Wren of avoiding lifting and carrying in excess of 5 to 10 pounds, avoiding sustained and repetitive manipulation of his hands, avoiding computer or writing in excess of 20 minutes an hour, and avoiding pulling and pushing in excess of 20 pounds or using both hands simultaneously. Dr. Wren never changed his opinion. He indicated that appellant's preference was to return to work for the employing establishment. Dr. Wren also reviewed the positions described by appellant's representative and determined that appellant could not perform these positions. However, he never stated that appellant could not perform the duties of a protective signal operator. The Board notes that the Office utilized the *Dictionary of Occupational Titles* to determine the vocational suitability and job duties of positions of jobs in relevant geographical areas.[5]

The Office properly determined appellant's wage-earning capacity. The Office determined his wage-earning capacity percentage equaled 49 percent by taking the amount per week that he was capable of earning, $400.00 and dividing it by the current pay rate for the job and step when injured of $821.63.[6] The Office then multiplied 49 percent by the current pay rate for appellant's job and step when injured, $793.53, to determine that he had a wage-earning capacity amount of $388.82. By subtracting this figure from the current pay rate of appellant's date-of-injury job, the Office properly determined that his wage-earning capacity loss was $404.71.[7] As appellant was entitled to be paid at a compensation rate of 75 percent, the Office determined ongoing compensation of $326.50 a week. The Board finds that the Office properly calculated appellant's wage-earning capacity.

CONCLUSION

The Office properly reduced appellant's compensation effective May 6, 2003, based on his capacity to perform the duties of a protective signal operator.

[5] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity*, Chapter 2.814.8(b) (December 1995).

[6] *See* 20 C.F.R. § 10.403(d).

[7] *See* 20 C.F.R. § 10.403(e).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 12, 2003 is affirmed.

Issued: December 1, 2004
Washington, DC

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member