United States Department of Labor
Employees' Compensation Appeals Board

JAMES E. WHARTON, Appellant	)	
and	)	**Docket No. 06-262**
	)	**Issued: April 19, 2006**
DEPARTMENT OF AGRICULTURE, CORPUS CHRISTI CLASSING OFFICE, Corpus Christi, TX, Employer	)	

Appearances:
James E. Wharton, 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 November 14, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated April 11, 2005, which reduced his compensation benefits based on his capacity to earn wages in the constructed position of administrative clerk. He also appealed September 28 and October 27, 2005 decisions which denied his requests for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this case.

ISSUES

The issues are: (1) whether the Office met its burden of proof to reduce appellant's compensation benefits based on his capacity to earn wages as an administrative clerk; and (2) whether the Office properly refused to reopen appellant's claim for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On July 30, 2002 appellant, then a 52-year-old seasonal commodities grader, sustained an employment-related lumbar strain while lifting a tray of cotton from a conveyor belt.[1] He stopped work that day and was placed on the periodic rolls. His accepted condition was expanded to include aggravation of lumbar intervertebral disc. He came under the care of Dr. Scott J. Lamb, a Board-certified physiatrist, who referred him to Dr. Thomas W. Edwards, Board-certified in anesthesiology, for pain management.

On December 29, 2003 the Office referred appellant, together with a statement of accepted facts and the medical record, to Dr. Walter A. DelGallo, for a second opinion evaluation. In a January 29, 2004 report, the physician advised that appellant continued to have residuals of the July 30, 2002 lumbar strain and was partially disabled. He recommended a functional capacity evaluation.[2] On January 13, 2004 appellant underwent intradiscal electrotherapy (IDET), performed by Dr. Edwards. In a work capacity evaluation dated August 31, 2004, Dr. Lamb advised that appellant could work a full day of light duty. He provided restrictions that appellant should limit sitting, walking, standing, reaching and driving a motor vehicle at work or to/from work to 3 hours, reaching above the shoulder, twisting, squatting and climbing to 1 hour with a 50-pound restriction on pushing and pulling and a 20-pound restriction on lifting.

By letter dated October 13, 2004, appellant was referred to Rick Flores, M.Ed., for vocational rehabilitation. On November 1, 2004 Mr. Flores conducted a transferable skills analysis and determined that, based on appellant's employment history and education, he was ready for direct placement. By letter dated November 3, 2004, the Office informed appellant that he had 90 days to secure employment and after that time his compensation would be reduced based on his wage-earning capacity. On November 30, 2004 Mr. Flores identified the positions of customer service representative and general office clerk as within the sedentary and light strength categories respectively. The positions were within appellant's work restrictions and reasonably available on the local labor market. In a November 30, 2004 treatment note, Dr. Lamb advised that appellant was not limited to light or light to moderate work "other than his pain problems." In a February 7, 2005 report, the physician noted appellant's continued complaint of low back pain.

On February 4, 2005 appellant was given a 30-day extension, but was unable to secure employment. By letter dated March 9, 2005, the Office proposed to reduce appellant's compensation benefits based on his capacity to earn wages as a general office or administrative clerk.[3] The Office advised appellant that if he disagreed with the proposed reduction, he should

[1] Appellant had previously sustained nonemployment-related back injuries in 1991 and 1992, after which he went on disability and attended college, graduating in December 2001 with a B.S. degree in agriculture.

[2] Appellant was thereafter scheduled for a functional capacity evaluation, which had to be cancelled because his blood pressure was elevated.

[3] The *Dictionary of Occupational Titles* (DOT) identifies this position under both titles. Section 219.362-010 of the DOT provides, in part, that the position requires light strength and it is described as a position in which a variety of clerical duties are performed. *United States Department of Labor, Dictionary of Occupational Titles*, 4th ed. rev. 1991.

submit additional evidence or argument within 30 days. In a response dated March 28, 2005, appellant disagreed with the proposed reduction, contending that he was not physically capable of performing the selected position and was still being treated with medication for low back pain. He resubmitted Dr. Lamb's August 31, 2004 work capacity evaluation and a March 3, 2005 form report in which the physician noted that appellant was stable and referred him for pain management with follow-up in three months.

