United States Department of Labor
Employees' Compensation Appeals Board

G.J., Appellant	)	
and	)	**Docket No. 06-674**
	)	**Issued: September 28, 2006**
DEPARTMENT OF AGRICULTURE,	)	
Albany, CA, Employer	)	

Appearances:
G J., 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 31, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' wage-earning capacity decision dated September 21, 2004. He also appealed a January 11, 2006 decision which denied modification of the wage-earning capacity decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether the Office met its burden of proof in reducing appellant's compensation based on its determination that the constructed position of retail store manager represented his wage-earning capacity; and (2) whether the Office properly denied modification of appellant's loss of wage-earning capacity determination.

FACTUAL HISTORY

On May 21, 1997 appellant, then a 46-year-old research technician, filed an occupational disease claim alleging that he developed a lower back injury as a result of repetitive lifting and

shoveling required as part of his job. The Office accepted his claim for aggravation of degenerative disc disease, lumbar sprain and strain. Appellant stopped working on March 25, 1997 and was granted disability retirement on September 26, 1997. He received appropriate compensation benefits for all periods of disability.

Appellant came under the treatment of Dr. Lawrence A. Hammond, a Board-certified orthopedist, who, in reports dated March 25 to July 26, 1997, provided a history of his work-related injury and diagnosed recurrent low back strain/sprain and possible lumbosacral radiculopathy which was caused by lifting and shoveling at work. A magnetic resonance imaging (MRI) scan dated April 1, 1997 revealed a disc space narrowing and a mild disc bulge at L5-S1. Appellant was subsequently seen in consultation by Dr. Barbara D. Morgan, a Board-certified anesthesiologist, on April 30 and May 23, 1997, who diagnosed chronic low back pain. She performed an electromyogram (EMG) which revealed no abnormalities. Finally, he sought treatment from Dr. Jeffrey S. Hirschauer, a Board-certified neurologist, who, in reports dated July 29 to September 9, 1997, noted a history of injury and diagnosed L5-S1 spinal degeneration. He recommended a L5-S1 posterior interbody lumbar fusion. In an operative report dated November 17, 1997, Dr. Hirschauer performed a L5-S1 low back fusion with pedicle screw and rods and a graft on bone matrix and diagnosed L5-S1 disc degeneration. In a report dated April 13, 1998, he opined that the degenerative changes seen at the L5-S1 space and the evidence of severe discal degeneration was a direct consequence of appellant's employment duties.

Thereafter, in the course of developing appellant's claim, he was referred to several second opinion physicians and also to an impartial medical adviser to determine the necessity of his surgery performed November 17, 1997. The referee physician determined that the surgery was not causally related to his accepted work-related condition.[1] However, the physician determined that appellant did sustain residuals of his accepted work-related injury. Appellant continued to receive disability compensation benefits.

Appellant began treatment with Dr. Benno Mohr, a Board-certified internist, who noted in a report dated December 24, 2003, his history of degenerative lumbar spinal disease and lumbar strain. In a work capacity evaluation dated December 21, 2003, he noted that appellant could return to work full time with restrictions of sitting and standing for 4 to 6 hours per day, walking intermittently, twisting, bending/stooping, pushing, pulling and kneeling occasionally, operating a motor vehicle for 1 hour per day, and no lifting greater than 35 pounds below knee level.

On January 22, 2004 appellant was referred for vocational rehabilitation. In a report dated June 16, 2004, the rehabilitation counselor noted that on April 1, 2004 he obtained full-time employment on his own as a parts runner for $5.15 per hour which was consistent with the DOT description for a merchandise deliverer and car rental deliverer. The rehabilitation counselor noted that this position paid minimum wage which was below appellant's true wage-earning capacity and, although the position was classified as light duty, it would exceed his restrictions with regard to driving an automobile.

[1] Based upon the determination of the referee physician, the Office did not authorize the November 17, 1997 surgery.

In a letter dated May 5, 2004, appellant noted that since returning to work in April his back problems became more chronic due to excess standing, bending and sitting. He requested that he be placed on permanent disability.

In a letter dated June 16, 2004, the Office requested that appellant submit pay stubs documenting his return to work.

