United States Department of Labor
Employees' Compensation Appeals Board

DENNIS SPECK, Appellant	)	
and	)	**Docket No. 05-1860**
	)	**Issued: March 3, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Carrollton, TX, Employer	)	

Appearances:
Dennis Speck, 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 September 6, 2005 appellant filed a timely appeal from a February 17, 2005 wage-earning capacity decision and an August 19, 2005 decision of the Office of Workers' Compensation Programs, denying modification of his wage-earning capacity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

ISSUE

The issue is whether the Office properly reduced appellant's compensation effective February 17, 2005 based on the selected position of paralegal.

FACTUAL HISTORY

On April 6, 2002 appellant, then a 53-year-old letter carrier, filed an occupational disease claim alleging that his depression reaction with anxiety was caused by being physically and mentally assaulted at work. The Office accepted his claim for acute post-traumatic stress disorder and depressive disorder and subsequently included a single episode of major

depression.[1] Appellant stopped work on April 22, 2002. He received appropriate medical and wage-loss compensation and eventually was placed on the periodic rolls.

In reports dated October 21, 2002 and April 28, 2003, Susan R. Dorsaneo, Ph.D, a clinical psychologist, advised that appellant was able to work eight hours a day, but not at the employing establishment. He had prior injuries which resulted in chronic mild bilateral carpal tunnel syndrome and chronic mild bilateral shoulder dysfunction and required physical limitations. Dr. Dorsaneo also noted that appellant was unable to drive postal vehicles or do heavy lifting.

In a duty status report dated February 10, 2003, Dr. Peter Polatin, a Board-certified psychiatrist, indicated that appellant could resume work at a sedentary desk job with repetitive hand movement limited to one hour every two hours and in a facility without a workroom floor.

In a December 13, 2003 report, Dr. Dorsaneo indicated that she was closing her practice. She noted that, although appellant made significant progress in overcoming his symptoms of major depression and post-traumatic stress disorder, he might require additional psychotherapy sessions.

In a May 3, 2004 letter, the Office requested that Dr. Dorsaneo provide a current medical report and complete a Form OWCP-5a, work capacity evaluation form. No response was received.

On May 17, 2004 the Office determined that appellant was unable to return to work at the employing establishment and referred him to vocational rehabilitation.

On June 15, 2004 the vocational rehabilitation counselor noted that appellant did not have to undergo vocational testing as he had graduated in December 2003 with honors from a two-year vocational training program through El Centro College as a paralegal. The vocational rehabilitation counselor noted that he had psychiatric/psychological limitations which prevented him from returning to the employing establishment. Appellant had other medical limitations which arose from his neck and back injuries, chronic mild bilateral carpal tunnel syndrome and chronic mild bilateral shoulder dysfunction. Based on appellant's psychiatric/psychological and physical limitations, the vocational counselor conducted job placement efforts from June 15 through October 31, 2004, focusing primarily on light jobs, such as paralegal and accounting clerk/booker positions.

As placement efforts did not result in employment, the vocational rehabilitation counselor identified the position of paralegal as within appellant's knowledge, training and physical capabilities. The position required him to demonstrate research skills of the law, investigate facts and prepare documents to assist lawyers. The position was classified as a light job with a strength level of occasional lifting up to 20 pounds. The physical demands of the position required frequent activity or 1/3 to 2/3 of the time, of reaching, handling, fingering, talking,

[1] In an April 26, 2005 letter, the Office informed appellant that, due to a change in system codes, the originally accepted condition of depressive disorder would be classified as a brief depressive reaction.

hearing and near acuity. The vocational rehabilitation counselor noted that the job was reasonably available in appellant's commuting area with wages of $540.00 per week.

