United States Department of Labor
Employees' Compensation Appeals Board

PATRICK T. MURRAY, Appellant	)	
and	)	**Docket No. 05-719**
	)	**Issued: December 13, 2005**
U.S. POSTAL SERVICE, MOUNT PROSPECT POST OFFICE, Mount Prospect, IL, Employer	)	

Appearances:
Ron Watson, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge

JURISDICTION

On February 3, 2005 appellant filed a timely appeal of a November 1, 2004 decision of the Office of Workers' Compensation Programs' denying modification of a prior decision finding that he had no loss of wage-earning capacity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether the position of full-time modified mail carrier properly represented appellant's wage-earning capacity as of March 2, 2002.

FACTUAL HISTORY

The Office accepted that, on March 25, 1989, appellant, then a 42-year-old full-time letter carrier, sustained an acetabular fracture, dislocation and contusion of the left hip requiring emergency surgical reduction, a herniated disc at L2-3 and lacerations of the chin and right hand when his delivery vehicle was broadsided by another vehicle. He stopped work and received

compensation for temporary total disability.[1] Appellant underwent knee surgery in January 1990. The Office subsequently accepted that, as a result of these injuries, appellant sustained traumatic macular edema of the left eye, depressive disorder and post-traumatic stress disorder.[2]

Appellant returned to limited duty four hours a day on September 8, 1990 at retained pay.[3] He remained in this part-time position through 1998 and received appropriate wage-loss compensation. Dr. Armen S. Kelikian, an attending Board-certified orthopedic surgeon, submitted periodic reports from October 1989 through July 1998 limiting appellant to light-duty work for four hours a day due to left knee and lumbar symptoms.

The Office obtained a second opinion from Dr. Julie M. Wehner, a Board-certified orthopedist, for a second opinion examination, who opined in a September 3, 1998 report that appellant could work eight hours a day. In March 11 and December 6, 1999 reports, Dr. Kelikian stated that he disagreed with Dr. Wehner and opined that appellant could work only four hours a day.[4] The Office then found a conflict of medical opinion between Dr. Kelikian, for appellant, and Dr. Wehner, for the government. To resolve this conflict, on July 8, 1999, the Office obtained an impartial medical opinion from Dr. James P. Elmes, a Board-certified orthopedic surgeon. In an August 5, 1999 report, Dr. Elmes opined that it was "difficult to determine" the precise number of hours appellant could work.

Appellant continued to work four hours a day light duty through 2001 within the restrictions prescribed by Dr. Kelikian in periodic reports. In a January 11, 2002 form, Dr. Kelikian indicated that appellant could work eight hours a day with restrictions.[5] In February 25, 2002 reports, Dr. Kelikian reiterated that appellant could work 8 hours a day, with lifting limited to 20 pounds and standing, walking, bending, twisting, turning, stooping, reaching and driving a vehicle limited to 4 hours a day.

On February 28, 2002 the employing establishment offered appellant a position as a full-time modified letter carrier at retained pay, effective March 2, 2002. Duties included seated office work and casing mail. The position required sitting, walking, lifting, bending, climbing,

[1] The record contains a September 28, 1998 decision regarding a $906.75 overpayment of compensation created in his case as he received augmented compensation from December 20, 1997 to July 18, 1998 when he had no eligible dependents. This decision is not before the Board on the present appeal.

[2] In June 1 and August 10, 1993 letters, Dr. Charles E. Kaegi, Jr., an attending Board-certified psychiatrist, diagnosed post-traumatic stress disorder and chronic depressive disorder related to the March 25, 1989 motor vehicle accident.

[3] From September 1989 through 1991, appellant participated in vocational rehabilitation, including a college course in computer training to assist him in developing skills applicable to sedentary work.

[4] In a March 10, 1999 report, Dr. Thomas Gleason, an attending Board-certified orthopedic surgeon, diagnosed a "[l]umbar syndrome, probably secondary to strain or temporary aggravation" related to "getting out of a train on March 4, 1999. He held appellant off work with an anticipated return to light duty.

[5] On February 8, 2002 Dr. Kelikian approved an employing establishment job offer for a modified letter carrier position, in which appellant would case letters and flats and perform sedentary clerical work.

twisting and standing intermittently for up to four hours a day. Appellant accepted the position on February 28, 2002 and began full-time work on March 2, 2002.

