United States Department of Labor
Employees' Compensation Appeals Board

THADDEUS A. KNIGHT, Appellant	)	
and	)	**Docket No. 06-503**
	)	**Issued: July 11, 2006**
DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, Miami, FL, Employer	)	

Appearances:
Thaddeus A. Knight, 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

JURISDICTION

On December 29, 2005 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated January 11, 2005 denying modification of a loss of wage-earning capacity decision. Appellant also timely appealed a September 14, 2005 decision denying his request for a review of the written record as untimely. Additionally, he also timely appealed the Office's denial of his request for merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits and nonmerits of this case.

ISSUES

The issues are: (1) whether the Office properly determined that appellant's actual earnings as an insurance investigator fairly and reasonably represented his wage-earning capacity effective October 11, 2004; (2) whether the Office properly denied appellant's February 16, 2005 request for a review of the written record on the grounds that it was untimely filed; and (3) whether the Office properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On May 14, 2001 appellant, a 40-year-old special agent, filed a traumatic injury claim alleging that on April 27, 2001 he sustained injuries to his right knee, left wrist, right ankle and lower back due to an automobile accident. The Office accepted the claim for right knee open wound, lumbar sprain/strain, right ankle strain/sprain and left wrist strain/sprain, which was subsequently expanded to include closed fracture of the right metatarsal and right chondromalacia of the patella. The Office authorized right knee arthroscopic surgery, which was performed on November 12, 2002, and right ankle arthroscopic surgery, which was performed on January 14, 2003. By letter dated January 27, 2003, the Office placed appellant on the periodic rolls for temporary total disability. On June 4, 2003 appellant had metatarsophalangeal arthroscopic surgery.

In a January 14, 2004 report, Dr. D. Barry Lotman, a second opinion Board-certified orthopedic surgeon, diagnosed right ankle degenerative joint disease, right foot neuroma superficial peroneal nerve, right ankle arthroscopic surgery for talar fracture, right knee patellofemoral subluxation and probable lumbosacral spine facet joint irritation. In an attached work capacity evaluation form (OWCP-5c), Dr. Lotman indicated that appellant had permanent restrictions, but was capable of working. The restrictions included walking, standing, twisting, stooping/bending, lifting, kneeling, squatting and climbing.

In a report dated February 24, 2004, Dr. Michael A. Abrahams, an attending Board-certified orthopedic surgeon, diagnosed right knee and ankle arthroscopic surgery, right foot surgery and chronic lumbar strain. He reported that appellant was "unable to stand or walk for any prolonged interval." A physical examination revealed restricted range of motion in the right ankle, 70 to 90 degrees straight leg raising/forward flexion, and 0 to 130 degrees range of motion in the right knee. In addition, the examination revealed "joint line tenderness with patellofemoral irritation" and atrophy of the quadriceps of the right knee. In concluding, Dr. Abrahams opined that appellant "remains multiply symptomatic and significantly restricted" due to his inability "to do any standing or walking."

On April 19, 2004 the Office referred appellant to Dr. Terrence J. Barry, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Dr. Abrahams and Dr. Lotman concerning appellant's work restrictions and the extent of his remaining residuals.

In a report dated May 12, 2004, Dr. Patrick J. Barry, an associate of Dr. Terrence J. Barry, based upon a physical examination, review of the medical record and statement of accepted facts, diagnosed acute low back strain, which was essentially resolved; traumatic patella chondromalacia; right knee lateral tracking syndrome; patella osteoporosis; right foot Morton's neuroma first web space; asymptomatic status post arthroplasty great toe for hallux rigidus and right ankle chondromalacia talar dome. He reported that appellant had "good ankle with full motion," and his back was in good order. However, Dr. Patrick J. Barry noted that "the main problem is the distal part of his foot with some involvement of the knee." With regards to appellant's work capability, he opined that appellant could "be returned to full duty with several months of management."