On January 18, 2005 the Office advised appellant that it proposed to reduce his wage-loss compensation based on his capacity to earn $540.00 a week as a paralegal, a light-duty position within Dr. Dorsaneo's April 28, 2003 restrictions. The Office noted that no medical evidence received after the April 28, 2003 report from Dr. Dorsaneo changed appellant's work limitations.[2]

On February 16, 2005 the Office received a December 2, 2004 report from Dr. Polatin which noted that appellant was on medication management for his neck and back injuries. Dr. Polatin stated that he experienced chronic neck and back pain and had been on modified duty, as reflected in a CA-17. No copy of a CA-17 or date reference to the CA-17 was attached.

By decision dated February 17, 2005, the Office reduced appellant's wage-loss compensation based on his ability to earn $540.00 a week as a paralegal. The Office noted that the decision did not affect his medical benefits, which remained open for coverage of treatment.

In letters dated February 14 and 19, 2005, appellant submitted arguments which he believed required further consideration. He contended that the Office and the vocational rehabilitation counselor ignored or failed to provide full medical restrictions for his conditions. Appellant asserted that the vocational rehabilitation counselor advised him to withhold certain information when applying for positions in the private sector. He contended that the Office should have requested medical evidence concerning his physical and emotional conditions. Appellant further asserted that even though he met the qualifications of a paralegal, he did not have the ability to perform the tasks of a paralegal and that, Dr. Polatin's reference to chronic pain was sufficient to support that he was unable to perform the position of paralegal.

Appellant also submitted an April 29, 2005 report from David Janway, LPC, which diagnosed post-traumatic stress disorder and major depressive disorder. Mr. Janway stated that he had moderate psychosocial stressors due to adjustment to the effects of on-the-job injury, uncertain vocational options and loss of income. He opined that appellant had moderate to severe psychological symptoms and moderate impairment of daily functioning.

By decision dated August 19, 2005, the Office denied modification of the February 17, 2005 decision. The Office found that there was no well-rationalized medical evidence or argument supporting appellant's inability to perform the duties of a paralegal.

[2] In a June 16, 2004 report, Dr. Polatin advised that appellant's post-traumatic stress disorder was in relative remission.

On appeal, appellant contends that he can not perform the duties of a paralegal as it is classified as a light-duty position and his physician restricted him to sedentary duties.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[3] 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.[4]

Under section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee, if the earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent the employee's wage-earning capacity or if the employee has no actual wages, the wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, the employee's usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect his wage-earning capacity in his disabled condition.[5]

The Office must initially determine an employee's medical condition and work restrictions before selecting an appropriate position that reflects his wage-earning capacity. The Board has stated that the medical evidence upon which the Office relies must provide a detailed description of the employee's condition.[6] Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.[7]

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an Office wage-earning capacity specialist for selection of a position listed in the Department of Labor, *Dictionary of Occupational Titles* (DOT) or otherwise available in the open labor market, that fits the employee's capabilities with regard to his or her physical limitations, education, age and prior experience.[8] 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. Finally,

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[3] *John D. Jackson*, 55 ECAB ____ (Docket No. 02-2281, issued April 8, 2004); *James B. Christenson*, 47 ECAB 775, 778 (1996); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

[4] 20 C.F.R. §§ 10.402, 10.403; *see Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

[5] 5 U.S.C. § 8115(a); *see Dorothy Lams*, 47 ECAB 584 (1996); *Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

[6] *See William H. Woods*, 51 ECAB 619 (2000); *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

[7] *Carl C. Green, Jr.*, 47 ECAB 737, 746 (1996).

[8] *See Luis R. Flores*, 54 ECAB 250 (2002).

application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.[9]

ANALYSIS -- ISSUE 1

Appellant received compensation for total disability due to his accepted acute post-traumatic stress disorder, depressive disorder and major depression, single episode. The record reflects that he had prior injuries which resulted in chronic mild bilateral carpal tunnel syndrome and chronic mild bilateral shoulder dysfunction and required physical limitations. The Office received medical evidence from Dr. Dorsaneo, a clinical psychologist, that appellant could work eight hours daily but not at the employing establishment. In a February 10, 2003 report, Dr. Polatin, an attending psychiatrist, advised that appellant was capable of performing a sedentary desk job, with hand movement limited to one hour every two hours and in a facility that did not have a workroom floor.