By decision dated May 17, 2002, the Office found that the modified letter carrier position properly represented appellant's wage-earning capacity. The Office noted that appellant performed the position successfully from March 2, 2002 onward, a period of more than 60 days. The Office further found that appellant had no loss of wage-earning capacity as his earnings in the modified letter carrier position of $819.90 a week were equal to those for the current grade and step of his date-of-injury position.[6]

Appellant then requested a hearing, held February 26, 2003. At the hearing, appellant contended that he could not tolerate a 40-hour workweek and submitted timekeeping records showing occasional work absences from June to December 2002.[7] He also asserted that working eight hours a day did not afford him enough time to perform prescribed home exercises. Appellant alleged a conflict of opinion between Dr. Elmes and Dr. Kelikian regarding whether he could work eight hours a day. Alternatively, he asserted that Dr. Elmes' opinion was indefinite regarding how many hours a day he could work. Appellant submitted additional evidence.

In a June 3, 2002 report, Dr. Kelikian noted that appellant complained of increased left hip pain and limited lumbar motion. He noted that x-rays revealed degenerative spondylosis from L4 to S1. In a June 4, 2002 report, Dr. Thomas Gleason, an attending Board-certified orthopedic surgeon, diagnosed left lumbar scoliosis with degenerative disc disease and possibly associated left lumbar radiculopathy, degenerative joint disease of the left hip and diminished range of motion. A July 19, 2002 lumbar magnetic resonance imaging (MRI) scan showed lumbar spondylosis with disc bulging from L2-5.

In an April 21, 2003 chart note, Dr. Kelikian related appellant's complaints of persistent knee discomfort and "clicking in his hip" without restricted motion or tenderness in either joint. He noted that appellant was "working eight hours a day at this point" and recommended a functional capacity evaluation.

On March 24, 2003 the employing establishment submitted comments to the hearing transcript, noting that appellant attributed his use of occasional sick leave since returning to full-time duty on March 2, 2002 to the accepted injuries. However, appellant did not submit claim forms regarding these absences.

By decision dated July 14, 2003, the Office hearing representative affirmed the May 17, 2002 decision, finding that the modified letter carrier position offered to him, effective March 2, 2002, properly represented his wage-earning capacity. The hearing representative noted

[6] The Office noted that, as of March 2, 2002, the weekly pay rate for the grade and step of appellant's date-of-injury position was $819.90. The pay rate for the modified letter carrier position was also $819.90.

[7] Time keeping records reflect that, in 2002, appellant was absent on June 4, 12, 21 and 27, July 17, 19 and 24, August 1 and 13, September 12, 25 and 26, October 10, 16 and 17, December 18 and 19, 2002. Notations on these forms reflect appellant's assertion that these absences were related to the accepted injuries.

appellant's contentions regarding Dr. Elmes' 1999 opinion were immaterial as the February 28, 2002 job offer was based only on the restrictions provided by Dr. Kelikian on February 25, 2002. The hearing representative noted that Dr. Kelikian did not subsequently modify his opinion that appellant could work eight hours a day and that "his most recent office note, dated April 21, 2003," indicated that appellant was working eight hours a day.

In an August 1, 2003 letter, appellant requested reconsideration. He submitted additional evidence.[8] In August 31, 2004 reports, Dr. Bruce J. Montella, an attending Board-certified orthopedic surgeon,[9] diagnosed degenerative arthritis of the left hip, knee, ankle and the lumbar spine attributable to the accepted 1989 motor vehicle accident. He found appellant able to work eight hours a day, with lifting restricted to 20 pounds with no driving, climbing or kneeling. Dr. Montella prescribed physical therapy.[10]

By decision dated November 1, 2004, the Office denied modification of the July 14, 2003 decision on the grounds that the evidence submitted was insufficient to warrant such modification. The Office found that Dr. Montella's reports did not address appellant's condition prior to starting work on March 2, 2002 or his "ability to perform the March 2002 job offer on a full-time basis."[11]

LEGAL PRECEDENT

Under section 8115(a) of the Federal Employees' Compensation Act,[12] wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. Generally, wages actually earned are the best measure of a wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.[13] The formula for determining loss of wage-earning capacity based on actual earnings, developed in the Board's decision in *Albert C. Shadrick*,[14] has been codified by regulation at 20 C.F.R. § 10.403. Office procedures provide that a determination regarding

[8] The record indicates that, although the Office received appellant's reconsideration request on August 7, 2003, no action was taken on the request until July 2004. However, this delay did not adversely affect appellant's claim as the Office performed a merit review of the claim pursuant to the November 1, 2004 decision.