By decision dated April 11, 2005, the Office reduced appellant's compensation benefits, effective April 17, 2005, based on his capacity to earn wages as a modified administrative clerk. On August 10, 2005 appellant requested reconsideration, again arguing that he was physically incapable of performing the selected position. He also submitted a May 25, 2005 report in which Dr. Lamb diagnosed chronic low back pain and failed IDET and referred appellant to Dr. Mathew T. Alexander, a neurosurgeon. Appellant submitted a magnetic resonance imaging (MRI) scan of the lumbar spine dated June 27, 2005, which demonstrated minimal disc bulge at L4-5 associated with tiny posterior annular tear, scar tissue along the right side of L5-S2 and an annular tear at the L3-4 level. In an August 4, 2005 report, Dr. Alexander noted the history of back injuries with surgery in 1991, appellant's complaints of pain and the MRI scan findings. Examination demonstrated a positive straight leg raising evaluation bilaterally and some pain to palpation in the L4, L5 and S1 regions of the back. He diagnosed chronic low back pain and recommended laminectomy and fusion at L3-S1. In a report dated September 1, 2005, an Office medical adviser opined that the accepted conditions should be expanded to include lumbar degenerative disc disease but that the medical record did not support that the recommended surgery was appropriate for appellant's condition. He recommended a second opinion evaluation. By decision dated September 28, 2005, the Office denied appellant's reconsideration request on the grounds that he did not raised a substantive legal question or include new and relevant evidence.

On October 12, 2005 the Office referred appellant, together with a set of questions, a statement of accepted facts and the medical record, to Dr. Charles W. Kennedy, Board-certified in orthopedic surgery, for a second opinion evaluation. Dr. Kennedy was asked whether the recommended back surgery was warranted and if the accepted conditions should be updated.

On October 12, 2005 appellant also requested reconsideration and submitted an August 4, 2005 letter in which Dr. Alexander again recommended surgery. In a treatment note dated September 12, 2005, the physician noted appellant's continued complaint of back pain and Dr. Alexander's recommendation for surgery. In an October 12, 2005 note, the physician advised that appellant could work light duty for four hours a day and on a Texas workers' compensation work status report, he advised that appellant could work light duty a maximum of 4 hours per day with a 5 minute break per hour, no driving heavy equipment and lifting restricted to 20 pounds. In a report dated October 18, 2005, Dr. Edwards advised that appellant had not been seen since early 2004. He advised that appellant's problem was the result of his underlying disc disease and altered back mechanics and recommended lumbar facet injections under fluoroscopy for diagnostic and therapeutic purposes.

By decision dated October 27, 2005, the Office denied appellant's reconsideration request. The Office noted that the only evidence submitted was a work capacity evaluation form

dated October 12, 2005 from Dr. Lamb, which did not include any new and relevant medical evidence sufficient to warrant merit review.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[4] An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.[5]

Section 8115 of the Federal Employees' Compensation Act[6] and Office regulations provide that 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 wage-earning capacity or the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, the degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors or circumstances, which may affect his wage-earning capacity in his disabled condition.[7]

The Office must initially determine a claimant's medical condition and work restrictions before selecting an appropriate position that reflects his or her wage-earning capacity. The medical evidence upon which the Office relies must provide a detailed description of the condition.[8] Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.[9]

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by the Office for selection of a position listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open market, that fits that employee's capabilities with regard to his or her physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable

[4] *James M. Frasher*, 53 ECAB 794 (2002).

[5] 20 C.F.R. §§ 10.402, 10.403; *John D. Jackson*, 55 ECAB ____ (Docket No. 03-2281, issued April 8, 2004).

