United States Department of Labor
Employees' Compensation Appeals Board

T.B., Appellant	)	
and	)	**Docket No. 06-2123**
	)	**Issued: August 22, 2007**
DEPARTMENT OF THE AIR FORCE, McCHORD AIR FORCE BASE, WA, Employer	)	

Appearances:
Appellant, 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 18, 2006 appellant filed a timely appeal from an August 23, 2006 decision of an Office of Workers' Compensation Programs' hearing representative who affirmed a wage-earning capacity decision dated January 31, 2006. 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 effective January 30, 2006 based on its determination that the constructed position of commercial drafter 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 September 12, 2000 appellant, then a 45-year-old maintenance mechanic, injured his right foot while in the performance of duty. The Office accepted his claim for a right foot sprain and authorized a right osteotomy, tarsometatarsal joint fusion and bone graft. Appellant stopped

work on September 12, 2000 and returned to work intermittently until stopping completely on October 29, 2001. He received appropriate compensation benefits for all periods of disability.[1]

Appellant came under the treatment of Dr. Kenneth L. Partlow, a Board-certified orthopedic surgeon. In reports dated March 19 to June 18, 2001, Dr. Partlow provided a history of appellant's work-related injuries of November 30, 1999 and September 12, 2000 and diagnosed subtle lisfranc injury. On October 29, 2001 he performed a dwyer-type osteotomy in the calcaneus through an incision over the heel, fusion of the tarsometatarsal joints 1 and 2 and bone graft from the proximal lateral tibia for fusion and diagnosed chronic lisfranc pain.

In reports dated May 27 to 31, 2002, Dr. Partlow advised that appellant had pain and tingling in his right foot and diagnosed symptoms related to hardware and possible sural nerve entrapment. He reviewed the position description for a maintenance mechanic provided by the nurse intervention program and determined that appellant could not perform the job duties. On June 19, 2002 Dr. Partlow performed hardware removal of the heel and sural nerve neurolysis and diagnosed painful hardware of the heel and entrapped sural nerve. In a work capacity evaluation dated October 7, 2002, he advised that appellant could work a sedentary job eight hours daily with sitting up to eight hours, no walking or standing, pushing, pulling and lifting limited to 25 pounds and limited squatting and climbing.

Appellant was referred for vocational rehabilitation. In reports dated January 13 to March 10, 2003, the rehabilitation counselor noted that appellant was unable to return to his previous job but was interested in computer-aided drafting. In training agreements, appellant agreed to attend community college classes full time in computer-aided drafting and design technology. A February 25, 2003 rehabilitation plan was developed for the job title of computer-aided design technician and commercial drafter. The rehabilitation counselor provided a job description for the position of a commercial drafter, Department of Labor, *Dictionary of Occupational Titles* (DOT) number 017.261026 and noted labor market survey findings for job availability in drafting positions. She advised that appellant's training and experience would be adequate for an entry level position in this field. The counselor indicated that the physical demands of the positions surveyed primarily entailed sitting in front of a computer. In reports dated November 8, 2003 to October 26, 2004, she noted that appellant successfully completed his community college courses. On May 17, 2005 the Office advised appellant that he would receive 90 days of placement assistance. The Office stated that, after this, his compensation for wage loss would be reduced based on the estimated wage-earning capacity for a computer-aided design technician.

In a May 31, 2005 work capacity evaluation form, Dr. Kirk Dawson, an osteopath, noted that appellant reached maximum medical improvement and could work eight hours per day subject to restrictions on walking, standing, squatting, kneeling and climbing limited to one hour per day.

From May 18 to July 6, 2005 the rehabilitation counselor noted that appellant expressed an interest in federal employment or employment overseas and resisted applying for private-

[1] Appellant filed a claim for a right foot injury, which occurred on November 30, 1999 and was accepted by the Office, in file number A14-348432.

sector jobs. She confirmed that employment was not possible with the employing establishment. The counselor further noted that appellant's wage expectations in the private sector were unrealistic and that he would not apply to certain private-sector positions in computer-aided drafting due to the low wages. She forwarded an August 12, 2005 job classification report for the commercial drafter position. The position was classified as light and required frequent or occasional reaching, handling, fingering, feeling and talking. In a closing report dated September 13, 2005, the counselor noted that appellant was referred for vocational services on December 13, 2002 and was approved for training at a community college. She advised that appellant successfully completed an associate of arts degree in computer-aided drafting and received 90 days of placement services but did not find a job. The counselor identified two positions for which appellant was suited, one of which was that of a commercial drafter. She noted that the position of commercial drafter was appropriate to appellant's skills and was reasonably available within appellant's labor market area, with a salary of a $587.20 per week.

In a letter dated September 13, 2005, the Office proposed to reduce appellant's compensation on the grounds that the medical and factual evidence established that he was no longer totally disabled. He was found partially disabled with the capacity to earn wages as a commercial drafter at the rate of $587.20 per week. The Office noted that this position, which was classified as light work, was in compliance with Dr. Dawson's physical restrictions. 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 commercial drafter which would pay wages of $587.20 per week and which would reasonably represent his wage-earning capacity.

