United States Department of Labor
Employees' Compensation Appeals Board

JIMMIE C. RALEY, Appellant	)	
	)	**Docket No. 05-326**
and	)	**Issued: May 20, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Little Rock, AK, Employer	)	

Appearances:
Frederick Spencer, Esq. 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 November 22, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated August 26, 2004, which found that appellant's actual earnings represented his wage-earning capacity. Appellant also appealed an August 30, 2004 decision of the Office, which found that appellant received an overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues on appeal are: (1) whether the Office properly determined appellant's wage-earning capacity based on his actual earnings; (2) whether the Office properly determined that appellant received an overpayment of $307.82 from June 13 to 25, 2004; and (3) whether the Office properly found that appellant was at fault in the creation of the overpayment.

FACTUAL HISTORY

On March 26, 1992 appellant, then a 38-year-old letter carrier, filed a traumatic injury claim alleging that on March 9, 1992 he injured his lower back when his mail truck was struck from behind by a trailer truck. The Office accepted that he sustained a cervical strain and paid appropriate compensation for all periods of disability. Appellant stopped work on March 10, 1992. He returned to his job and worked intermittently until stopping on December 28, 1993. On June 26, 2004 appellant returned to work as a full-time modified rehabilitation clerk position. His salary on the date of injury was $36,800.00 per year.

In the course of developing appellant's claim, he was referred to a second opinion physician. In a report dated April 19, 1994, Dr. Joe P. Alberty, a Board-certified orthopedic surgeon, advised that appellant was not able to return to his preinjury employment but could perform light-duty work with restrictions on lifting of 10 pounds with a maximum of 25 pounds. In September 1994, appellant was referred for vocational rehabilitation. On December 2, 1994 appellant and his counselor prepared a rehabilitation plan for an electrical assembler, fast food worker and a hotel clerk. The Office determined that the position of hotel clerk was within his work limitations as set forth by Dr. Alberty. In a closure report, the vocational rehabilitation counselor advised that placement services were offered to appellant; however, appellant believed he was too disabled to work and would not take advantage of this service and appeared to sabotage the placement effort. In a memorandum dated June 9, 1995, the Office advised that appellant received 90 days of placement services but did not obtain employment.

On June 9, 1995 the Office issued a notice of proposed reduction of compensation, finding that appellant was no longer totally disabled. The Office noted that appellant was partially disabled and had the capacity to earn wages as a hotel clerk at the rate of $180.00 a week.

By decision dated July 20, 1995, the Office adjusted appellant's compensation benefits to reflect his wage-earning capacity as a hotel clerk. The wage-earning capacity determination took into consideration such factors as appellant's disability, training, experience, age and the availability of such work in the commuting area in which he lived. Attached to the decision was a notice of appeal rights, specifying the procedures necessary for reconsideration, a hearing before the Office or an appeal to the Board.

Appellant requested an oral hearing which was held on May 21, 1996. In a decision dated August 5, 1996, the hearing representative affirmed the July 20, 1995 wage-earning capacity determination.

Appellant submitted reports from Dr. Robert C. Ahrens, a Board-certified orthopedic surgeon, from March 21, 1994 to May 14, 1996. Dr. Ahrens noted a history of appellant's work-related injury of March 9, 1993 and noted treating appellant for a muscular ligamentous injury of the cervical spine. He did not believe appellant's condition would improve and advised that appellant's ability to work was profoundly impaired. He opined that appellant would be incapable of returning to his prior job and was generally unemployable. In a report of November 12, 1998, Dr. Ahrens prepared a work capacity evaluation noting that appellant had reached maximum medical improvement and could work two hours per day with the following

restrictions: sitting for one to two hours per day intermittently, standing and walking for one hour per day intermittently, very little squatting and kneeling, some twisting, normal hand functions and fine manipulation for one to two hours per day, and very little reaching above the shoulders. In reports dated August 31, 1999 and August 31, 2000, Dr. Ahrens noted no change in appellant's condition and opined that he had no expectation of improvement in appellant's work-related condition.

Appellant continued to receive compensation and on January 9, 2002 he was referred for a fitness-for-duty examination. In a report dated February 11, 2002, Dr. Kenneth M. Rosenzweig, a Board-certified orthopedic surgeon, diagnosed a whiplash-type injury with persistent myofascial pain. He advised that the examination revealed some element of symptom magnification. He noted no objective residuals of the work-related injury. Dr. Rosenzweig opined that appellant could be gainfully employed where he could sit and stand at will, no overhead work, no repetitive work and a lifting restriction of 10 to 20 pounds.

