United States Department of Labor
Employees' Compensation Appeals Board

RAYMOND ROMERO, Appellant	)	
	)	**Docket No. 05-618**
and	)	**Issued: November 21, 2005**
GENERAL SERVICES ADMINISTRATION, Denver, CO, Employer	)	

Appearances:
Raymond Romero, 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 January 18, 2005 appellant filed a timely appeal from a September 14, 2004 merit decision of the Office of Workers' Compensation Programs, finding that the position of recreation facility attendant 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 January 23, 2004 based on its determination that the selected position of recreation facility attendant represented his wage-earning capacity.

FACTUAL HISTORY

On April 13, 1987 appellant, then a 34-year-old maintenance helper, filed a traumatic injury claim alleging that he hurt his left shoulder and neck on that date when he slipped down stairs. The Office accepted his claim for left shoulder strain, cervical strain, rotator cuff tear of the left shoulder and reflex sympathetic dystrophy. The Office authorized surgery on appellant's left shoulder on June 5, 1989. Following surgery, appellant accepted the employing

establishment's October 18, 1988 job offer and returned to a light-duty position as a custodial worker. This position was eliminated as part of a reduction-in-force on January 13, 1990. Thereafter, the Office paid appropriate compensation for total disability.

Appellant was treated by Dr. Herbert Maruyama, an orthopedic surgeon, who opined that he was still experiencing problems with his left shoulder and that he was totally disabled from performing the duties of a maintenance helper but could perform light-duty work. Dr. Maruyama stated that further surgical intervention on the left shoulder might be necessary but indicated that he was not anxious to proceed with this type of treatment. He found that appellant had sustained permanent impairment in the left shoulder joint due to multiple surgeries.

By letter dated November 7, 2002, the Office referred appellant together with a statement of accepted facts, case record and a list of questions to be addressed, to Dr. Jeffrey Hrutkay, a Board-certified orthopedic surgeon, for a second opinion medical examination.

Dr. Hrutkay submitted a December 26, 2002 report, in which he reviewed the history of the April 13, 1987 employment injury and appellant's medical treatment. He also provided findings on physical examination of the left upper extremity. Dr. Hrutkay reviewed a September 21, 2000 magnetic resonance imaging scan which demonstrated mild supraspinatus tendinitis of the left shoulder. He found a history of left shoulder impingement syndrome and status post decompressive surgery three times. Dr. Hrutkay diagnosed persistent left shoulder pain with no evidence of reflex sympathetic dystrophy. In response to the Office's questions, he stated that there was no evidence that a left shoulder rotator cuff tear ever occurred, noting that the three surgeries were directed at decompression. There was no evidence of any ongoing cervical strain injury. There was evidence of active and disabling residuals with respect to the left shoulder, impingement-type symptoms that were likely due to scarring and adhesions resulting from the three surgical procedures. Dr. Hrutkay opined that appellant's current symptomology was consistent with residuals of impingement syndrome and rotator cuff tendinitis. He reviewed a description of the maintenance helper position and opined that appellant was unable to perform the duties of this position. Dr. Hrutkay opined that appellant was able to perform light-duty work eight hours a day within certain physical limitations. He agreed with Dr. Maruyama's assessment in not recommending further surgical intervention for the left shoulder.

In a work capacity evaluation dated December 16, 2002, Dr. Hrutkay found that appellant could perform light-duty work eight hours a day with physical limitations regarding the left arm. These restrictions included no reaching above the shoulder and no pushing and pulling more than 20 pounds and lifting more than 15 pounds. He stated that appellant had reached maximum medical improvement.

