United States Department of Labor
Employees' Compensation Appeals Board

RAYMOND HOIDA, Appellant	)	
and	)	**Docket No. 04-1024**
	)	**Issued: July 15, 2004**
DEPARTMENT OF THE NAVY, PHILADELPHIA NAVAL SHIPYARD, Philadelphia, PA, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On October 7, 1997 appellant filed an appeal from an October 2, 1997 merit decision of the Office of Workers' Compensation Programs which determined his wage-earning capacity. This appeal was docketed by the Clerk of the Board on February 9, 2004.[1] Pursuant to 20 C.F.R.

[1] Appellant established that he first requested an appeal by a letter dated October 7, 1997. On February 9, 2004 appellant's attorney submitted a second request for an appeal of the October 2, 1997 decision. The attorney submitted a sworn affidavit dated March 8, 2004, asserting that the original appeal request was mailed in the due course of business on October 7, 1997. The date an appeal is deemed filed is the date it is received in the office of the Clerk of the Board. 20 C.F.R. § 501.3(d)(3)(i). In this case, appellant's request for an appeal of the October 2, 1997 decision was received on February 9, 2004. As the Board's jurisdiction is limited to decisions of the Office issued within one year of the filing of an appeal, the February 9, 2004 request for appeal of the October 2, 1997 decision would be untimely. 20 C.F.R. § 501.3(d)(2). However, the Federal Employees' Compensation Act's implementing regulation further provide that, "[i]f the notice is sent by mail and the fixing of the date of delivery as the date of filing would render the appeal untimely," as in this case, "it will be considered to have been filed as of the date of mailing." 20 C.F.R. § 501.3(d)(3)(ii). The March 8, 2004 affidavit establishes that appellant mailed his request for an appeal on October 7, 1997. The regulations provide that evidence such as affidavits may be used to establish the date of mailing in the absence of a postmark. *Id*. Therefore, appellant's appeal is deemed filed as of
FOOTNOTE 1 CONTINUED ON NEXT PAGE.

§§ 501.2(c) and 501.3, the Board has merit jurisdiction over the October 2, 1997 wage-earning capacity determination.

ISSUE

The issue on appeal is whether the Office properly determined that the position of general office clerk represented appellant's wage-earning capacity as of October 2, 1997.

FACTUAL HISTORY

The Office accepted that, on August 22, 1995, appellant, then a 39-year-old carpenter, sustained a left foot sprain while in the performance of duty. Appellant received continuation of pay through September 15, 1995 when he was terminated from federal employment when the employing establishment was closed. He then received compensation for temporary total disability.

Appellant submitted periodic reports from Dr. Anthony J. Palmaccio, Jr., an attending orthopedic surgeon, who diagnosed plantar fasciitis and heel spurs of the left foot.[2] Dr. Palmaccio released appellant to sedentary work as of July 2, 1996.[3] The Office referred appellant for vocational rehabilitation services. In a March 27, 1997 form report, Dr. Palmaccio found appellant able to work four to eight hours a day with limited standing, walking and climbing. Based on these restrictions, appellant's vocational rehabilitation counselor conducted job placement efforts from April 18 to August 1, 1997, focusing primarily on sedentary jobs. As placement efforts did not result in employment, the vocational rehabilitation counselor identified the position of general office clerk as within appellant's knowledge, training and physical capabilities. The position required performance of a "combination of clerical duties requiring limited knowledge of systems or procedures," including writing, typing, data entry, addressing envelopes, stamping mail, filing, answering the telephone and managing petty cash. The position was classified as sedentary with lifting up to 10 pounds. The counselor noted that the job was reasonably available in appellant's commuting area with wages of $349.60 per week.

On August 27, 1997 the Office advised appellant that it proposed to reduce his compensation based on his capacity to earn $349.60 working 40 hours a week, or 8 hours a day, as a general office clerk, a sedentary position within Dr. Palmaccio's March 27, 1997

CONTINUATION OF FOOTNOTE 1.

October 7, 1997 as it was mailed on that date. The Board does not have jurisdiction over decisions in this case issued after appellant filed his appeal an on October 7, 1997; which include a February 3, 2003 denial of a claim for recurrence of disability; an October 24, 2003 reversal and remand of the February 3, 2003 decision; and a January 16, 2004 approval of an attorney's fee. The Board notes that appellant's January and February 2004 correspondence and the February 9, 2004 appeal request stated that he wished to appeal only the decision of the Office dated October 2, 1997.

[2] Dr. Steven Allon, a Board-certified orthopedic surgeon and second opinion physician, submitted February 1996 reports concurring with Dr. Palmaccio's finding of total disability.

