United States Department of Labor
Employees' Compensation Appeals Board

JOHN D. MYRTER, JR., Appellant	)	
	)	**Docket No. 05-1165**
and	)	**Issued: January 12, 2006**
DEPARTMENT OF THE AIR FORCE, AIR NATIONAL GUARD, Sacramento, CA, Employer	)	

Appearances:
John D. Myrter, Jr., 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 May 3, 2005 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decisions dated December 3, 2004 and March 9, 2005, adjusting his compensation based on his ability to earn wages as a volunteer coordinator. 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 met its burden of proof to reduce appellant's compensation benefits based on his capacity to earn wages as a volunteer coordinator.

FACTUAL HISTORY

On April 29, 1992 appellant, a 31-year-old electronics communication technician, filed an occupational disease claim alleging that on March 20, 1992 he sustained tendinitis in his right arm as a result of shoveling and trench clearing. Appellant's claim was accepted for bilateral arm synovitis, a psychic factor, bilateral epicondylitis, left elbow surgery, right elbow surgery

and implantation of the spinal stimulator. He lost intermittent time from work and stopped working in 1993.

On July 2, 1999 appellant was evaluated by Dr. Richard Talbott, a Board-certified orthopedic surgeon, for a second opinion. In a report dated July 26, 1999, he indicated that appellant had no residuals from his accepted work-related injury. Dr. Talbott opined that appellant was physically able to perform his date-of-injury job without restrictions.

By letter dated December 20, 1999, Dr. Jay D. Law, appellant's treating Board-certified neurosurgeon, submitted comments with regard to Dr. Talbott's report. Dr. Law noted that appellant's pain responded to sympatholytic blocks. He believed appellant was still in pain as he agreed to two spinal cord stimulators. Dr. Law concluded that the diagnosis of reflex sympathetic dystrophy was supported by the response to the sympathic blocks.

In order to resolve a conflict between Dr. Law and Dr. Talbott with regard to whether appellant had any residuals from his accepted injury, the Office referred appellant to Dr. Herbert Maruyama, a Board-certified orthopedic surgeon. In a report dated April 17, 2000, he indicated that appellant's surgeries to the lateral aspects of the elbows resulted in some permanent residuals; but surgery had not weakened the elbows or compromised the extensor function at the elbows. Dr. Maruyama noted that the residuals produced the discomfort appellant was experiencing in and around the lateral aspect of the elbows, but that this discomfort did not preclude the functional capacity of the elbow joints. He opined that appellant could perform gainful work with his upper extremities, "limiting lifting to perhaps 50 pounds periodically." Dr. Maruyama noted that a period of reconditioning was needed. He limited repetitive movement of the wrists and elbows to 1.5 to 2 hours per workday, with periodic rest periods. Dr. Maruyama stated that "[T]he fact that he had some relief from the pain with the various treatment programs may suggest a sympathetic system mediated pain, but I do not believe a definitive diagnosis of reflex sympathetic dystrophy has been confirmed." He noted that there was no objective evidence to suggest reflex sympathetic dystrophy. Dr. Maruyama did not believe that appellant had reflex sympathetic dystrophy as a result of the injury of 1992.

Appellant returned to part-time work as a teacher on October 1, 2001. By letter dated February 28, 2003, the Office informed him that his compensation was being reduced by his earning effective March 23, 2003 and would continue at that level until his medical condition changed or until rehabilitation lead to an increased earning capacity. The Office noted that his part-time position did not fairly and reasonably represent appellant's wage-earning capacity. His compensation was reduced effective March 23, 2003.

A vocational rehabilitation plan was prepared on April 22, 2003. In a November 10, 2003 report, the rehabilitation counselor noted available job openings for a volunteer coordinator.

In a February 18, 2004 report, Dr. Timothy J. Poate, a Board-certified internist, indicated that appellant had reflex sympathetic dystrophy involving both of his upper extremities. He noted that the initiating factor was a past history of epicondylitis and that appellant "suffers from quite debilitating pain and requires multiple medications for pain control as well as an antidepressant."