Based on Dr. Hrutkay's opinion, the Office referred appellant to a vocational rehabilitation counselor. The vocational rehabilitation counselor submitted reports which identified the positions of security guard, recreation facility attendant and teacher's aide as being within appellant's physical limitations, vocational skills and geographical area. The recreation facility attendant position, as it appeared in the Department of Labor's *Dictionary of Occupational Titles* (DOT), required scheduling of sports facilities including golf courses, settling of disputes between groups or individual players regarding the use of the facilities and

sell or rent of sports and other equipment. In addition, the position was classified as a light occupation that involved lifting less than 20 pounds occasionally and less than 10 pounds frequently. The position did not require climbing, balancing, stooping, kneeling, crouching, crawling, feeling, taste/smelling, far acuity, depth perception, accommodation, color vision and field vision. Additional physical requirements included occasional reaching, fingering and near acuity and frequent handling, talking and hearing. Appellant's résumé indicated that he volunteered at an elementary school and coached children ages 7 to 19 in several sports for 18 years and he coached a semi-professional football team. He also held a position in golf course maintenance and equipment operation.

The vocational rehabilitation counselor later determined that the recreational facility attendant position should be used for determining appellant's wage-earning capacity. He stated that a security guard position would be an airport screener position which was increasingly a federal job which should not be used for wage-earning capacity determinations. Further, he noted that work as a teacher's aide was often not year round. Appellant informed the vocational rehabilitation counselor that he wished to attend school to become a personal trainer.

In a November 24, 2003 letter, the Office advised the employing establishment that it would issue a constructed wage-earning capacity rating based on the position of recreation facility attendant. By letter dated November 24, 2003, the Office requested that the employing establishment provide the current salary for appellant's maintenance helper position. In a December 2, 2003 letter, the employing establishment responded that the current salary for this position was $13.40 per hour.

In a December 15, 2003 notice, 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 found that he had the capacity to earn the wages of a recreation facility attendant. The Office requested that appellant submit additional evidence or argument within 30 days if he disagreed with the proposed action.

On January 12, 2004 appellant responded that the recreation facility attendant jobs he had applied for were part-time positions starting at $7.50 per hour. Appellant contended that he could not work for eight hours a day because he had trouble sitting and standing for a prolonged period of time and experienced left shoulder pain. He stated that a medical evaluation he underwent was not complete as he was only seen for 20 minutes.

By decision dated January 23, 2004, the Office finalized the wage-earning capacity determination. The Office found that appellant failed to submit evidence sufficient to overcome the weight of Dr. Hrutkay's report. The Office reduced appellant's compensation to $388.00 effective January 23, 2004 based on the formula developed in *Albert C. Shadrick*.[1] The Office indicated that his salary on April 13, 1987, the date of the accepted employment injury, was $359.20 per week, that the current adjusted pay rate for his job on the date of injury effective December 2, 2003 was $537.80 per week and that he was currently capable of earning $400.00 per week, the pay rate of a recreation facility attendant. The Office determined that appellant had a 74 percent wage-earning capacity ($400.00 ÷ $537.80), which when multiplied by $359.20

[1] 5 ECAB 376 (1953).

totaled a wage-earning capacity of $265.80 per week. The Office then determined that appellant had a loss of wage-earning capacity of $93.40 by subtracting $265.80 from $359.20. The Office multiplied $93.40 by 2/3 which amounted to a compensation rate of $62.27 per week. The Office found that based on current cost-of-living adjustments, appellant's current adjusted compensation rate was $388.00.

By letter dated February 12, 2004, the Office denied appellant's February 11, 2004 request for permission to attend school to become a personal trainer, noting that the constructed loss of wage-earning capacity determination was in place, that there were positions of a recreation facility attendant available in his community and that he had not demonstrated a willingness to "find positions that are currently available."

Appellant disagreed with the Office's January 23, 2004 decision and, on February 5, 2004, requested an oral hearing before an Office hearing representative. At the July 19, 2004 hearing, appellant described the April 13, 1987 employment injury and testified that he had not worked since 1990 and he had been under Dr. Maruyama's care since 1989. He testified that he had limited use of his left shoulder and that Dr. Maruyama recommended that he undergo further surgery, a shoulder decompression. Appellant stated that he made attempts to obtain a recreation facility attendant position but employers were not hiring and that he could not perform the duties of this position. He expressed his desire to attend a six-month program to become a personal trainer.