In a report dated June 16, 2004, the rehabilitation counselor indicated that appellant's return to work as a parts runner precluded his active participation in an active work search effort for an occupation which may have provided him with a greater wage-earning capacity and with an occupation which may have been more compatible with his physical restrictions. Due to his reemployment for greater than 60 days as a parts runner, appellant was considered rehabilitated and, therefore, his rehabilitation case would be closed. The rehabilitation counselor noted that there were three positions identified which matched his qualifications and medical restrictions, specifically the job title of retail store manager, sales clerk and general merchandise sales person. It was noted that appellant previously worked as a retail store manager and sales clerk. The rehabilitation counselor provided a job description for the position of a retail store manager and sales clerk. The rehabilitation counselor noted that the labor market survey documented a reasonable labor market for a retail store manager and the wages range from $14.27 per hour and $570.51 per week, the hiring occurs regularly and appellant had seven years of work experience in this occupation. The counselor further noted that the position was consistent with the medical restrictions provide by Dr. Mohr on December 21, 2003.

In a letter dated June 21, 2004, appellant asserted that the rehabilitation counselor did not assist him in obtaining a job, rather he obtained the position as a parts runner on his own. He indicated that the rehabilitation counselor met with him only once in person and primarily counseled him over the telephone. Appellant advised that he was terminated as a parts runner at the end of May 2004 and experienced additional back pain and knee problems. He indicated that he could not work light duty and wanted a determination that he was permanently disabled. Appellant submitted two pay stubs from his employment as a parts runner from April 4 to 30, 2004 and May 1 to 31, 2004.

In a letter dated July 13, 2004, the Office issued a proposed reduction of compensation on the grounds that the medical and factual evidence established that appellant was no longer totally disabled, but rather partially disabled and now had the capacity to earn wages as a retail store manager, at the rate of $570.51 per week. The Office noted that this position was in compliance with Dr. Mohr's restrictions. It further indicated that appellant was employed in the private sector as a parts runner from April 1 to May 31, 2004; however, the Office determined that this position did not represent his wage-earning capacity because it paid minimum wage while appellant's vocational rehabilitation counselor was qualified for other employment. The Office referenced the rehabilitation counselor's report which determined that based upon appellant's experience, education, medical restrictions and a labor market survey, he would be employable as a retail store manager which would pay wages greater than minimum wage and which would reasonably represent his wage-earning capacity.

By letter dated September 20, 2004, the Office indicated that appellant had been employed as a full-time parts runner effective April 4 to May 31, 2004 and that his monetary compensation would be reduced effective April 4 to May 31, 2004 based upon actual earnings.[2]

By decision dated September 21, 2004, the Office adjusted appellant's compensation benefits to reflect his wage-earning capacity as a retail store manager. The wage-earning capacity determination took into consideration such factors as his disability, training, experience, age and the availability of such work in the commuting area in which he lived.

On October 2, 2004 appellant requested an oral hearing before the Office and submitted additional medical evidence. A hearing was held on October 27, 2005. Appellant submitted reports from Dr. Mohr dated September 3, 2003 and April 21, 2004, who noted treating him for back and knee pain. Dr. Mohr indicated that appellant returned to work on April 1, 2004 and remained symptomatic. He diagnosed chronic back pain and left knee pain, rule out meniscus tear. Also submitted were reports from Dr. Charles A. Jacobson, a Board-certified orthopedist, dated June 21, 2004, who treated appellant for left knee pain experienced after he assisted his brother moving hay. In reports dated January 25 to October 5, 2005, he diagnosed medial meniscal tear of the left knee with significant degenerative changes and on October 5, 2005 performed a diagnostic arthroscopy with partial medial meniscectomy. An MRI scan of the lumbar spine dated September 27, 2005 revealed no complication identified with the posterior fusion of L5-S1 and mild disc bulge at L3-4. Appellant submitted a work capacity evaluation from Dr. Jeffrey L. Harris, a Board-certified internist, dated September 26, 2005, who noted that he had not worked since 1997 due to a back surgery and opined that it was unlikely that he would be able to return to work. He noted that appellant was able to sit one hour per day, no walking, standing, twisting, bending/stopping, operating a vehicle, squatting, kneeling, climbing or lifting greater than five pounds. On October 10, 2005 Dr. Harris noted that appellant's back pain recently worsened and diagnosed back pain, status post L4-5 fusion and recurrent back pain. Also submitted was a report from Dr. David P. Gruber, a Board-certified neurologist, dated November 3, 2005, who saw appellant for a consultation for lumbar disc herniation and noted a history of long-standing low back pain. He diagnosed low back pain and history of lumbar fusion at L5-S1.

In a decision dated January 11, 2006, the hearing representative affirmed the decision of the Office dated September 21, 2004.

LEGAL PRECEDENT -- ISSUE 1

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.[3]

[2] This letter did not purport to be a formal loss of wage-earning capacity determination.