On November 18, 2003 the Office referred appellant for a second opinion evaluation by Dr. Ted Honghiran, a Board-certified orthopedic surgeon. In a report dated December 15, 2003, Dr. Honghiran reviewed the records provided to him and performed a physical examination of appellant. He noted an essentially normal objective physical examination. He diagnosed an acute cervical strain which progressed into a chronic cervical strain, which was muscle and ligamentous strain in nature. Dr. Honghiran noted appellant's accepted condition would have resolved within in one year. He opined that appellant could work 8 hours per day with restrictions of reaching limited to 4 hours per day, reaching above the shoulder limited to 2 hours per day, bending and stooping limited to 4 hours per day, operating a vehicle limited to 2 hours per day, pushing and pulling limited to 4 hours per day and lifting limited to 2 hours per day and no more than 20 pounds.

On April 2, 2004 the employing establishment offered appellant a full-time position as a modified rural carrier with a salary of $54,566.00. The position duties included casing mail for one and a half hours, box mail for one and a half hours, accountable mail and miscellaneous clerical duties for four hours per day. The position was in compliance with the medical restrictions set forth by Dr. Honghiran.

By letter dated April 8, 2004, the Office informed appellant that it had reviewed the position description and found the job offer suitable with his physical limitations. Appellant was advised that he had 30 days to accept the position or offer his reasons for refusing. He was apprised of the penalty provision of the Federal Employees' Compensation Act[1] if he did not return to suitable work.

In letters dated March 30 and April 10, 2004, appellant refused the position indicating that he was unable to return to gainful employment as noted by his treating physician Dr. Ahrens. Appellant submitted a report from Dr. Ahrens dated April 8, 2004, who noted he treated appellant prior to and after the work-related motor vehicle accident of March 9, 1992. He diagnosed cervical soft tissue injury and fibromyalgia. He advised that appellant's exertion

[1] 5 U.S.C. §§ 8101-8193.

capacity was limited and he required frequent rest periods of 15 to 30 minutes throughout the day. He opined that appellant's condition had not improved and he did not anticipate improvement and appellant was totally disabled. Appellant submitted a decision of the Social Security Administration advising that effective February 1, 1994 appellant was totally disabled.

By letter dated May 10, 2004, the Office advised appellant that they reviewed his reason for refusal of the offered position and determined that the refusal was not justified. The Office advised appellant that the modified-duty position was suitable work and he would be given an additional 15 days to accept the job offer without penalty.

In a letter dated May 24, 2004, appellant indicated that Dr. Ahrens advised that he was permanently disabled; however, he would do his best to perform the limited-duty assignment and would return June 1, 2004 after completing physical therapy. Appellant noted that he was accepting the position under duress.

On June 16, 2004 the employing establishment offered appellant a full-time position as a rehabilitation clerk with a salary of $53,195.00 effective June 26, 2004. The position duties included boxing mail; delivering express mail; casing mail and accountable mail; miscellaneous clerical duties; and other duties available which fall within appellant's medical limitations. The physical requirements were sitting, simple grasping and fine manipulation up to eight hours per day, occasional standing and minimal lifting, bending and reaching above the shoulders intermittently and driving occasionally. The position was in compliance with the medical restrictions set forth by Dr. Honghiran.[2]

Appellant accepted the position on June 26, 2004.

In a letter dated July 20, 2004, appellant advised that he has been able to perform all his duties except casing mail. He requested that his job description be changed to exclude casing mail, limit his lifting to 10 pounds, permit him to have two consecutive days off per week and change his work hours to 7:30 a.m. to 3:30 p.m. Appellant submitted a report from Dr. Ahrens dated July 15, 2004, who advised that appellant would require 15 minutes of rest every 45 minutes of activity to avoid severe muscle spasm of the shoulder, back and upper extremities.

On July 29, 2004 the Office issued a preliminary determination that appellant received an overpayment of compensation in the amount of $307.82. The Office advised that the overpayment occurred because appellant received monetary compensation for the period June 13 to 25, 2004, for total disability rather that partial disability upon his return to work in a modified position on June 26, 2004. The Office determined appellant was at fault as he accepted payment which he knew or should have been reasonably aware was incorrect. The Office allotted appellant 30 days to request a telephone conference, review of the written evidence or hearing and to submit financial information by completing an overpayment recovery questionnaire (Form OWCP-20) to allow the Office to determine if it should waive recovery of the overpayment.

[2] In a memorandum of conference dated June 25, 2004 between appellant and a senior claims examiner, it was noted that appellant failed to report for work on June 1, 2004. The claims examiner noted that the salary listed on the job offer was incorrect and should be $53,195.00 per year and the position was that of a rehabilitation clerk rather than a modified rural carrier.

Appellant submitted a notice of recurrence of disability dated August 9, 2004 and noted that he experienced cervical pain causally related to his work injury.[3] Appellant noted that he did not stop work. On the recurrence form appellant stated that he did not experience a recurrence, rather he explained that he was unable to case mail as his position required. Appellant also submitted an x-ray of the cervical spine dated July 24, 2004, which revealed minimal postural irregularity, mild or early degenerative change, evidence of muscle spasm, but no appreciable instability, overt structural alteration or other specific cause for pain.