By decision dated September 14, 2004, the Office hearing representative found that the evidence submitted by appellant was insufficient to overcome the weight of Dr. Hrutkay's report. The hearing representative further found that, as the selected position of recreational facility attendant was suitable from a medical and vocational standpoint and was reasonably available in sufficient numbers in appellant's geographic area, the Office properly reduced his compensation. The hearing representative affirmed the Office's January 23, 2004 decision. The hearing representative remanded the case to the Office for review by an Office medical adviser to determine whether the surgery proposed by Dr. Maruyama was medically warranted and if so, whether it was causally related to the accepted employment injuries.[2]

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.[3]

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

[2] The Office hearing representative pointed out that appellant remained on the periodic rolls as the Office had not reduced his compensation benefits. On remand, the hearing representative instructed the Office to reduce appellant's compensation retroactive to January 23, 2004.

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

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.[4]

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 the 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.[5] Finally, application of the principles set forth in *Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.[6] This has been codified by the regulations in 20 C.F.R. § 10.403(c).

ANALYSIS

In finding that appellant was capable of performing the duties of a recreation facility attendant, the Office relied on the December 26, 2002 medical report of Dr. Hrutkay, who found that appellant could perform light-duty work eight hours a day with the restrictions of no reaching above the shoulder and no pushing and pulling more than 20 pounds and lifting more than 15 pounds with the left arm. He provided an accurate factual and medical background. Dr. Hrutkay conducted a thorough medical examination and a detailed review of appellant's medical records. His opinion that appellant can perform light-duty work is in accord with the opinion of appellant's treating physician, Dr. Maruyama. The Board finds that Dr. Hrutkay's opinion as to appellant's work restrictions is rationalized, based on an accurate factual and medical background and constitutes the weight of the medical opinion evidence. Appellant did not submit any medical evidence to overcome the weight of Dr. Hrutkay's report.

The physical requirements of the recreational facility attendant position involved lifting less than 20 pounds occasionally and less than 10 pounds frequently, occasional reaching, fingering and near acuity and frequent handling, talking and hearing. The position did not require any climbing, balancing, stooping, kneeling, crouching, crawling, feeling, taste/smelling, far acuity, depth perception, accommodation, color vision and field vision. The position was also considered to be a light-duty position. Appellant was permanently restricted from reaching above the shoulder, pushing and pulling more than 20 pounds and lifting more than 15 pounds with his left arm. The recreation facility attendant position requires occasional reaching within the confines of the left upper extremity restrictions. As the requirements of the recreational facility attendant position are consistent with the limitations imposed by Dr. Hrutkay, the Board finds that the selected position was within appellant's permanent work restrictions and was

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

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

[6] *See William H. Woods*, *supra* note 3; *Shadrick*, *supra* note 1.

appropriate for a wage-earning capacity determination. Appellant contended that he could not work eight hours a day because he had trouble sitting and standing for a prolonged period of time and he experienced left shoulder pain. However, he did not submit any medical evidence to support such medical restrictions. The vocational rehabilitation counselor confirmed that the selected position is available in appellant's commuting 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 of the Office's regulations.[8] In this regard, the Office indicated that appellant's salary on April 13, 1987, the date of the accepted employment injury, was $359.20 per week, that the current adjusted pay rate for his job on the date of injury was $537.80 per week and that he was currently capable of earning $400.00 per week, the pay rate of a recreational facility attendant. The Office then determined that appellant had a 74 percent wage-earning capacity by dividing $400.00 by $537.80, which when multiplied by $359.20 totaled $265.80 per week. The Office went on to determine that appellant had a loss of wage-earning capacity of $93.40 by subtracting $265.80 from $359.20. The Office then multiplied $93.40 by 2/3 which amounted to compensation rate of $62.27 per week. The Office found that, based on the current consumer price index, appellant's current adjusted compensation rate was $388.00. The Board finds that the Office's application of the *Shadrick* formula was proper and, therefore, it properly found that the position of recreation facility attendant reflected appellant's wage-earning capacity effective January 23, 2004.

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation effective January 23, 2004 based on its determination that the selected position of recreation facility attendant represented his wage-earning capacity.

[7] *See Albert C. Shadrick, supra* note 1.

[8] 20 C.F.R. § 10.403.

ORDER

IT IS HEREBY ORDERED THAT the September 14, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 21, 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