[6] 5 U.S.C. §§ 8101-8193.

[7] 5 U.S.C. § 8115; 20 C.F.R. § 10.520; *John D. Jackson, supra* note 5.

[8] *William H. Woods*, 51 ECAB 619 (2000).

[9] *John D. Jackson, supra* note 5.

service.[10] Finally, application of the principles set forth in *Albert C. Shadrick*[11] will result in the percentage of the employee's loss of wage-earning capacity.[12]

In determining an employee's wage-earning capacity based on a position deemed suitable, but not actually held, the Office must consider the degree of physical impairment, including impairments resulting from both injury-related and preexisting conditions, but not impairments resulting from postinjury or subsequently acquired conditions. Any incapacity to perform the duties of the selected position resulting from subsequently acquired conditions is immaterial to the loss of wage-earning capacity that can be attributed to the accepted employment injury and for which appellant may receive compensation.[13]

ANALYSIS -- ISSUE 1

The medical evidence includes by a work capacity evaluation dated August 31, 2004, from Dr. Lamb, an attending physician. It established that appellant was no longer totally disabled. The Office referred appellant to Mr. Flores for vocational rehabilitation counseling in October 2004. In a report of November 2, 2004, Mr. Flores noted that, based on appellant's education and work history, he had sufficient transferable skills to start job placement. The Office informed appellant that he had 90 days to secure employment or his compensation would be reduced based on his capacity to earn wages. Because appellant was unable to secure employment, the vocational rehabilitation counselor identified two positions that he found fit appellant's work capabilities. The Office determined that appellant had the capacity to earn wages as an administrative clerk, based on the August 31, 2004 work capacity evaluation provided by Dr. Lamb and reduced his compensation effective April 17, 2005.

The Board finds that the medical evidence establishes that appellant was capable of performing the duties required for the selected position of administrative clerk. In the August 31, 2004 work capacity evaluation, Dr. Lamb advised that appellant could return to a full day of light-duty work with restrictions to his physical activity and a 20-pound lifting restriction. On November 30, 2004 he advised that appellant was not limited to light or light to moderate work. While Dr. Lamb submitted additional reports prior to the April 11, 2005 decision, he did not discuss appellant's capacity to work.

In November 30, 2004 report, the Office rehabilitation counselor determined that appellant was able to perform the position of administrative or general office clerk. He provided a job description and determined that the position was light with occasional lifting of 20 pounds, which was within appellant's medical restrictions and noted that appellant had past work history and background indicating office and computer skills and that the position was available in sufficient numbers so as to make it reasonably available within appellant's commuting area and that the wage of the position was $300.00 per week.

[10] *James M. Frasher, supra* note 4.

[11] 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.403.

[12] *James M. Frasher, supra* note 4.

[13] *John D. Jackson, supra* note 5.

The Board finds that the Office considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment and age and employment qualifications, in determining that the position of administrative clerk represented his wage-earning capacity.[14] The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of administrative clerk and that such a position was reasonably available within the general labor market of appellant's commuting area. The Office therefore properly determined that the position of administrative clerk reflected appellant's wage-earning capacity and using the *Shadrick* formula,[15] reduced his compensation effective April 17, 2005.[16]

LEGAL PRECEDENT -- ISSUE 2

Section 10.606(b)(2) of Office regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.[17] Section 10.608(b) provides that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[18] Evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case.[19] Likewise, evidence that does not address the particular issue involved does not constitute a basis for reopening a case.[20]

Once the Office has made a determination of an employee's wage-earning capacity, a modification of such 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. The burden of proof is on the party attempting to show a modification of the wage-earning capacity award.[21] It is, however, well established that either a claimant or the Office may seek to modify a formal loss of wage-earning capacity determination and such a request is not a request for review under 5 U.S.C. § 8128. It is a request for additional compensation.[22]

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[14] *James M. Frasher, supra* note 4.

[15] *Supra* note 11.

[16] *James Smith*, 53 ECAB 188 (2001).