By decision dated August 26, 2004, the Office indicated that appellant had been employed as a full-time rehabilitation clerk effective June 26, 2004, which was over 60 days and that the pay in that position of $1,022.98 per week was equivalent to the pay rate for the position appellant held at the time of his injury; with no loss of wages occurred. The Office concluded that the position of full-time rehabilitation clerk fairly and reasonably represented appellant's wage-earning capacity.

By decision dated August 30, 2004, the Office finalized its preliminary determination and found that appellant received a $307.82 overpayment of compensation from June 13 to 25, 2004, for which he was at fault in creating. In an accompanying memorandum, the Office indicated that appellant should have reasonably known that he was not entitled to receive total disability upon return to work in a modified job on June 26, 2004. The Office requested that appellant submit a check for the entire amount of the overpayment of $307.82.

LEGAL PRECEDENT

Once the wage-earning capacity of an injured employee is properly determined, it remains undisturbed regardless of actual earnings or lack of earnings.[4] A modification of such a determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was in fact erroneous.[5] The burden is on the Office to establish that there has been a change so as to affect the employee's capacity to earn wages in the job determined to represent her earning capacity. Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn and not on actual wages lost.[6]

In addition, Chapter 2.814.11 of the Office's procedure manual contains provisions regarding the modification of a formal loss of wage-earning capacity. The relevant part provides that a formal loss of wage-earning capacity will be modified when: (1) the original rating was in error; (2) the claimant's medical condition has changed; or (3) the claimant has been vocationally

[3] As the Office did not issue a final decision with regard to the recurrence of disability, the Board does not have jurisdiction over the matter. *See* 20 C.F.R. § 501.2(c).

[4] *Sharon C. Clement*, 55 ECAB ___ (Docket No. 01-2135, issued May 18, 2004); *Roy Mathew Lyon*, 27 ECAB 186, 188-90 (1975).

[5] *Elmer Strong*, 17 ECAB 226, 228 (1965).

[6] *Ronald M. Yokota*, 33 ECAB 1629, 1632 (1982).

rehabilitated. Office procedures further provide that the party seeking modification of a formal loss of wage-earning capacity decision has the burden to prove that one of these criteria has been met. If the Office is seeking modification, it must establish that the original rating was in error, that the injury-related condition has improved or that the claimant has been vocationally rehabilitated.[7]

ANALYSIS

In this case, on August 26, 2004 the Office issued a formal loss of wage-earning capacity decision in which it determined that appellant's actual earnings as a modified rehab clerk for which he worked 60 days represented his wage-earning capacity.[8] However, the Office did not follow the applicable case law and procedures regarding appellant's wage-earning capacity. The Office did not address its existing formal loss of wage-earning capacity decision of July 20, 1995, as a hotel clerk, or otherwise formally modify this loss of wage-earning capacity decision which was in place at the time that it made its decision on August 26, 2004.[9]

The Board precedent establishes that a formal loss of wage-earning capacity decision remains undisturbed unless appropriately modified.[10] While the Office's procedures, noted above, provide a mechanism for modifying a loss of wage-earning capacity determination, such procedure was not followed in this case. As the Office has not appropriately addressed modification of appellant's formal loss of wage-earning capacity decision of July 20, 1995, the loss of wage-earning capacity decision of August 26, 2004 was not proper.[11]

[7] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11 (June 1996).

[8] The Board notes that the above-described criteria for modifying formal loss of wage-earning capacity decisions remains the same regardless of whether a given claimant continues to work or stops work after the issuance of a formal loss of wage-earning capacity decision.

[9] *See Sharon C. Clement, supra* note 4. The Board has previously addressed instances in which formal loss of wage-earning capacity decisions remain undisturbed unless modified in accordance with the above-described criteria. In *Wallace D. Ludwick*, 38 ECAB 176 (1986), the Office issued a formal loss of wage-earning capacity in which it determined that the employee's wage-earning capacity was represented by the position of deputy, a position which she had been performing. The Office then terminated the employee's compensation based on her refusal of a job which had been offered by the employing establishment and determined by the Office to be suitable. The Board reversed the Office's termination indicating that the loss of wage-earning capacity decision had not been modified and that the employee's refusal of the offered position was justified by the work which had been determined to represent her wage-earning capacity.

[10] *Sharon C. Clement, supra* note 4; *see also Ronald M. Yokota, supra* note 6.

[11] *See Acquilla S. Hill*, Docket No. 02-1762 (issued September 9, 2004) (Board reversed where Office reduced appellant's compensation effective based on her ability to earn wages as a computer home specialist; however, the Office failed to consider a prior loss of wage-earning capacity in effect).

CONCLUSION

The Board finds that the Office improperly issued its August 26, 2004 loss of wage-earning capacity decision.[12]

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs decision dated August 26, 2004 is reversed.

Issued: May 20, 2005
Washington, DC

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[12] The Board finds that it is unnecessary to address the overpayment issues in view of the Board's disposition of the first issue.