In a June 4, 2004 work capacity evaluation form (OWCP-5c), Dr. Patrick J. Barry indicated that appellant was capable of working an 8-hour day with restrictions including pushing up to 50 pounds for 1 hour per day; pulling up to 50 pounds for up to 1 hour per day; lifting up to 50 pounds for up to 5 hours per day; squatting and kneeling up to 3 hours per day and climbing up to 2 hours per day.

On July 28, 2004 appellant was referred for vocational rehabilitation based upon Dr. Patrick J. Barry's conclusion that he was capable of working with restrictions.

On August 24, 2004 the Office of Personnel Management (OPM) approved appellant's disability retirement application. On September 28, 2004 he elected to receive benefits under the Civil Service Retirement Act/Federal Employees Retirement System effective November 1, 2004.[1]

On October 29, 2004 the Office received a copy of appellant's wage statement for the position of claims investigator with St. Paul's Traveler's Insurance. The Office noted that appellant began the position on October 11, 2004 with weekly wages of $1,136.25.

By decision dated January 11, 2005, the Office determined that appellant's wages as an insurance investigator with weekly wages of $1,153.85 fairly and reasonably represented appellant's wage-earning capacity and reduced appellant's compensation accordingly.[2]

In a letter dated January 20, 2005, appellant indicated that he wished to "appeal" the January 11, 2005 decision and requested to receive benefits under the Federal Employees' Compensation Act instead of OPM.

In a letter dated March 7, 2005, appellant again requested to "appeal" the January 11, 2005 loss of wag-earning capacity decision and that no response to his January 20, 2005 letter had been received.

On March 25, 2005 the Office received appellant's March 7, 2005 request for a review of the written record by an Office hearing representative.

In a letter dated March 28, 2005 and received on March 31, 2005, appellant requested to receive benefits under the Act and to receive vocational rehabilitation. In concluding he indicated that he elected to receive benefits under the Act rather than under OPM.

By decision dated September 14, 2005, the Office's Branch of Hearings and Review denied appellant's request for a review of the written record. The Office determined that his

[1] On January 10, 2005 the Office sent a letter to OPM advising that appellant's health benefits payments were no longer being deducted due to his transfer to receiving benefits under OPM effective October 31, 2004.

[2] Subsequently the Office issued a June 10, 2005 overpayment decision which found that there was an overpayment in the amount of $878.25. Appellant was found to be without fault in the creation of the overpayment and waiver of repayment was denied. In his appeal to the Board, appellant specifically refers to the January 11, 2005 loss of wage-earning capacity decision and the failure to consider his preexisting condition in its determination. Appellant does not refer to the overpayment decision nor does he mention any dissatisfaction with the overpayment determination.

request, which was postmarked March 7, 2005, was untimely because it was not made within 30 days of the January 11, 2005 decision. It further indicated that it had exercised its discretion and further denied appellant's request for the reason that the relevant issue of the case could be addressed by requesting reconsideration and submitting additional evidence.

By decision dated October 18, 2005, the Office denied appellant's request for a merit review of the January 11, 2005 decision.

LEGAL PRECEDENT -- ISSUE 1

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages.[3] Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.[4]

Section 8115(a) of the Act[5] provides that, if actual earnings of the employee do not fairly and reasonably represent his wage-earning capacity or if the employee has no actual earnings, the wage-earning capacity as appears reasonable under the circumstances is determined with due regard to: (1) the nature of the injury; (2) the degree of physical impairment; (3) his usual employment; (4) age; (5) his qualifications for other employment; (6) the availability of suitable employment; and (7) other factors or circumstances which may affect wage-earning capacity in his disabled condition.[6]

The Office's procedure manual states that, when an employee cannot return to the date-of-injury job because of disability due to work-related injury or disease, but does return to alternative employment, the claims examiner must determine whether the earnings in the alternative employment fairly and reasonably represent the employee's wage-earning capacity.[7] The procedure manual provides in relevant part as follows:

> "*Factors Considered.* To determine whether the claimant's work fairly and reasonably represents his or her wage-earning capacity, the claims examiner should consider whether the kind of appointment and tour of duty … are at least

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[3] *See* 20 C.F.R. §§ 10.403, 10.520.

