United States Department of Labor
Employees' Compensation Appeals Board

RUSSELL D. RULEY, Appellant	)	
and	)	**Docket No. 05-1901**
	)	**Issued: June 8, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Denver, CO, Employer	)	

Appearances:
Gregory A. Hall, Esq., for the appellant
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 September 22, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' September 22, 2004 and June 24, 2005 decisions concerning his wage-earning capacity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly determined that the position of modified letter carrier fairly and reasonably reflected appellant's wage-earning capacity effective September 22, 2004, the date that it adjusted his compensation.

FACTUAL HISTORY

On January 28, 1991 appellant, then a 34-year-old letter carrier, filed a traumatic injury claim alleging that he sustained a back injury at work on January 25, 1991. He indicated that he observed his postal vehicle moving and had to "jump" to the vehicle to prevent it from moving

away. Appellant's regular hours prior to his injury were 6:30 a.m. to 3:00 p.m. on Tuesday through Saturday.[1]

The Office accepted that appellant sustained a low back strain and herniated nuclei pulposus (HNP) at L4-5 and L5-S1 (in a spine with a preexisting degenerative condition).[2] In July 1991, appellant underwent fusion and decompression surgery at L4-5 and L5-S1 and in October 1997 he had a spinal cord stimulator implanted. Both procedures were authorized by the Office as related to his January 25, 1991 injury.[3]

Appellant periodically worked in various limited-duty positions for the employing establishment. He received treatment from several attending physicians for his physical and emotional conditions, including Dr. Christopher B. Ryan, a Board-certified physical medicine and rehabilitation physician and Dr. Bert S. Furmansky, a Board-certified psychiatrist.[4]

In a report dated June 18, 2001, Dr. Ryan stated that appellant reported that on January 25, 1991 "he pulled himself forcefully into a jeep that was rolling, suffering, probably among other things, a forced rotation injury of his trunk." He diagnosed chronic low back, neurogenic pain (not now seen to a significant degree), chronic pain syndrome and anxiety and depression. Dr. Ryan stated that appellant could perform limited-duty work for four hours per day with a goal of gradually returning to full-time work.

In February 2003, appellant returned to limited-duty work for the employing establishment for four hours per day. The work was mostly sedentary in nature and included such duties as answering the telephone, filing documents and working on the computer. Appellant initially worked four hours per day for five days per week, but in June 2003 he changed to working three hours per day for four days per week. In August 2003, he changed to working four hours per day for four days per week. The record contains form reports in which Dr. Ryan indicated that appellant could work these varying numbers of hours per week with some work restrictions such as no lifting more than 10 pounds and sitting "as tolerated." He consistently indicated that, beginning in August 2003, appellant could only work four hours per day for four days per week.

The Office referred appellant to Dr. Glenn D. Kelley, a Board-certified physical medicine and rehabilitation physician. In a September 4, 2003 report, Dr. Kelley stated that on examination appellant exhibited decreased motion of the lumbar spine and decreased strength in

[1] Appellant stopped work on January 28, 1991.

[2] The Office later accepted that appellant sustained employment-related "displacement of an intervertebral disc, major depressive disorder, recurrent episode, moderate and pain disorder."

[3] In July 2000, appellant had hardware removed from the July 1991 fusion surgery and in May 2001 he had the spinal cord stimulator removed.

[4] Between May 1995 and April 1999, appellant performed limited-duty work for the employing establishment for four hours per day. After another period of work stoppage, he began working in January 2001 in another limited-duty position for four hours per day. He stopped work again in January 2002. Prior to his return to work, appellant had been participating in a vocational rehabilitation program.

the lower extremities. He posited that appellant's current work restrictions were appropriate and recommended that the number of hours he worked per week be slowly increased.

The Office also referred appellant to Dr. Michael Shrift, a Board-certified psychiatrist, for further evaluation of his emotional condition. In an August 8, 2003 report, he diagnosed pain disorder associated with both psychological factors and a general medical condition, recurrent major depressive disorder of a moderate nature and opioid dependence in full, sustained remission. In an August 2, 2003 report, Dr. Shrift indicated that appellant could perform limited-duty work for four hours on a given workday.

The Office then referred appellant to Dr. Jeffrey M. Hrutkay, a Board-certified orthopedic surgeon.[5] In a report dated December 10, 2003, he diagnosed failed back syndrome with chronic low back pain and intermittent left posterior thigh pain. Dr. Hrutkay noted that appellant was working 16 hours per week and stated: "It would be the goal to gradually increase the number of working hours per week…."[6]

In April 2004, both Dr. Ryan and Dr. Furmansky recommended that appellant begin a trial period of increasing his work hours to 20 hours per week.[7]

On July 19, 2004 the employing establishment offered appellant a "modified letter carrier" position, which required working four hours per day for five days per week. The position restricted appellant from lifting more than 10 pounds and included such duties as restocking supplies, filing documents and preparing mail for dispatch. Appellant accepted the position and on July 21, 2004 he started working four hours per day for five days per week.