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

Under section 8115(a) of the Federal Employees' Compensation Act,[4] titled "Determination of Wage-Earning Capacity" states in pertinent part: "In determining compensation for partial disability, 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." Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.[5] If the actual earnings do not fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, his degree of physical impairment, his usual employment, his age, his 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.[6] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[7] The job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives.[8] In determining an employee's wage-earning capacity, the Office may not select a makeshift or odd lot position or one not reasonably available on the open labor market.[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 or to an Office wage-earning capacity specialist for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open labor market, that fits that employee's capabilities with regard to his physical limitation, 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* will result in the percentage of the employee's loss of wage-earning capacity.[11]

ANALYSIS -- ISSUE 1

Appellant was employed in the private sector as a parts runner from April 1 to May 31, 2004 and earned minimum wage. The Office, however, did not rely on the actual wages of this

[4] 5 U.S.C. § 8115.

[5] *Hubert F. Myatt*, 32 ECAB 1994 (1981); *Lee R. Sires*, 23 ECAB 12 (1971).

[6] *See Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

[7] *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

[8] *Id*.

[9] *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

[10] *Karen L. Lonon-Jones*, 50 ECAB 293, 297 (1999).

[11] *Id. See Shadrick*, 5 ECAB 376 (1953).

employment. Rather, the Office, pursuant to section 8115 of the Act, determined appellant's wage-earning capacity as of September 21, 2004 in a constructed position with due regard to his injury and physical impairment, his usual employment, his age, his qualifications and the availability of suitable employment. It is well established that, if a claimant has actual earnings, the Office cannot use a selected position unless it makes a proper determination that actual earnings do not fairly and reasonably represent wage-earning capacity.[12]

The evidence in this case establishes that appellant's actual earnings as a parts runner did not fairly and reasonably represent his wage-earning capacity. In support of this determination, the Office referenced the findings of the rehabilitation counselor which supported that, based upon appellant's experience, education, medical restrictions and a labor market survey, he would be employable as a retail store manager and that this would more closely approximate his earning capacity and which also paid greater than the minimum wage rate of the parts runner position. The Board also notes that there is some evidence that appellant's employment as a parts runner may have been for less than 60 days.[13] Office procedures only contemplate making a retroactive wage-earning capacity decision based on actual earnings where the claimant has returned to alternative work more than 60 days.[14] The Office properly determined appellant's wage-earning capacity based on the constructed position and noted that there was no prohibition from using his general background and experience to determine his wage-earning capacity based on a constructed position so long as this position was selected pursuant to the factors outlined in section 8115. The Board finds that the Office acted in accordance with Board case law and Office regulations in determining appellant's wage-earning capacity based on a constructed position.

The Office then properly followed established procedures for determining appellant's employment-related loss of wage-earning capacity.

Through contact with the vocational counselor, the Office determined that the constructed position of retail store manager reasonably represented appellant's wage-earning capacity. The vocational counselor identified the retail store manager position listed in the Department of Labor's *Dictionary of Occupational Titles*, DOT No. 185.167.046 and provided the required information concerning the position descriptions, the availability of the positions within appellant's commuting area and pay ranges within the geographical area, as confirmed by state officials. He determined that this position was in accord with appellant's background, education and experience. It was noted that he previously worked as a retail store manager and sales clerk. The rehabilitation counselor noted that the labor market survey documented a reasonable labor market for a retail store manager position and was available in sufficient numbers so as to make it reasonably available within appellant's commuting area with wages from $14.27 per hour and $570.51 per week. He noted that the hiring occurs regularly and appellant had seven years of work experience in this occupation. The counselor further noted that the position was consistent

[12] *Sherman Preston*, 56 ECAB ___ (Docket No. 05-721, issued June 20, 2005).

[13] Pay stubs submitted by appellant only documented employment from April 4 to 30, 2004 and May 1 to 31, 2004.

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

with the medical restrictions provide by Dr. Mohr on December 21, 2004, whereby appellant could work 8 hours per day with restrictions of sitting and standing for 4 to 6 hours per day, walking intermittently, twisting, bending/stooping, pushing, pulling and kneeling occasionally, operating a motor vehicle for 1 hour per day and no lifting greater than 35 pounds below knee level. The rehabilitation counselor provided a job description for the position of a retail store manager.

The Office received a work capacity evaluation from appellant's attending physician, Dr. Mohr, dated December 21, 2003, who noted that appellant could return to work full time subject to sitting and standing for 4 to 6 hours per day, walking intermittently, twisting, bending/stooping, pushing, pulling and kneeling occasionally, operating a motor vehicle for 1 hour per day and no lifting greater than 35 pounds below knee level. He did not make any finding that appellant remained totally disabled or unable to do any work due to residuals of his accepted claim for aggravation of degenerative disc disease, lumbar sprain and strain.[15] The restrictions offered by Dr. Mohr are consistent with the duties of the selected position.