[9] The record indicates that, in July 2004, appellant changed primary physicians from Dr. Kelikian to Dr. Montella.

[10] Appellant also submitted unsigned physical therapy and chiropractic notes dated from September to October 2004. As these audiograms do not appear to have been reviewed or signed by a physician, they cannot constitute medical evidence in this case. *Vickey C. Randall*, 51 ECAB 357 (2000); *Merton J. Sills*, 39 ECAB 572, 575 (1988).

[11] Following the issuance of the Office's November 1, 2004 decision, appellant submitted additional evidence. The Board may not consider evidence for the first time on appeal that was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c).

[12] 5 U.S.C. §§ 8101-8193, 8115(a).

[13] *Hayden C. Ross*, 55 ECAB ___ (Docket No. 04-136, issued April 7, 2004).

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

whether actual earnings fairly and reasonably represent wage-earning capacity should be made after an employee has been working in a given position for more than 60 days.[15] The amount of any compensation paid is based on the wage-earning capacity determination and it remains undisturbed until properly modified.[16]

ANALYSIS

The Office accepted that appellant sustained left hip, knee, right arm, facial and eye injuries and consequential emotional conditions in a March 25, 1989 motor vehicle accident. He performed light-duty work for four hours a day at a retained pay rate from September 1990 through February 2002.

Appellant's limited-duty assignment as a modified letter carrier, which he began on March 2, 2002, was consistent with the February 25, 2002 restrictions identified by his attending Board-certified orthopedic surgeon, Dr. Kelikian. Appellant's performance of this position in excess of 60 days is persuasive evidence that the position represents his wage-earning capacity.[17] Moreover, there is no evidence that the position was seasonal, temporary or make-shift work designed for appellant's particular needs.[18] Also, the rate of pay for the modified carrier position and the current pay rate for the grade and step of appellant's date-of-injury position are identical. Therefore, he had no loss of wage-earning capacity under the *Shadrick* formula as of March 2, 2002, as the Office found in its May 17, 2002 decision.[19]

Appellant then submitted additional medical evidence pursuant to an oral hearing and a subsequent request for reconsideration. In June 3, 2002 and April 21, 2003 reports, Dr. Kelikian mentioned various symptoms and findings but did not opine that appellant could not continue working eight hours a day or that he was otherwise unable to perform the modified letter carrier position. In a June 4, 2002 report, Dr. Gleason, an attending Board-certified orthopedic surgeon, diagnosed various orthopedic conditions but did not comment on appellant's ability to work. In August 31, 2004 reports, Dr. Montella, an attending Board-certified orthopedic surgeon, found appellant able to work eight hours a day with restrictions commensurate with the physical requirements of the modified carrier position. Appellant did not submit medical evidence indicating that he was unable to perform the modified carrier position on or after March 2, 2002.

---

[15] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity,* Chapter 2.814.7(c) (December 1993).

[16] *See Sharon C. Clement*, 55 ECAB ____ (Docket No. 01-2135, issued May 18, 2004).

[17] Office procedures provide that a determination regarding whether actual earnings fairly and reasonably represent wage-earning capacity should be made after an employee has been working in a given position for more than 60 days. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1993).

[18] *Elbert Hicks*, 49 ECAB 283 (1998).

[19] *Albert C. Shadrick*, *supra* note 14.

Although appellant submitted time keeping records noting occasional absences from June to December 2002, he did not submit medical evidence finding him totally disabled for work on or after March 2, 2002. Also, appellant did not file any claims alleging that he sustained any recurrences of total disability on or after March 2, 2002 related to the accepted injuries.

As there was no evidence to show that appellant's actual earnings as a modified letter carrier did not properly represent his wage-earning capacity, the Office properly accepted these earnings as the best measure of his wage-earning capacity.[20]

CONCLUSION

The Board finds that the Office properly found that the position of modified letter carrier represented appellant's wage-earning capacity as of March 2, 2002.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 1, 2004 is affirmed.

Issued: December 13, 2005
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

[20] *Afegalai L. Boone*, 53 ECAB 533 (2002).