In a report dated September 29, 2004, a vocational rehabilitation counselor recommended the job of volunteer coordinator, with weekly wages of $514.80, as suitable to appellant's limitations. He made his recommendation based on appellant's experience and the weight of the medical evidence. On October 7, 2004 the Office issued a notice of proposed reduction of compensation based on appellant's ability to earn wages as a volunteer coordinator at the rate of $514.80 per week. By letter dated October 14, 2004, appellant responded to the proposed reduction of compensation noting, *inter alia*, that he wanted to pursue a career in teaching, that he was a hard worker and that there were no volunteer coordinator positions available that would pay a salary of $514.80 a week.

In a November 23, 2004 report, the vocational rehabilitation counselor reviewed the work restrictions placed on appellant by Dr. Poate and Dr. Maruyama, his educational and work history and the results of his vocational testing. The vocational counselor concluded that appellant was capable of working as a volunteer coordinator with a wage-earning capacity between $22,755.20 and $29,390.40 per year. He noted that both full-time and part-time positions were available and that these positions paid between $10.94 and $14.13 per hour.

In a decision dated December 3, 2004, the Office reduced appellant's monthly compensation based on his ability to earn $514.80 per week in the constructed position of a volunteer coordinator. On January 20, 2005 he requested reconsideration, noting his disagreement with the availability of full-time positions as volunteer coordinator. Appellant also submitted a September 3, 1998 report by Dr. Law, who indicated that he had reflex sympathetic dystrophy afflicting both arms and was disabled. He indicated that appellant would not be trainable in any useful trade.

By decision dated March 9, 2005, the Office denied modification of the December 3, 2004 decision.

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 reasonably 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, qualification for other employment, the availability of suitable employment and other factors and circumstances which may affect wage-earning capacity in his disabled condition.[3]

[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).

In situations where there are 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 on a proper factual background, must be given special weight.[4]

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.[5] Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.[6]

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 service.[7] Finally, application of the principles set forth in *Albert C. Shadrick*[8] will result in the percentage of the employee's loss of wage-earning capacity.[9]

ANALYSIS

Dr. Maruyama, the impartial medical examiner, was selected to resolve a conflict in medical opinion between appellant's treating neurosurgeon, Dr. Law, and the second opinion specialist Dr. Talbott. He reported that, although appellant had some residuals from his surgeries, he was able to perform gainful employment within certain physical restrictions. In a February 18, 2004 report, Dr. Poate noted that appellant experienced pain. However, in a February 16, 2004 duty status report, he indicated that appellant could work eight hours a day within specified limitations. The Office determined that appellant could perform the physical requirements of the selected position based on the reports of Dr. Maruyama and Dr. Poate.

The Board finds that there is no recent, rationalized medical evidence in the record supporting that appellant is capable of performing the duties required for the position of

[4] *Manuel Gill*, 52 ECAB 282 (2001).

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

[6] *John D. Jackson*, 55 ECAB ____ (Docket No. 03-2281, issued April 8, 2004).

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

[8] 5 ECAB 376 (1953), codified at 20 C.F.R. § 10.430 (d)-(e).

[9] *James M. Frasher, supra* note 7.

volunteer coordinator. A wage-earning capacity determination must be based on a reasonably current medical evaluation.[10] Dr. Maruyama's report was dated April 17, 2000. The Office's determination as to appellant's wage-earning capacity was made in a decision dated December 3, 2004, over four years after the April 17, 2000 report. As Dr. Maruyama's report was not reasonably current, it cannot be utilized in determining appellant's abilities on December 3, 2004. Furthermore, Dr. Poate's report does not constitute a rationalized opinion as it does not provide a detailed description of appellant's condition. The Office, therefore, failed to meet its burden of proof to establish that the position of volunteer coordinator represented appellant's wage-earning capacity and failed to properly reduce his compensation benefits.

CONCLUSION

The Board finds that the Office failed to meet its burden of proof in reducing appellant's wage-earning capacity based on his ability to earn wages in the constructed position of volunteer coordinator as there is no current medical evidence supporting its finding that appellant was capable of performing the duties of this position.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 9, 2005 and December 3, 2004 are reversed.

Issued: January 12, 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

[10] *See William F. Moss,* Docket No. 04-24 (issued August 19, 2004); *see also Keith Hanselman,* 42 ECAB 680, 687 (1991); *Ellen G. Trimmer,* 32 ECAB 1878, 1882 (1981); and *Samuel J. Russo,* 28 ECAB 43, 47 (1976).