United States Department of Labor
Employees' Compensation Appeals Board

ANICETO H. MORENO, Appellant	)	
and	)	**Docket No. 05-449**
	)	**Issued: March 21, 2006**
DEPARTMENT OF THE ARMY,	)	
Fort Hood, TX, Employer	)	

Appearances:
James A. Endicott, Jr., 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 10, 2004 appellant, through his attorney, filed a timely appeal of the September 14 and March 5, 2004 merit decisions of the Office of Workers Compensation Programs, which denied modification of a loss of wage-earning capacity determination. 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 met its burden of proof to reduce appellant's compensation benefits based on its determination that the constructed position of case aide represented his wage-earning capacity; and (2) whether appellant established that the May 13, 2002 loss of wage-earning capacity determination should be modified.

FACTUAL HISTORY

On August 3, 1992 appellant, then a 36-year-old forklift operator, filed an occupational disease claim for carpal tunnel syndrome which he alleged developed in the course of his federal

duties. The Office accepted the claim for bilateral carpal tunnel syndrome. Appellant returned to work in a limited-duty position, which he worked until June 1999 when the employing establishment could no longer accommodate his work restrictions. Thereafter, the Office placed appellant on the periodic compensation rolls in receipt of temporary total disability. Rehabilitation services were started in July 1999.

In June 2000, following an unsuccessful training program, the vocational rehabilitation counselor provided placement services for the positions of computer aide design technician, case aide or illustrator. However, appellant was not successful in obtaining employment.

In a July 5, 2001 letter, Dr. Wallace E. Lowry, Jr., a Board-certified orthopedic surgeon, advised that his December 17, 1999 work restrictions remained in effect and were permanent. On December 17, 1999 Dr. Lowry advised that appellant had bilateral carpal tunnel syndrome, as confirmed by nerve conduction velocity studies and was able to do light-duty work. Appellant's light-duty work restrictions were specified as lifting up to 30 pounds, pushing up to 45 pounds, occasional bending, squatting, kneeling and crawling and no climbing.

In a March 20, 2002 report, the vocational rehabilitation counselor verified that appellant was physically and vocationally qualified for the positions of case aide, teacher aide, general clerk, sales clerk or telemarketer. He provided current wage information and job availability information for these positions. The description of the position of case aide from the Department of Labor, *Dictionary of Occupational Titles* (DOT) 195.397-010 is noted as follows:

> "Performs community work on simpler aspects of programs or cases and assists in providing services to clients and family members, under close and regular supervision and tutorage of CASEWORKER or CASEWORK SUPERVISOR. Assists in locating housing for displaced individuals and families. Monitors free, supplementary meal program administered by agencies for children and youth from low-income families to ensure cleanliness of facility and that eligibility guidelines are met for persons receiving meals. Assists elderly clients in preparation of forms, such as tax and rent refund forms. Accompanies elderly clients on visits to social, charitable and government agencies to assist clients with their problems. Submits to and reviews reports and problems with superior. May be designated according to clients serviced as Senior Service Aide (social services); Youth Nutritional Monitor (social services)."

The case aide position is described as having a light strength level with an occasional lifting of 0 to 20 pounds, with no climbing, balancing, stooping, kneeling, crouching, crawling, feeling, taste/smelling, far acuity, accommodation, color vision, field of vision or depth perception. The position requires an occasional, up to 1/3 of the time, amount of reaching, handling, fingering and near acuity and frequent, or up to 1/3 to 2/3 of the time, of talking and hearing. The vocational rehabilitation counselor also noted that the state employment service had confirmed that the position was performed in sufficient numbers so as to make it reasonably

available to appellant in his commuting area and the position had a mean annual salary of $18,120.00.[1]

On April 12, 2002 the Office advised appellant that it proposed to reduce his wage-loss compensation based on his capacity to earn wages as a case aide at the rate of $348.46 per week. The Office noted that the medical evidence from Dr. Lowry established that he was medically capable of performing the duties of a case aide worker and the rehabilitation counselor found that the position was reasonably available and vocationally suitable. Appellant was provided 30 days to submit additional evidence or argument. No additional evidence was submitted.

By decision dated May 13, 2002, the Office determined that the selected position of case aide represented appellant's wage-earning capacity effective May 19, 2002. The Office found that the position was medically and vocationally suitable and took into consideration such factors as his disability, training, age and experience and the availability of such work in the commuting area where he lived. The Office provided a computation of appellant's wage-earning capacity based on the selected case aide position.