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.[16]

The Board finds that the Office considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment and age and employment qualifications, in determining that the position of retail store manager represented appellant's wage-earning capacity. The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of retail sales manager and that such a position was reasonably available within the general labor market of appellant's commuting area. The Office properly determined that the position of retail sales manager reflected appellant's wage-earning capacity effective September 21, 2004. Because the Office followed proper procedures in determining appellant's loss of wage-earning capacity, the Board affirms the Office's reduction of appellant's compensation.

LEGAL PRECEDENT -- ISSUE 2

Once the loss of wage-earning capacity 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.[17] The burden of proof is on the party attempting to show modification of the award.[18]

---

[15] *See James Smith*, Docket No. 00-1103 (issued October 25, 2001).

[16] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(b) (December 1995); *see also Dorothy Jett*, 52 ECAB 246 (2001).

[17] *George W. Coleman*, 38 ECAB 782, 788 (1987); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

[18] *Jack E. Rohrabaugh*, 38 ECAB 186, 190 (1986), *James D. Champlain*, 44 ECAB 438 (1986).

ANALYSIS -- ISSUE 2

After the Office properly found that appellant could perform the duties of a retail sales manager, the pertinent medical issue is whether there had been any change in his condition that would render him unable to perform those duties.[19] For a physician's opinion to be relevant on this issue, the physician must address the duties of the selected position.[20] However, medical evidence submitted by appellant after the loss of wage-earning capacity determination did not specifically address whether the position of retail sales manager was unsuitable.

Dr. Mohr's reports dated September 3, 2003 and April 21, 2004 diagnosed chronic back pain and left knee pain and indicated that appellant returned to work on April 1, 2004 and remained symptomatic. However, he did not provide any medical rationale[21] explaining how any of appellant's injury-related conditions would disable him from a position of a retail sales manager. Dr. Mohr did not note any change in appellant's injury-related condition that would render him unable to perform the position of retail sales manager. Because he did not specifically address appellant's ability to perform the selected position, Dr. Mohr's opinion is of diminished probative value and is, therefore, insufficient to support a modification of his previously calculated wage-earning capacity. Other reports from Dr. Jacobson dated June 21, 2004 to October 5, 2005 noted treating appellant for left knee pain experienced after he assisted his brother moving hay. The Board notes that Dr. Jacobson did not attribute appellant's knee condition to his accepted injury, nor did he address his specific ability to perform the selected position, rather Dr. Jacobson attributed his condition to assisting his brother move hay. Moreover, the Office never accepted that appellant sustained a left medial meniscus tear as a result of his work-related injury and there is no medical evidence to support such a conclusion.

Also submitted was a report from Dr. Harris dated October 10, 2005, who diagnosed back pain, status post L4-5 fusion and recurrent back pain. He noted that appellant had not worked since 1997 due to back surgery and it was unlikely that he would be able to return to work. In a work capacity evaluation dated September 26, 2005 Dr. Harris noted that appellant was able to sit one hour per day, no walking, standing, twisting, bending/stopping, operating a vehicle, squatting, kneeling, climbing or lifting greater than five pounds. However, he did not provide any medical rationale explaining how any injury-related condition had changed to such an extent to disable appellant from a position of a retail sales manager. Finally, appellant submitted a report from Dr. Gruber dated November 3, 2005, who diagnosed low back pain and a history of lumbar fusion at L5-S1. However, he did not address whether appellant's injury-related condition had changed and rendered him unable to perform the position of a retail sales manager. Therefore, these physicians did not establish that appellant could not perform the duties of a retail sales manager.

---

[19] *Phillip S. Deering*, 47 ECAB 692 (1996).

[20] *Id.*

[21] *See George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

The Board finds that there is no medical evidence which establishes a change in appellant's employment related condition such that a modification of the Office's loss of wage-earning capacity determination would be warranted. The evidence from Dr. Mohr, Dr. Jacobson, Dr. Harris and Dr. Gruber do not indicate that the position of retail sales manager was unacceptable. Appellant also did not otherwise establish a basis for modification by submitting evidence establishing that he had been retrained or otherwise vocationally rehabilitated or that the original determination was, in fact, erroneous. Consequently, he has failed to carry his burden of proof to establish modification of the wage-earning capacity determination.

CONCLUSION

The Board finds that the Office properly determined that the position of retail sales manager reflects appellant's wage-earning capacity effective September 21, 2004. The Board further finds that he did not submit sufficient medical evidence, following the Office's September 21, 2004 decision, to justify modification of the Office's loss of wage-earning capacity determination.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated January 11, 2006 is affirmed.

Issued: September 28, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board