[4] *Id.*; *see Katherine T. Kreger*, 55 ECAB ___ (Docket No. 03-1765, issued August 13, 2004).

[5] 5 U.S.C. § 8115(a).

[6] 5 U.S.C. § 8115(a); *Sherman Preston*, 56 ECAB ___ (Docket No. 05-721, issued June 20, 2005); *Loni J. Cleveland*, 52 ECAB 171 (2000).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (July 1997). *See Connie L. Potratz-Watson*, 56 ECAB ___ (Docket No. 03-1346, issued February 8, 2005).

equivalent to those of the job held on the date of injury. Unless they are, the [claims examiner] may not consider the work suitable."[8]

The formula for determining loss of wage-earning capacity based on actual earnings,[9] which developed in *Albert C. Shadrick*,[10] has been codified by regulation at 20 C.F.R. § 10.403.[11] Subsection (d) of this regulation provides that the employee's wage-earning capacity in terms of percentage is obtained by dividing the employee's actual earnings by the current pay rate for the job held at the time of injury.[12]

In situations where there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist for the purpose of resolving the conflict, pursuant to section 8123(a) of the Act.[13] Impartial medical specialists are selected by a strict rotational system to eliminate any inference of bias or partiality.[14]

ANALYSIS -- ISSUE 1

In the instant case the Office, on April 19, 2004, referred appellant to Dr. Terrence J. Barry to resolve the conflict in the medical opinion evidence between Dr. Abraham, an attending Board-certified orthopedic surgeon, and Dr. Lotman, a second opinion Board-certified orthopedic surgeon, with regard to appellant's work restrictions and the extent of his remaining residuals. However, the physician who performed the examination was Dr. Patrick J. Barry and not Dr. Terrence J. Barry. Because the Office did not select Dr. Patrick J. Barry to act as the impartial specialist, his opinion could not be afforded special weight or be used to resolve the conflict.[15] As Dr. Patrick J. Barry was an associate of Dr. Terrence J. Barry and not the impartial medical specialist selected by the Office following its established procedures for selecting on a rotational basis,[16] the Board finds that the conflict in medical opinion remains unresolved[17] as an

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[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment*: *Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (July 1997).

[9] *Hayden C. Ross*, 55 ECAB ___ (Docket No. 04-136, issued April 7, 2004).

[10] 5 ECAB 376 (1953).

[11] 20 C.F.R. § 10.403.

[12] 20 C.F.R. § 10.403(d).

[13] 5 U.S.C. § 8123(a) states in pertinent part: If there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.

[14] *LaDonna M. Andrews*, 55 ECAB ___ (Docket No. 03-1573, issued January 30, 2004); *Miguel A. Muniz*, 54 ECAB 217 (2002); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b) (May 2003).

[15] *Saundra B. Williams*, 53 ECAB 334 (2002).

[16] *William C. Iadipaolo,* 39 ECAB 530 (1988).

[17] *Id.*

opinion of an associate of the physician selected as the impartial medical specialist cannot be accorded special weight under 5 U.S.C. § 8123(a).[18] Because there remains an unresolved conflict in medical opinion with regards to appellant's work restrictions and the extent of his remaining residuals, the Board finds that the Office did not meet its burden of proof to issue a loss of wage-earning capacity decision.

CONCLUSION

The Board finds that the Office did not meet its burden of proof to reduce appellant's compensation. The case will be remanded to the Office for further development of the medical evidence and for referral to an impartial medical specialist to resolve the conflict of medical opinion.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 11, 2005 is reversed.[19]

Issued: July 11, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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[18] *Leonard W. Waggoner,* 37 ECAB 676 (1986).

[19] In view of the disposition of the first issue, the Board finds that it is unnecessary to address the second and third issues in this case.