United States Department of Labor
Employees' Compensation Appeals Board

PAUL H. CURTIS, Appellant	)	
and	)	**Docket No. 05-565**
	)	**Issued: October 6, 2005**
U.S. POSTAL SERVICE, POST OFFICE, RANCHO PARK STATION, Los Angeles, CA, Employer	)	

Appearances:
Paul H. Curtis, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On January 7, 2005 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decisions dated June 17 and July 23, 2004, finding that he had the capacity to earn wages as a paralegal. He also filed a timely appeal from nonmerit decisions of the Office dated October 6 and November 2, 2004. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly reduced appellant's compensation benefits on the grounds that he had the capacity to earn wages as a paralegal; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a) on October 6 and November 2, 2004.

FACTUAL HISTORY

On September 15, 1989 appellant, then a 44-year-old letter carrier, filed a traumatic injury claim alleging that he sustained stress and an asthma attack while in the performance of duty. He filed an occupational disease claim on June 25, 1990 alleging that he developed stress due to factors of his federal employment. The Office accepted appellant's claim for adjustment disorder on November 8, 1990. The Office entered him on the periodic rolls on June 25, 1992 and referred him for vocational rehabilitation counseling on October 8, 1992.

A vocational rehabilitation counselor indicated that appellant had received a law degree in 1980, but had not passed the bar examination. He relocated to Temecula, California on December 21, 1992.

Appellant's attending physician Dr. Robert A. Gallway, a licensed clinical psychologist, completed a report on December 2, 1992 and stated that appellant could return to work on January 1, 1993 in a low stress, light-duty assignment.

On February 20, 1993 the vocational rehabilitation counselor suggested that appellant consider placement as a paralegal. He suggested that his opportunities would be improved with a refresher course. The vocational rehabilitation counselor noted that his current locale had a depressed job market. He recommended that appellant undergo a paralegal training program. Appellant signed a rehabilitation plan to complete training as a paralegal from November 30, 1993 through January 31, 1995. On September 29, 1994 the counselor added an addendum to the plan to allow him to attend computer tutoring. He noted on November 30, 1994 that there were no openings in appellant's commuting area for a paralegal.

The Office referred appellant for a second opinion evaluation with Dr. Richard L. Gomez, a Board-certified psychiatrist, on May 15, 1995.

On May 31, 1995 the vocational rehabilitation counselor noted that a local legal office was interested in providing appellant with an assisted reemployment offer contingent upon him passing the bar. On June 14, 1995 the Office agreed to pay appellant's bar fees and study costs. On July 20, 1995 the Office entered into a letter of agreement with counsel stating that appellant would work as a paralegal earning $40,000.00 per year working 40 hours a week. The Office agreed to reimburse the attorney for part of the wages he paid appellant.

In a report dated July 9, 1995, Dr. Gomez noted appellant's history of injury and diagnosed anxiety disorder with mixed elements of generalized anxiety disorder, post-traumatic stress disorder and panic disorder as well as psychological factors affecting a physical or general medical condition. He concluded that appellant was not capable of performing the duties of his date-of-injury position and stated that he suspected that he would have some problems in the position of paralegal given his difficulty sustaining significant stress, particularly that involving interpersonal conflict or conflict with authority figures. Dr. Gomez recommended additional medical treatment.

The Office expanded appellant's claim to include psychological factors affecting physical conditions on July 25, 1995.

On August 22, 1995 appellant was placed in the assisted reemployment position contingent upon him passing the bar examination. His wage-loss compensation stopped effective August 20, 1995. By decision dated October 5, 1995, the Office reduced appellant's wage-loss compensation to zero, based on his actual earnings as a paralegal earning $769.23 per week effective August 1, 1995.

On November 30, 1995 the vocational rehabilitation counselor noted that appellant was interested in purchasing the business he was in, the assisted reemployment position. On December 31, 1995 the counselor noted that he had not passed the bar. Appellant began studying for the bar again in March 1996.

On January 23, 1996 the Office informed the attorney that he must report the amount of wages paid appellant, which he had indicated was not applicable. On February 12, 1996 the Office rehabilitation specialist noted that appellant had purchased the law firm from counsel on October 13, 1995.

On June 13, 1996 Dr. Stanley J. Geller, a psychiatrist, found that appellant was temporarily totally disabled due to his focus on the severe emotional stress he suffered in the last two years of his service at the employing establishment.

Appellant requested an oral hearing which was scheduled for February 5, 1997. On January 22, 1997 the Office noted that his oral hearing was postponed until a later date.

On April 13, 1999 appellant again requested an oral hearing. On October 28, 2003 the Branch of Hearings and Review informed him that his hearing would be rescheduled in December 2003. Appellant applied for a writ of mandamus on December 6, 2003. His oral hearing was rescheduled for February 24, 2004.

Appellant testified at the oral hearing and noted that Greg Stewart was not an attorney, but a workers' compensation representative and that due to a change in state law he was no longer able to represent claimants. He denied buying the business from Mr. Stewart and stated that the business went bankrupt. Appellant noted that he passed the bar.

By decision dated June 17, 2004, the hearing representative reviewed a March 27, 1997 statement from the Office rehabilitation specialist who considered appellant's ability to work as a paralegal in Los Angeles, California, determined that this position was performed in sufficient numbers in that location, that entry level wages were $10.00 per hour and that he was capable of performing this job based on his training program. The hearing representative found that he did not have actual earnings from his employment with Mr. Stewart, but that he did have the capacity to earn $400.00 a week as a paralegal beginning August 1, 1995. The hearing representative remanded the case for the Office to determine appellant's loss of wage-earning capacity effective August 1, 1995.