By decision dated September 22, 2004, the Office adjusted appellant's compensation effective September 22, 2004 based on its determination that the modified letter carrier position, which appellant performed for 20 hours per week, fairly and reasonably reflected his wage-earning capacity. The Office stated:

> "On the date you were injured, you were employed in a full-time capacity. The medical evidence currently supports that you are only capable of part-time employment. The medical report dated July 14, 2004 from Dr. Christopher Ryan

[5] The Office referred appellant for an impartial medical examination, but there was no clear conflict in the medical evidence at the time of the referral. Section 8123(a) of the Federal Employees' Compensation Act provides in pertinent part: "If there is 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." 5 U.S.C. § 8123(a). When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence. *William C. Bush*, 40 ECAB 1064, 1975 (1989).

[6] In a supplemental report dated January 13, 2004, Dr. Hrutkay provided additional details regarding his recommendation that appellant gradually increase his work hours.

[7] Appellant increased his hours to 20 hours for a brief period in May 2004 but returned to 16 hours per week after experiencing increased symptoms.

supports a finding that your current employment fairly and reasonably represents your earning capacity."[8]

Appellant requested a hearing before an Office hearing representative which was held on April 19, 2005. Appellant's attorney argued that the modified letter carrier position was a make-shift position of a temporary nature and therefore did not fairly and reasonably reflect appellant's wage-earning capacity.[9]

By decision dated and finalized June 24, 2005, the Office hearing representative affirmed the Office's September 22, 2004 decision. The Office hearing representative discussed and rejected the claim that the modified letter carrier position was a make-shift position of a temporary nature.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[10] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[11]

Section 8115(a) of the Act provides that the "wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity."[12] The Board has stated: "Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure."[13]

The Office's procedure manual provides guidelines for determining wage-earning capacity based on actual earnings:

> "a. Factors considered. To determine whether the claimant's work fairly and reasonably represents his or her WEC [wage-earning capacity], the CE [claims examiner] should consider whether the kind of appointment and tour of duty (see FECA PM 2.900.3) are at least equivalent to those of the job held on date of injury. Unless they are, the CE may not consider the work suitable.

[8] The record does not contain a July 14, 2004 report from Dr. Ryan, but it does contain a July 15, 2004 report in which Dr. Ryan indicated that appellant could perform limited-duty work for 20 hours per week.

[9] Appellant continued to submit reports from attending physicians, which indicated that his condition had not significantly changed.

[10] *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

[11] *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

[12] 5 U.S.C. § 8115(a).

[13] *Floyd A. Gervais*, 40 ECAB 1045, 1048 (1989); *Clyde Price*, 32 ECAB 1932, 1934 (1981).

"For instance, reemployment of a temporary or casual worker in another temporary or casual (USPS) position is proper, as long as it will last at least 90 days and reemployment of a term or transitional (USPS) worker in another term or transitional position is likewise acceptable. However, the reemployment may not be considered suitable when:--

> (1) The job is part-time (unless the claimant was a part-time worker at the time of injury) or sporadic in nature;
>
> (2) The job is seasonal in an area where year-round employment is available….
>
> (3) The job is temporary where the claimant's previous job was permanent."[14]

ANALYSIS

The record indicates that appellant's date-of-injury job as a letter carrier was a full-time job for at least 40 hours per week.[15] The actual earnings in this case were based on a part-time position, at 20 hours per week, as a modified letter carrier. As the Office procedure manual indicates, in situations where an employee is working full time when injured and is reemployed in a part-time position, a formal wage-earning capacity determination is generally not appropriate. The Board has held that the Office must address the issue and explain why a part-time position is suitable for a wage-earning capacity determination based on the specific circumstances of the case.[16] The Office did not address this issue in its September 22, 2004 and June 24, 2005 decisions. The decisions make a finding that the modified letter carrier position represented appellant's wage-earning capacity, without clearly explaining why the actual earnings were based on a part-time position and appellant was not a part-time employee when injured.[17] The Board finds that the Office failed to meet its burden of proof in determining appellant's wage-earning capacity.

CONCLUSION

The Board finds that the Office failed to explain why it was appropriate to use actual earnings in a part-time position when the evidence indicated that appellant was a full-time employee at the time of injury and therefore it improperly determined that the modified letter carrier position fairly and reasonably reflected his wage-earning capacity.

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

[15] Appellant's regular hours prior to his injury on January 25, 1991 were 6:30 a.m. to 3:00 p.m. on Tuesday through Saturday.

[16] *Connie L. Potratz-Watson*, 56 ECAB ____ (Docket No. 03-1346, issued February 8, 2005).

[17] The Office briefly noted that the medical evidence showed appellant was only capable of part-time employment, but it did not provide any further explanation of why it was appropriate to base appellant's wage-earning capacity on a part-time position.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' June 24, 2005 and September 22, 2004 decisions are reversed.

Issued: June 8, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board