On June 11, 2002 appellant requested an oral hearing, which was held on August 15, 2003. By decision dated November 12, 2003, the Office hearing representative affirmed the May 13, 2002 decision. The hearing representative found that the Office acted appropriately and had followed established procedures in making the determination that the position of case aide represented his wage-earning capacity and therefore the reduction of benefits to reflect this wage-earning capacity was appropriate.

In a February 10, 2004 letter, appellant requested reconsideration and submitted a December 19, 2003 nerve conduction study, which noted that he had a moderate left carpal tunnel syndrome and a mild to moderate right carpal tunnel syndrome. In a January 6, 2004 report, Dr. Lowry noted the history of appellant's injury and involvement in the Office's rehabilitation program. He advised that the repeat nerve conduction velocity tests of December 19, 2003 confirmed the diagnosis of bilateral carpal tunnel syndrome and showed that both the left and right hand and wrist were worse than they were in 1998, with the left side being more symptomatic. Dr. Lowry opined that appellant would benefit from a surgical release of the left carpal tunnel. In a January 13, 2004 report, he repeated his findings and statements contained in the January 6, 2004 report.

By decision dated March 5, 2004, the Office denied modification of the November 12, 2003 decision finding that the medical evidence did not establish appellant's inability to perform the selected position of case aide.

By letter dated August 19, 2004, appellant again requested reconsideration. In an April 9, 2004 report, Dr. Lowry stated that he had advised appellant that it was his opinion that working

[1] The record reflects that the vocational rehabilitation counselor had previously documented placement assistance for the position of case aide.

as a case aide would include caseworker-type work, which would be symptomatically to him and thus appellant would not be able to perform that type of work.

In an April 14, 2004 report, Dr. Lowry advised that he had been provided the work description for a case aide and a caseworker as described by DOT. He stated that the lifting procedures in assisting clients and doing their paperwork were the type of activities that exacerbated the pain and dysesthesia appellant had in his hand/wrist. Dr. Lowry stated that working as a case aide would obviously require helping caseworkers in performing their more extensive duties. He opined that this was not a satisfactory work status for appellant.

By decision dated September 14, 2004, the Office denied modification of the March 5, 2004 decision, finding that the medical evidence was insufficient to modify the wage-earning capacity determination.

The Board notes that oral argument was originally scheduled in this case for December 12, 2005 at 12:00 p.m. at the request of appellant's attorney, it was rescheduled for February 1, 2006 at 11:00 a.m.[2] Neither appellant nor his attorney appeared for the February 1, 2006 oral argument. On February 1, 2006 at 11:59 a.m., the Board received another request to reschedule the oral argument and a brief in support of appeal. The Board denies appellant's second request to reschedule oral argument; thus, the case will proceed for a review of the merits.[3] The Board grants appellant's request to consider his brief on appeal.

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

[2] The Board also informed appellant's attorney that there would be no further rescheduling.

[3] 20 C.F.R. § 501.5(c), 501.6.

[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.

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 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]

Where vocational rehabilitation is unsuccessful, the rehabilitation counselor will prepare a final report, which lists two or three jobs which are medically and vocationally suitable for the employee and proceed with information from a labor market survey to determine the availability and wage rate of the position.[14]

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[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.

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

[11] 5 ECAB 376 (1953).

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

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

[14] *Dorothy Jett*, 52 ECAB 246 (2001).

ANALYSIS -- ISSUE 1

In finding that appellant was physically capable of performing the duties of a case aide as of May 13, 2002, the Office relied on a July 5, 2001 report of Dr. Lowry, an attending physician. He advised that the light-duty restrictions he previously recommended on December 17, 1999 remained in effect. Dr. Lowry opined that, although appellant still had bilateral carpal tunnel syndrome, he was able to do light-duty work. Appellant's physical restrictions included lifting up to 30 pounds, pushing up to 45 pounds, occasional bending, squatting, kneeling and crawling and no climbing. The Board finds that Dr. Lowry's reports establish that appellant was capable of performing the duties of the offered position and that appellant was capable of performing the duties of a case aide as of the May 13, 2002 wage-earning capacity determination. There is no evidence to establish that appellant was medically unable to perform such duties.