[3] A July 10, 1996 functional capacity evaluation demonstrated that appellant could work 4 to 8 hours a day, with sitting 5 to 6 hours, standing for 3 hours up to 45 minutes at a time and walking for up to 4 hours.

restrictions. Appellant submitted a September 23, 1997 affidavit asserting that the proposed reduction was in error as Dr. Palmaccio told him that he could work only six hours a day, not eight as the Office had found. Appellant did not contest the Office's mathematical calculations of his wage-earning capacity. By decision dated October 2, 1997, the Office reduced appellant's wage-loss compensation based on his ability to earn $349.60 a week as a general office clerk. The Office noted that, while appellant contended that Dr. Palmaccio told him he could work only six hours a day, his March 27, 1997 report found that appellant was able to work up to eight hours a day.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[4] 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.[5]

Under section 8115(a) of the Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent the employee's wage-earning capacity, or if the employee has no actual wages, the wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, the employee's usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect his wage-earning capacity in his or her disabled condition.[6]

The Office must initially determine appellant's medical condition and work restrictions before selecting an appropriate position that reflects appellant's vocational wage-earning capacity. The Board has stated that the medical evidence upon which the Office relies must provide a detailed description of appellant's condition.[7] Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.[8]

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's *Dictionary of Occupational Titles*, or otherwise available in the open labor 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 open labor market should be made through

[4] *James B. Christenson*, 47 ECAB 775, 778 (1996); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

[5] 20 C.F.R. §§ 10.402, 10.403 (1999); *see Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

[6] 5 U.S.C. § 8115(a); *see Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

[7] *Samuel J. Russo*, 28 ECAB 43 (1976).

[8] *Carl C. Green, Jr.*, 47 ECAB 737, 746 (1996).

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

Appellant received compensation for total disability beginning in September 1995 due to an accepted left foot sprain. The Office received medical evidence from Dr. Palmaccio, an attending orthopedic surgeon, that appellant was capable of performing sedentary light duty as of July 2, 1996. Dr. Palmaccio noted in a March 27, 1997 form report that appellant was able to work four to eight hours a day with limited standing, walking and climbing. As the medical evidence demonstrated that appellant was no longer totally disabled for work, the Office referred him to a vocational rehabilitation counselor. The counselor then evaluated appellant's vocational aptitudes and conducted an assisted placement program**.** As appellant was not hired, the counselor selected the position of general office clerk as listed in the Department of Labor's *Dictionary of Occupational Titles***.** The general office clerk position was classified as sedentary, with lifting up to 10 pounds. The Board notes that these physical requirements are within the restrictions set forth by Dr. Palmaccio on March 27, 1997 and that the vocational requirements were found by the counselor to be commensurate with appellant's education and experience. The specialist then determined the prevailing wage rate of these positions and their reasonable availability in the open labor market.[10] Based on these calculations, the Office reduced appellant's compensation based on his ability to earn $349.60 a week as a general office clerk. The Board finds that the Office considered the proper factors, such as availability of clerk positions and appellant's physical limitations, in determining that the general office clerk position represented appellant's wage-earning capacity. Also, the Office followed the established procedures under the *Shadrick* decision in calculating appellant's employment-related loss of wage-earning capacity. Appellant did not allege that the Office erred in its mathematical calculations of his wage-earning capacity. The Board has reviewed these calculations and finds them to be correct.

Appellant contended in a September 23, 1997 affidavit that Dr. Palmaccio told him on March 27, 1997 that he could work only six hours a day, not eight hours. He thus asserted that the Office's determination of his wage-earning capacity was incorrect as it was based on his ability to work eight hours a day. However, appellant did not submit any medical evidence demonstrating that Dr. Palmaccio's March 27, 1997 report finding that he could work from four to eight hours a day was incorrect. He did not submit a report from Dr. Palmaccio or any other physician indicating that he was not capable of working eight hours a day. Also, appellant did not submit any medical evidence subsequent to Dr. Palmaccio's March 27, 1997 findings that he was medically unable to perform the duties of a general office clerk. Thus, the Office properly found that appellant was no longer totally disabled as a result of his accepted employment injury and capable of working eight hours day as a general office clerk.

[9] *Albert C. Shadrick*, 5 ECAB 376 (1953).

[10] *See Leo A. Chartier*, 32 ECAB 652 (1981) (the fact that an employee has been unsuccessful in obtaining jobs in the selected position does not establish that the work is not reasonably available in the area).

Thus, the Office's October 2, 1997 decision reducing appellant's compensation based on his ability to earn wages in the constructed position of general office clerk is proper under the law and facts of this case.

CONCLUSION

The Board finds that the Office properly determined that the position of general office clerk represented appellant's wage-earning capacity as of October 2, 1997 and reduced his continuing compensation accordingly.

ORDER

IT IS HEREBY ORDERED THAT the October 2, 1997 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 15, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member