As the medical evidence demonstrated that appellant was no longer totally disabled for work, the Office referred him to a vocational rehabilitation counselor. Based on his recent graduation from a paralegal program with honors, the counselor did not conduct vocational testing and proceeded with an assisted placement program. As appellant was not hired, the counselor selected the position of paralegal as listed in the Department of Labor, *Dictionary of Occupational Titles*. The paralegal position was classified as light, with lifting up to 20 pounds and contained frequent activities such as fingering and handling which amounted to 1/3 to 2/3 of the time.

With respect to appellant's ability to perform the duties of the position, Dr. Polatin advised on February 10, 2003 that he could work with restrictions at a sedentary desk job, with repetitive hand movement limited to one hour every two hours. The selected position is a light-duty position in which appellant's restrictions on repetitive hand movement is contained within the specified frequencies of the required activities. Although Dr. Polatin advised that appellant should have a sedentary desk job, he provided no lifting or sitting requirements that would preclude appellant from performing the activities required in the selected position. He did not provide any restrictions that would be inconsistent with work as a paralegal. Although Dr. Polatin noted that appellant had chronic pain, he did not find that chronic pain prevented appellant from performing the duties of the selected paralegal position. The Board finds that the medical evidence supports that the selected position of paralegal is medically suitable to appellant's restrictions. Additionally, the vocational requirements of the paralegal position match his education and experience and he has not disputed this fact. The specialist also determined the prevailing wage rate of the position and its reasonable availability in the open labor market.[10] The Office reduced appellant's compensation based on his ability to earn $340.00 a week as a paralegal. The Board finds that the Office considered the proper factors,

[9] *See William H. Woods, supra* note 6; *Hattie Drummond*, 39 ECAB 904 (1988); *see Albert C. Shadrick*, 5 ECAB 376 (1953).

[10] *See Karen L. Lonon-Jones*, 50 ECAB 293, 298 (1999); *Leo A. Chartier*, 32 ECAB 652 (1981) (the fact that an employee has been unsuccessful in obtaining jobs in the selected position does not establish that the work is not reasonably available in the area).

such as availability of paralegal positions and his physical limitations, in determining that the paralegal position represented appellant's wage-earning capacity. Also, the Office followed the established procedures under the *Shadrick*[11] decision in calculating his employment-related loss of wage-earning capacity. Appellant did not allege that the Office erred in its mathematical calculations of his wage-earning capacity. The Board has reviewed these calculations and finds them to be correct.

Appellant contends that, even though he completed the rehabilitation process and qualified for the position of a paralegal, the Office and the vocational rehabilitation counselor failed to consider the full medical restrictions or conditions from which he suffered. He asserted that the Office's determination of his wage-earning capacity was incorrect as the paralegal position was classified as a light position. However, the physical requirements of the paralegal position are consistent with those specified by Dr. Polatin in his February 10, 2003 report. Moreover, appellant has submitted no medical evidence to show that he is physically limited from performing the duties of a paralegal or that his restrictions had changed. The April 29, 2005 report of Mr. Janway, a counselor, is of no probative value as a licensed counselor is not a physician as defined under the Act.[12] Appellant's argument pertaining to the rehabilitation counselor's advice of withholding certain information when applying for positions in the private sector is unsubstantiated. The weight of the evidence of record establishes that appellant is capable of working as a paralegal.

CONCLUSION

The Board finds that the selected paralegal position properly represented appellant's wage-earning capacity.

[11] *Albert C. Shadrick*, 5 ECAB 376 (1953).

[12] *See* 5 U.S.C. § 8101(2). This subsection defines the term "physician." *See also Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board held that medical opinion, in general, can only be given by a qualified physician).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated August 19 and February 17, 2005 are affirmed.

Issued: March 3, 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