United States Department of Labor
Employees' Compensation Appeals Board

DANIEL J. AMARO, Appellant	)	
	)	**Docket No. 05-411**
and	)	**Issued: July 15, 2005**
DEPARTMENT OF THE ARMY, COLORADO ARMY NATIONAL GUARD, FORT CARSON, CO, Employer	)	

Appearances:
Daniel J. Amaro, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 6, 2004 appellant filed a timely appeal from the September 22, 2004 merit decision of the Office of Workers' Compensation Programs, finding that the selected position of general clerk represented 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 October 3, 2004 based on its determination that the selected position of general clerk represented his wage-earning capacity.

FACTUAL HISTORY

On March 10, 2000 appellant, then a 39-year-old materials examiner and identifier, filed a traumatic injury claim alleging that on that date he experienced pain in his lower back when he lifted a tool bag weighing about 35 to 40 pounds from a shelf and placed it in a box. Appellant

stopped work and he returned to light-duty work on March 13, 2000. The Office accepted appellant's claim for low back strain and annular tear at L4-5.

On January 12, 2001 appellant was medically disqualified from his job. Effective April 9, 2001 appellant was honorably discharged from the Army National Guard. On April 24, 2001 he filed a claim for compensation for the period beginning April 9, 2001. He submitted the May 15, 2002 letter of Dr. Dana R. Bennett, a treating Board-certified family practitioner, who stated that a proposal to rescind appellant's disability and return him to work in a much lower paying position than his previous job was unjust. He noted appellant's suggestion to be placed back in his previous position with restrictions agreed upon by his supervisors.

By letter dated February 4, 2003, the Office referred appellant, together with his case record, a list of questions to be addressed and a statement of accepted facts, to Dr. Christopher G. Palmer, a Board-certified orthopedic surgeon, for a second opinion medical examination.

Dr. Palmer submitted a February 24, 2003 report which provided a history of appellant's March 10, 2000 employment injuries and medical treatment. He reported his findings on physical and objective examination. He noted a July 26, 2000 magnetic resonance imaging (MRI) scan which revealed degenerative disc disease at L4-5 and L5-S1, some posterior displacement of the descending left L5 nerve root with a mild asymmetric bulging of the L5-S1 disc and mild to moderate posterior displacement of the proximal right S1 nerve root. In response to the Office's questions, Dr. Palmer stated that, in the absence of evidence of significant back pain prior to the March 10, 2000 employment injuries, his objective findings were related to the accepted employment injuries. He opined that the majority of appellant's symptoms were related to his L4-5 disc condition, that he could return to light-duty work and that he had not reached maximum medical improvement. Dr. Palmer concluded that appellant was a good candidate for vocational rehabilitation. In an accompanying work capacity evaluation, Dr. Palmer indicated that appellant could work eight hours a day within specified physical limitations.

By letter dated February 28, 2003, the Office requested that Dr. Bennett review Dr. Palmer's report and state whether he agreed or disagreed with the findings. In an undated response, Dr. Bennett stated that appellant would have residuals of his back condition for his lifetime. He noted that appellant might be able to return to his previous job with the changes that were already agreed upon by his supervisors.

In a March 25, 2003 letter, the Office advised appellant that his claim had been expanded to include displacement and bulging disc at L5-S1 based on Dr. Palmer's February 24, 2003 report. On June 13, 2003 the Office authorized surgery for an anterior and posterior fusion from L4-5 which appellant declined to undergo.

By letter dated September 12, 2003, the Office referred appellant to a vocational rehabilitation counselor. In a letter of the same date, the Office requested that Dr. Bennett provide updated information about appellant's back condition and work restrictions. Specifically, the Office asked Dr. Bennett to state whether appellant had reached maximum medical improvement and if not, what date he anticipated him to do so. The Office further asked what ongoing treatment was necessary if appellant had reached maximum medical improvement.

Finally, the Office requested that Dr. Bennett complete a work capacity evaluation and state whether appellant's restrictions were permanent or temporary.

On September 17, 2003 letter Dr. Bennett noted appellant's physical restrictions and ongoing medical treatment and stated that he had reached maximum medical improvement. In an accompanying work capacity evaluation dated September 16, 2003, Dr. Bennett indicated that appellant could not work due to chronic pain and disc degeneration which had not improved in three years. He noted appellant's physical limitations and stated that they were permanent. Based on Dr. Bennett's finding, the Office suspended appellant's vocational rehabilitation services.

The Office found a conflict in the medical opinion evidence between Dr. Bennett and Dr. Palmer as to whether appellant had the capacity to return to work. By letter dated November 20, 2003, the Office advised appellant about the conflict. On December 22, 2003 the Office referred appellant together, with a statement of accepted facts, a list of questions to be addressed and case record, to Dr. Stanley H. Ginsburg, a Board-certified neurologist, for an impartial medical examination.

