United States Department of Labor
Employees' Compensation Appeals Board

GERALD DUMAGUIT, Appellant	)	
	)	**Docket No. 04-1633**
and	)	**Issued: December 21, 2004**
U.S. POSTAL SERVICE, PROCESSING CENTER, Richmond, CA, Employer	)	

Appearances:
Gerald Dumaguit, pro se
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On June 14, 2004 appellant filed a timely appeal of a March 17, 2004 decision of the Office of Workers' Compensation Programs, reducing his compensation on the grounds that his wage-earning capacity was represented by the selected position of personnel clerk. 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 determined that appellant's wage-earning capacity was represented by the selected position of personnel clerk.

FACTUAL HISTORY

Appellant filed an occupational disease claim (Form CA-1) on January 29, 2001 alleging that he sustained an emotional condition causally related to his employment as an Equal Employment Opportunity (EEO) dispute resolution specialist. The Office accepted the claim for major depression, single episode. Appellant stopped working in December 2000 and received compensation for temporary total disability.

The Office referred appellant for vocational rehabilitation services and a rehabilitation plan was developed. Dr. Joel Fine, an attending physician, stated in a May 23, 2003 report that it was a distinct possibility that appellant could return to work, but certain accommodations needed to be made for a successful return. Dr. Fine indicated that appellant should not interact with mangers named in his EEO complaint, his commute should be within 30 miles of his residence and there should be no prolonged walking or standing due to an emerging gout condition. He also indicated that appellant was anticipating a position commensurate with his experience, and an entry level position would be psychologically devastating and likely result in a worsening of his symptoms.

In a report dated June 3, 2003, the rehabilitation consultant indicated that appropriate jobs had been identified, including human resources clerk (Department of Labor, *Dictionary of Occupational Titles,* DOT No. 209.362-026, also known as personnel clerk). The consultant indicated that the job was available in the private sector and appellant had the vocational preparation for the job based on his date-of-injury job. A Form OWCP-66 job classification for the position noted that of personnel clerk was a sedentary position reasonably available in appellant's commuting area. In a labor market survey report dated December 23, 2003, the entry level wages were reported as $11.02 per hour with average hourly wages of $15.44 per hour.

By letter dated January 13, 2004, the Office advised appellant that it proposed to reduce his compensation because he had the capacity to earn wages as a personnel clerk of $440.80 per week. The Office advised appellant that he could submit additional evidence within 30 days.

Appellant submitted a brief report dated October 21, 2003 from Dr. David Cortum who stated that he was seriously disabled with gout, and could hardly ambulate without pain. He stated that appellant possibly could work seated, but not with any ambulation. Appellant also submitted evidence regarding jobs he had applied for unsuccessfully.

By decision dated March 17, 2004, the Office reduced appellant's compensation based on his capacity to earn $440.80 per week as a personnel clerk. The Office provided a computation worksheet indicating that appellant's loss of wage-earning capacity was 60 percent, and his net compensation would be $1,581.10 every 4 weeks. Appellant remained entitled to medical benefits.

LEGAL PRECEDENT

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction in such benefits.[1]

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

[1] *Carla Letcher*, 46 ECAB 452 (1995).

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.[2]

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, *Dictionary of Occupational Titles* or otherwise available in the open market, that fits the employee's capabilities with regard to his or her 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.[3] Finally, application of the principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.[4]

ANALYSIS

In the present case, the Office determined that appellant's wage-earning capacity was represented by the selected position of personnel clerk, Department of Labor, *Dictionary of Occupational Titles*, DOT No. 209.362-026. With respect to appellant's ability to perform the duties of the position, Dr. Fine indicated in a May 23, 2003 report that appellant could work within specified physical restrictions with no prolonged standing and walking. The selected position is a sedentary position that does not involve prolonged standing or walking. Dr. Fine indicated that appellant should limit commuting time in the car; the rehabilitation consultant indicated that an occupational handbook for Riverside County, California reported high demand for personnel workers, and the labor market survey reported numerous positions within a reasonable commuting distance. Dr. Fine also briefly stated that appellant was expecting a position commensurate with his experience and an entry level position would likely result in a worsening of symptoms. To the extent that Dr. Fine is attempting to restrict appellant from working a position not commensurate with his background, the selected position was found by the rehabilitation specialists to be appropriate based on appellant's work experience.

The Board therefore finds that the selected position was within the restrictions set forth by Dr. Fine. Appellant submitted an October 21, 2003 report from Dr. Cortum that briefly discussed disability related to a gout condition, but this report is incomplete and of diminished probative value. Dr. Cortum did not provide a history or results on examination, and he did not provide a reasoned opinion as to specific work restrictions from a gout condition. The Board finds that the probative medical evidence of record indicated that the selected position was medically appropriate.

Appellant has argued that the position was not vocationally suitable as he did not have the necessary experience or skills. The reports from the rehabilitation counselor, however,

[2] *See Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); *see also* 5 U.S.C. § 8115(a).

[3] *See Dennis D. Owen*, 44 ECAB 475 (1993).

[4] 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.403.

indicate that appellant's work experience as an EEO dispute resolution specialist was appropriate vocational preparation for the position. The February 12, 2003 rehabilitation report, for example, noted that appellant had experience as a human resources associate and labor relations liason. The opinion of the rehabilitation specialist was that appellant had the skills to perform the position, and the Board finds no probative contrary evidence.

The vocational rehabilitation evidence indicates that the job was reasonably available in appellant's commuting area. As noted above, the June 3, 2003 report indicated that an occupational handbook for the area reported high demand for personnel workers. Appellant submitted evidence regarding his unsuccessful attempts to secure a position. To the extent that appellant argued that this evidence demonstrated that the position was not reasonably available, the Board has held that the inability to secure a job does not establish the work is not available.[5] If the evidence establishes that jobs in the selected position are reasonably available, the selection of such a position is proper even though the employee has been unsuccessful in obtaining work or has submitted documents from individual employers indicating they did not have a position available.[6] The relevant evidence of record in this case indicated that the position was reasonably available in appellant's commuting area.

The Office selected the lowest entry level wages reported of $11.02 per hour or $440.80 per week. Appellant's compensation is reduced in accord with the *Shadrick* formula, which has been codified at 20 C.F.R. § 10.403.[7] The Office properly determined appellant's loss of wage-earning capacity based on earnings of $440.80 per week.

CONCLUSION

The Board finds that the Office properly determined that the selected position of personnel clerk was medically and vocationally suitable for a wage-earning capacity determination. The Office properly followed its procedures as the rehabilitation consultant found that the job was reasonably available with wages of $440.80 per week, and the Office reduced appellant's compensation in accord with 20 C.F.R. § 10.403.

[5] *Karen L. Lonon-Jones*, 50 ECAB 293, 298 (1999).

[6] *Id.*

[7] The Office first calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the current pay rate for the date-of-injury job; the wage-earning capacity in terms of dollars is computed by multiplying the pay rate for compensation purposes by the percentage of wage-earning capacity, and the resulting dollar amount is subtracted from the pay rate for compensation purposes to obtain the loss of wage-earning capacity.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 17, 2004 is affirmed.

Issued: December 21, 2004
Washington, DC

Alec J. Koromilas
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member