As appellant's vocational rehabilitation was unsuccessful, the counselor properly prepared a final report which determined that appellant was able to perform the duties of case aide. Contact with state employment services showed the position was available in sufficient numbers so as to make it reasonably available within his commuting area. The rehabilitation specialist also determined that the annual salary of the position was $18,120.00, provided a job description for the case aide position and confirmed that the position was light duty and consistent with appellant's medical restrictions. A rehabilitation counselor is an expert in the field of vocational rehabilitation and the Office claims examiner may rely on his or her opinion as to whether a job is reasonably available and vocationally suitable.[15] Appellant has not submitted sufficient evidence or argument to show that he could not vocationally or physically perform the case aide position. Dr. Lowry recommended that work limitations be incorporated into the duties of the constructed position. Additionally, the Board notes that the Office provided placement services for the positions of computer aide design technician, case aide and illustrator but, in spite of a very active job placement activity, appellant was not successful in obtaining employment. Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[16] The fact that the rehabilitation counselor is not able to secure a job offer does not establish that the selected position is not reasonably available.[17]

The Board finds that the Office considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment, age and employment qualifications, in determining that the position of hotel clerk represented appellant's wage-earning capacity.[18] Further, the Office properly applied the *Shadrick* formula[19] and codified at 20 C.F.R. § 10.403 in determining appellant's loss of wage-earning capacity.

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[15] *Michael Hughes*, 52 ECAB 387 (2001).

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

[17] *See Marilyn J. Carter*, 49 ECAB 661 (1998).

[18] *See id., Michael Hughes, supra* note 15*; Dorothy Sidwell*, 41 ECAB 857 (1990).

[19] *Albert C. Shadrick, supra* note 11.

The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of case aide and that the position was reasonably available within the general labor market of appellant's commuting area. The Office properly determined that the position of a case aide reflected his wage-earning capacity.

LEGAL PRECEDENT -- ISSUE 2

Once the wage-earning capacity of an injured employee is determined, 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.[20] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[21]

ANALYSIS -- ISSUE 2

Appellant does not claim that he has been retrained or otherwise vocationally rehabilitated and the record does not support such a finding. Rather, he contends that the wage-earning capacity decision should be modified due to a material change in the nature and extent of his injury-related condition.[22]

In January 6 and 13, 2004 reports, Dr. Lowry opined that appellant's bilateral carpal tunnel syndrome condition had worsen from 1998, with the left side more symptomatic than the right side, and recommended a surgical release of the left carpal tunnel. Although he noted that appellant's accepted condition had worsened, Dr. Lowry did not comment on appellant's ability to work. On April 9, 2004 he indicated that the case aide position was not a good choice for appellant as the position would include caseworker-type work, which would be symptomatic to appellant's condition. Dr. Lowry's opinion is of limited probative value. He failed to adequately address how any specific job duties of the case aide position caused or contributed to any worsening of his medical condition. Moreover, although he appears to be under the impression that the case aide position includes caseworker-type work, he fails to specify what duties appellant physically could not perform due to any worsening of the accepted condition.[23] Dr. Lowry did not state that he was modifying the physical restrictions previously recommended.

Dr. Lowry advised that the lifting procedures involved in assisting clients and doing their paperwork could exacerbate appellant's hand/wrist pain and dysesthesia. The case aide position description that accompanied the Office's May 13, 2002 loss of wage-earning determination, as noted, conformed to the restrictions Dr. Lowry set forth on July 5, 2001. These restrictions

[20] *Tamra McCauley*, 51 ECAB 375, 377 (2000).

[21] *Id*.

[22] *Tamra McCauley*, *supra* note 20.

[23] *See generally Melvina Jackson*, 38 ECAB 443, 450 (1987) (discussing the factors that bear on the probative value of medical opinions).

included lifting up to 30 pounds, pushing up to 45 pounds, occasional bending, squatting, kneeling and crawling and no climbing. Even though Dr. Lowry stated that appellant's hand/wrist conditions had worsened, he has not indicated that there was any change in appellant's lifting restrictions since July 5, 2001 nor did he provide a reasoned opinion supporting that appellant's injury-related condition has worsened. The reports fail to address whether appellant has been rendered totally disabled due to a change in the accepted condition. Moreover, Dr. Lowry was not clear that his reports were based on the possibility of future injury.

The Board finds that Dr. Lowry's opinion that the case aide position is not a good choice for appellant is insufficient to establish a material change in appellant's condition or that the original wage-earning capacity decision was erroneous. Appellant, therefore, failed to carry his burden to justify modification of the Office's May 13, 2002 loss of wage-earning capacity determination.

CONCLUSION

The Board finds that the Office properly determined that the constructed position of case aide reflected appellant's wage-earning capacity. The Board further finds that appellant has not met any of the requirements for modification of the Office's May 13, 2002 loss of wage-earning capacity determination.

ORDER

IT IS HEREBY ORDERED THAT the September 14 and March 5, 2004 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 21, 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