Dr. Ginsburg submitted a January 2, 2004 report in which he reviewed a history of appellant's March 10, 2000 employment injuries and medical treatment and his social and family background. He provided an extensive review of appellant's medical records. Dr. Ginsburg reported his findings on physical examination and found that appellant experienced lumbar radicular syndrome due to discogenic disease with evidence of L4-5 and L5-S1 abnormalities without loss of strength and with positive straight leg raising but with a "nonanatomical" sensory loss. In response to the Office's questions, Dr. Ginsburg provided his clinical findings, which included restricted lumbar motion, tenderness, spasm and positive straight leg raising on the left and stated that they were a result of the accepted employment injuries. Dr. Ginsburg indicated that he could not state that the reduced ankle jerks were the result of the accepted L4-5 condition because they were related to the L5-S1 interspace. He noted that appellant's employment injuries were most likely superimposed on preexisting degenerative disease. Dr. Ginsburg opined that appellant's current problems were related to the March 10, 2000 employment injuries and that there were no other significant nonwork-related or unrelated factors that contributed to his current symptoms. He stated that appellant had reached maximum medical improvement as of January 1, 2003. Dr. Ginsburg concluded that appellant would not be able to return to his previous job and that he was a good candidate for vocational rehabilitation. In an accompanying work capacity evaluation, Dr. Ginsburg indicated that appellant could work eight hours a day with physical limitations, including sitting and standing at hourly intervals, walking and standing up to 4 hours, reaching, reaching above the shoulder and twisting up to 2 hours, alternating up to 4 hours during the operation of a motor vehicle and pushing and pulling no more than 25 pounds and lifting between 20 and 25 pounds up to 4 hours. Dr. Ginsburg suggested that appellant avoid squatting, kneeling and climbing and take five-minute breaks every hour. He stated that appellant should never lift more than 40 pounds. Dr. Ginsburg also stated that the above-noted restrictions were permanent.

In a February 9, 2004 note, appellant contended that he could not work due to his back condition. He stated that his condition had not changed, that he could not sit or stand and that he

experienced pain and stiffness. Appellant indicated that he could not drive due to his medication and that some days he could not get out of bed.

On January 27, 2004 the Office reinstated vocational rehabilitation efforts based on Dr. Ginsburg's January 2, 2004 report. A vocational rehabilitation counselor submitted a July 5, 2004 report which identified the position of general clerk as being within appellant's physical limitations, vocational skills and commuting area. The position as it appeared in the Department of Labor's *Dictionary of Occupational Titles* (DOT) was classified as a light occupation that was sedentary in nature. It involved lifting no more than 20 pounds occasionally and lifting no more than 10 pounds frequently. The position also required no climbing, balancing, stooping, kneeling, crouching and crawling. Additional physical requirements included frequent reaching, handling and fingering. The vocational rehabilitation counselor determined that appellant met the vocational requirements of the position based on his past work experience and training.[1] She noted that, while appellant served in the Army National Guard, he received training in leadership, Environmental Protection Agency requirements, receiving, ordering and stocking. Appellant related that he had computer skills in that he used Excel, Power Point and Word to complete reports at work. The vocational rehabilitation counselor determined that the selected position was available in appellant's commuting area based on her contact with a labor market specialist and employers in the area.

In an August 10, 2004 notice of proposed reduction of compensation, the Office advised appellant that it proposed to reduce his compensation because the medical and factual evidence of record established that he was no longer totally disabled. The Office further advised him that he had the capacity to earn the wages of a general clerk. The Office requested that appellant submit additional evidence or argument within 30 days if he disagreed with the proposed action.

In an August 16, 2004 response letter, appellant disagreed with the Office's proposed action. He contended that he was totally disabled for any type of work due to his back condition and the opinion of his treating physicians. In an August 16, 2004 report, Dr. Bennett stated that appellant's back problems and chronic pain remained unchanged. He opined that appellant was totally disabled from performing the duties of the selected position of general clerk. Dr. Bennett noted that the treatment modalities available to appellant, with the exception of surgery, had been exhausted. He further noted that appellant should continue taking his medication and listed his physical restrictions.

By decision dated September 22, 2004, the Office finalized the proposed reduction of compensation based on Dr. Ginsburg's January 2, 2004 report. The Office found that appellant failed to submit evidence sufficient to overcome the weight of Dr. Ginsburg's report. The Office reduced appellant's compensation to $328.50 effective October 3, 2004. The Office indicated that his salary on April 9, 2001, the date he began receiving compensation for temporary total disability, was $725.90 per week, that the current adjusted pay rate for his job on the date of injury effective January 2004 was $820.16 per week and that he was currently capable of earning $342.00 per week, the pay rate of a general clerk. The Office determined that appellant had a 42

[1] The vocational rehabilitation counselor noted that appellant was enrolled in school through the 11th grade and that he did not complete the 12th grade or obtain a general education diploma (GED). The vocational rehabilitation counselor identified employers who did not require a high school diploma or GED for the general clerk position.

percent wage-earning capacity, which when multiplied by $725.90 totaled a wage-earning capacity of $304.87 per week. The Office found that appellant had a loss of wage-earning capacity of $421.03 by subtracting $304.87 from $725.90. The Office multiplied $421.03 by ¾ which amounted to a compensation rate of $315.77 per week. The Office found that, based on the current consumer price index, appellant's current adjusted compensation rate was $328.50.