[17] 20 C.F.R. § 10.606(b)(2).

[18] 20 C.F.R. § 10.608(b).

[19] *Helen E. Paglinawan*, 51 ECAB 591 (2000).

[20] *Kevin M. Fatzer*, 51 ECAB 407 (2000).

[21] *Thaddeus J. Spevack*, 53 ECAB 474 (2002).

[22] *Gary L. Moreland*, 54 ECAB 638 (2003).

ANALYSIS -- ISSUE 2

The Board initially finds that in its September 28, 2005 decision, the Office properly denied appellant's August 10, 2005 request for reconsideration. With this request, appellant submitted no new argument but merely reiterated his contention that he was physically incapable of performing the selected position. He thus did not allege or demonstrate that the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by the Office. Consequently, appellant was not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).[23]

With respect to the third above-noted requirement under section 10.606(b)(2), while appellant submitted a May 25, 2005 report in which Dr. Lamb diagnosed chronic low back pain and failed IDET, a June 27, 2005 lumbar spine MRI scan and an August 4, 2005 report in which Dr. Alexander noted appellant's medical history, provided examination findings, diagnosed chronic low back pain and recommended surgery, none of these reports provided any opinion regarding appellant's ability to perform the duties of the selected position or, for that matter, any opinion whatsoever regarding his capacity for work.

The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case[24] and the evidence appellant submitted with his August 10, 2005 reconsideration request is not relevant as to whether he had the capacity to earn wages as an administrative clerk. Appellant therefore did not submit relevant and pertinent new evidence not previously considered by the Office and the Office properly denied his August 10, 2005 reconsideration request.[25]

Regarding the October 27, 2005 Office decision, as noted either a claimant or the Office may seek to modify a formal loss of wage-earning capacity determination.[26] The Board finds that the Office improperly characterized appellant's October 12, 2005 letter as a request for reconsideration as he submitted evidence relevant to his capacity to work. With his request, appellant submitted an October 12, 2005 treatment note in which Dr. Lamb advised that appellant could work light duty for only four hours a day. On a Texas workers' compensation work status report, the physician advised that appellant could work light duty a maximum of 4 hours per day with a 5 minute break per hour, no driving heavy equipment and a lifting restriction of 20 pounds.

The Board finds that although appellant used the term "reconsideration" in his October 12, 2005 correspondence, it is evident that he is seeking modification of the April 11, 2005 loss of wage-earning capacity determination. It is well established that either a claimant or

[23] 20 C.F.R. § 10.606(b)(2).

[24] *David J. McDonald*, 50 ECAB 185 (1998).

[25] *Helen E. Paglinawan, supra* note 19.

[26] *Thaddeus J. Spevack, supra* note 21.

the Office may seek to modify a formal loss of wage-earning capacity determination.[27] The Board finds that the Office improperly characterized appellant's October 12, 2005 letter as a request for reconsideration subject to the requirements of section 10.606(b)(2) of Office regulations. As appellant requested modification of the April 11, 2005 loss of wage-earning capacity determination and submitted relevant evidence with his request, he is entitled to a merit decision on that issue. The October 27, 2005 decision will therefore be vacated and the case remanded to the Office. On remand, the Office shall develop the record as necessary and issue a *de novo* decision regarding appellant's loss of wage-earning capacity.

CONCLUSION

The Board finds that the Office met its burden of proof in reducing appellant's wage-earning capacity effective April 17, 2005, based on his capacity to earn wages in the constructed position of administrative clerk and properly denied his August 10, 2005 request for reconsideration. The Board, however, finds that the Office improperly reviewed appellant's October 12, 2005 letter as a request for a merit review pursuant to section 8128(a) of the Act.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 28 and April 11, 2005 be affirmed. The decision dated October 27, 2005 is vacated and the case is remanded to the Office for proceedings consistent with this opinion of the Board.

Issued: April 19, 2006
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

[27] *Gary L. Moreland, supra* note 22.