By decision dated July 23, 2004, the Office stated that appellant had been employed as a paralegal specialist for Mr. Stewart with wages of $400.00 per week effective August 1, 1995. The Office stated that this position fairly and reasonable represented his wage-earning capacity. The Office found that appellant was entitled to $915.00 every four weeks.

Appellant requested reconsideration on July 22 and September 8, 2004. By decision dated October 6, 2004, the Office declined to reopen his claim for consideration of the merits. Appellant submitted additional new medical evidence. By decision dated November 2, 2004, the Office reopened his claim on its own motion and again declined to consider the merits.

LEGAL PRECEDENT

Once the Office has made a determination that a claimant 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.[1] Under section 8115(a) of the Federal Employees' Compensation Act[2] the wage-earning capacity of an employee is determined by actual earnings if actual earnings fairly and reasonable represent the 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 the injury, the degree of physical impairment his usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect wage-earning capacity in his disabled condition.[3]

The Office's procedure manual notes that the claims examiner is responsible for determining whether the medical evidence establishes that the claimant is able to perform the job, taking into consideration medical conditions due to the accepted work-related injury or disability and any preexisting medical conditions. If the medical evidence is not clear and unequivocal, the claims examiner will seek medical advice from the district medical adviser, the treating physician or second opinion specialist as appropriate.[4]

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 *Directory of Occupational Titles* or otherwise available in the open market, that fit the employee's capabilities with regard to his physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the labor market should be made through contact with the state employment service or other applicable service. Finally, application of the principles set forth in *Albert C. Shadrick*[5] and codified by regulation at 20 C.F.R. § 10.403[6] should be applied. Subsection (d) of this regulations provides that the employee's wage-earning capacity in terms of percentage is obtained by dividing the employee's actual earnings or the pay

[1] *David W. Green*, 43 ECAB 883 (1992).

[2] 5 U.S.C. §§ 8101-8193, § 8115(a).

[3] *John E. Cannon*, 55 ECAB ___ (Docket No. 03-347, issued June 24, 2004).

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8.e. (December 1995).

[5] 5 ECAB 376 (1953).

[6] 20 C.F.R. § 10.403.

rate of the position selected by the Office, by the current pay rate for the job held at the time of injury.[7]

The Office's procedure manual provides that the availability of employment is usually evaluated with respect to the area where the injured employee resides at the time the determination is made, rather than the area of the residence at the time of injury. However, when an employee voluntarily moves to an isolated locality with few job opportunities, the question of availability should be applied to the area of residence at the time of the injury.[8]

The procedure manual further provides that retroactive constructed wage-earning capacity determinations should be considered only when the evidence clearly shows that partial rather than total disability existed prior to the adjudication and no compensation has been paid for the period of disability in question.[9]

ANALYSIS

In this case, the hearing representative set aside the Office's 1995 wage-earning capacity determination which was based on appellant's alleged actual earnings as a paralegal. The hearing representative instead relied on the 1997 determination by the rehabilitation specialist that he could perform the duties of a paralegal, that this position was reasonably available in the area where the injury occurred, Los Angeles, California, as appellant had voluntarily moved to an isolated locality with few job opportunities and that he had the capacity to earn $10.00 per hour in this constructed position.

The Board finds that the hearing representative failed to properly consider the medical evidence of record in reaching this retroactive wage-earning capacity decision based on a constructed position. In a report dated July 9, 1995, Dr. Gomez, the Office second opinion physician and a psychiatrist, diagnosed anxiety disorder with mixed elements of generalized anxiety disorder, post-traumatic stress disorder and panic disorder as well as psychological factors affecting a physical or general medical condition. He stated that he suspected that appellant would have some problems in the position of paralegal given his difficulty sustaining significant stress, particularly that involving interpersonal conflict or conflict with authority figures. He recommended additional medical treatment.

On June 13, 1996 Dr. Geller, a psychiatrist, found that appellant was temporarily totally disabled due to focus on the severe emotional stress he suffered in the latter two years of his service at the employing establishment.

The Board finds that this medical evidence is not clear and unequivocal that appellant was partially disabled or that the position of paralegal would be medically suitable. Therefore,

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[7] 20 C.F.R. § 10.403(d).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8.c. (December 1993).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8.f. (December 1995).

the hearing representative should have sought medical evidence from the district medical adviser, the treating physician or second opinion specialist as appropriate.[10]

As the hearing representative did not properly reduce appellant's compensation benefits retroactively based on the constructed position of paralegal, the Office failed to meet its burden of proof to reduce his compensation benefits.[11]

CONCLUSION

The Board finds that the Office failed to meet its burden of proof to reduce appellant's compensation benefits based on the constructed position of paralegal.[12]

ORDER

IT IS HEREBY ORDERED THAT the November 2, October 6, July 23 and June 17, 2004 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: October 6, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8.e. (December 1995).

[11] The Board notes that the Office misunderstood the directions of the hearing representative and improperly attempted to analyze appellant's wage-earning capacity based on fictitious actual earnings in its July 23, 2004 decision.

[12] Due to the disposition of the merit issue in this case, it is not necessary for the Board to address the nonmerit decisions.