LEGAL PRECEDENT

Once the Office has made a determination that an employee is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction of benefits.[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 his 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 injuries and the degree of physical impairment, his usual employment, the employee's age and vocational qualifications and the availability of suitable employment.[3]

After the Office makes a medical determination of partial disability and of special work restrictions, it may refer the employee's case to an Office wage-earning capacity specialist for selection of a position listed in DOT or otherwise available in the open market, that fits the employee's capabilities with regard to his physical limitations, education, age and prior experience. Once this selection is made, determination of wage rate and availability in the open labor market should be made through contact with the state employment services or other applicable services.[4] Finally, application of the principles set forth in *Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.[5] This has been codified by the regulations in 20 C.F.R. § 10.403(c).

In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[6]

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[2] *William H. Woods*, 51 ECAB 619 (2000); *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

[3] *Samuel J. Chavez*, 44 ECAB 431 (1993).

[4] *Karen L. Lonon-Jones*, 50 ECAB 293, 297 (1999).

[5] *See William H. Woods*, *supra* note 3; *Albert C. Shadrick*, 5 ECAB 376 (1953).

[6] *See Willie M. Miller*, 53 ECAB 697 (2002); *James M. Frasher*, 53 ECAB 794 (2002).

ANALYSIS

In this case, the Board noted that a conflict existed in the medical opinion evidence as to whether appellant was totally disabled for work. Dr. Palmer, an Office referral physician, opined that appellant could work eight hours a day with certain physical restrictions, while Dr. Bennett, a treating physician, opined that he remained totally disabled for work.

In finding that appellant was capable of performing the duties of a general clerk, the Office relied on the January 2, 2004 medical report of Dr. Ginsburg, an impartial medical examiner. Dr. Ginsburg found that appellant could work eight hours a day with the restrictions of sitting and standing at hourly intervals, walking and standing up to 4 hours, reaching, reaching above the shoulder and twisting up to 2 hours, alternating up to 4 hours during the operation of a motor vehicle and pushing and pulling no more than 25 pounds and lifting between 20 and 25 pounds up to 4 hours. Appellant should avoid squatting, kneeling and climbing and take five-minute breaks every hour. He was advised to never lift more than 40 pounds. Dr. Ginsburg provided an accurate factual and medical background. He conducted a thorough medical examination and a detailed review of appellant's medical records. The Board finds that Dr. Ginsburg's opinion as to appellant's work restrictions is rationalized and based on an accurate factual and medical background and, thus, it is entitled to special weight. The additional report of Dr. Bennett is not sufficient to overcome the opinion of the impartial medical specialist.

The physical requirements of the general clerk position included lifting no more than 20 pounds occasionally and no more than 10 pounds frequently, no climbing, balancing, stooping, kneeling, crouching and crawling and frequent reaching, handling and fingering. Based on the evidence of record, the Board finds that the selected position was within the work restrictions set forth by Dr. Ginsburg and was appropriate for a wage-earning capacity determination.

The evidence of record establishes that appellant has the appropriate knowledge, training and background to perform the selected position of general clerk based on his past work experience, training and computer skills. Further, the vocational rehabilitation counselor confirmed that the selected position is available in appellant's commuting area based on her contact with a labor market specialist and employers in the area.

Finally, the Office properly determined appellant's loss of wage-earning capacity in accordance with the formula developed in *Shadrick*,[7] and codified at section 10.403.[8] In this regard, the Office indicated that appellant's salary on April 9, 2001, the date he began receiving compensation for temporary total disability, was $725.90 per week, that the current adjusted pay rate for his job on the date of injury effective January 2004 was $820.16 per week and that he was currently capable of earning $342.00 per week, the pay rate of a general clerk. The Office then determined that appellant had a 42 percent wage-earning capacity, which when multiplied by $725.90 totaled a wage-earning capacity of $304.87 per week. The Office went on to determine that appellant had a loss of wage-earning capacity of $421.03 by subtracting $304.87

[7] *See Albert C. Shadrick, supra* note 5.

[8] 20 C.F.R. § 10.403.

from $725.90. The Office then multiplied $421.03 by ¾, as appellant had dependents, which amounted to a compensation rate of $315.77 per week. The Office found that, based on the current consumer price index, appellant's current adjusted compensation rate was $328.50. The Board finds that the Office's application of the *Shadrick* formula was proper and therefore it properly found that the position of general clerk reflected appellant's wage-earning capacity effective October 3, 2004.

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation effective October 3, 2004 based on its determination that the selected position of general clerk represented his wage-earning capacity.

ORDER

IT IS HEREBY ORDERED THAT the September 22, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 15, 2005
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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