In a letter dated October 4, 2005, appellant noted that he sent resumes to potential employers but receive no employment offers. He subsequently advised that he was unable to find a commercial drafter position. Appellant stated that he "started his own job. That is of an innkeeper." He further advised that he was in the process of selling his home and purchasing the Windjammer Motel in Westport Washington. He indicated that his job was not presently a moneymaking enterprise and that he was also continuing to look for computer-design work. Appellant submitted reports from Dr. Partlow, dated September 9, 2005 to January 16, 2006, who treated appellant for increased foot pain and diagnosed possible stress fracture. On September 19, 2005 Dr. Partlow noted that appellant was retrained as a computer-aided draft designer and was in good health until recently when he experienced right foot pain. On January 16, 2006 he indicated that appellant's symptoms resolved and diagnosed post-traumatic arthrosis. Dr. Partlow noted that appellant recently purchased a motel that allowed him to work flexible hours.

By decision dated January 31, 2006, the Office adjusted appellant's compensation to reflect his wage-earning capacity as a commercial drafter effective January 30, 2006.

In a telephone call log dated February 24, 2006, appellant notified the Office that he received the decision dated January 31, 2006 and advised that he was currently the owner of a motel which was a better job for him. He indicated that he would be submitting a medical report in support of his innkeeper position.

On February 24, 2006 appellant requested an oral hearing which was held on July 7, 2006. He submitted a December 27, 2005 bone scan report and reports from Dr. Partlow dated January 2 and 23, 2006. Dr. Partlow noted that appellant's symptoms had resolved and diagnosed post-traumatic arthrosis. He stated that appellant was a motel owner which permitted him to work at his convenience. Appellant submitted a June 20, 2006 report from Dr. Dawson who treated appellant for ongoing foot and ankle pain. Dr. Dawson noted that appellant reported completing a computer engineering program but did not think that he could perform such a job as he was unable to work 40 hours per week. He advised that appellant purchased a motel which was his primary job. Dr. Dawson diagnosed chronic foot and ankle pain secondary to "labor and industries" injury and hyperlipidemia and opined that appellant's foot pain would require ongoing medical management.

In a decision dated August 23, 2006, the hearing representative affirmed the decision of the Office dated January 31, 2006.

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.[2]

Section 8115(a) of the Federal Employees' Compensation Act,[3] 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.[4] 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.[5] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[6] 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.[7] In

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

[3] 5 U.S.C. § 8115.

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

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

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

[7] *Id*.

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.[8]

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, *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.[9] 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.[10]

ANALYSIS -- ISSUE 1

The medical evidence established that appellant had the physical capacity for work and the Office referred appellant for vocational rehabilitation. In a February 25, 2003 report, the Office rehabilitation counselor determined that appellant was able to perform the position of a computer-aided design technician and commercial drafter.

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.[11]

When appellant was subsequently unable to obtain employment, the counselor, in a rehabilitation closing report dated September 13, 2005, noted that he had completed a two-year computer-aided drafting program at South Puget Sound Community College and received additional placement services. The counselor identified two positions, one of which was the commercial drafter position, for which appellant was qualified. She found that the commercial drafter position had a weekly wage rate of $587.20, was classified as light work and appropriate to appellant's skills. The counselor further certified that the position remained reasonably available in appellant's labor market area. The Board finds that this evidence establishes that the position was reasonably available in appellant's commuting area.

The medical evidence also establishes that appellant is capable of performing the duties of the commercial drafter position. Dr. Partlow advised on October 7, 2002 that appellant could return to work eight hours per day in a sedentary position, sitting for eight hours with no walking or standing and pushing, pulling, lifting were limited to 25 pounds and squatting and climbing

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

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

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

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

were also limited. In reports dated September 9, 2005 to January 16, 2006, he noted appellant's status and did not find that he was totally disabled or otherwise unable to work as a commercial drafter. In reports dated June 7 to 21, 2004, Dr. Dawson treated appellant for severe left foot pain and opined that appellant's bilateral forefoot problems were related to performing heavy work which required him to stand on his feet. In a work capacity evaluation form dated May 31, 2005, he noted that appellant could work for eight hours per day subject to restrictions on walking, standing, squatting, kneeling and climbing of one hour per day. Dr. Dawson set forth appellant's capacity for work due to residuals of his accepted conditions. The Board finds that the medical evidence establishes that the physical requirements of the commercial drafter position are consistent with the work restrictions set forth by Dr. Dawson.

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 commercial drafter 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 commercial drafter 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 commercial drafter reflected appellant's wage-earning capacity effective January 31, 2006. The Board therefore affirms the Office's reduction of appellant's compensation.[12]

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.[13] The burden of proof is on the party attempting to show modification of the award.[14]

ANALYSIS -- ISSUE 2

After the Office properly found that appellant could perform the duties of a commercial drafter, the pertinent medical issue is whether there had been any change in his condition that would render him unable to perform those duties.[15] For a physician's opinion to be relevant on

[12] In a letter received by the Office on January 3, 2006, appellant stated that he "started his own job. That is of an innkeeper." He noted that he was in the process of selling his home and purchasing a motel. Appellant indicated that his job was not a moneymaking enterprise at that time and that he was continuing to look for computer-design work. The Board has held that 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. *Floyd A. Gervais*, 40 ECAB 1045, 1048 (1989); *Clyde Price*, 32 ECAB 1932, 1934 (1981). However, in this case, appellant did not submit evidence establishing that he had actual earnings for work as an innkeeper. The letter received on January 3, 2006 merely noted his intention to purchase and operate a motel in the future. There is no specific evidence that he had actual earnings at that time.

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

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

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

this issue, the physician must address the duties of the selected position.[16] However, medical evidence submitted by appellant after the loss of wage-earning capacity determination did not specifically address whether the position of commercial drafter was unsuitable.

Appellant submitted reports from Dr. Partlow dated January 2 and 23, 2006. Dr. Partlow treated appellant in follow-up for degenerative changes at the tarsal metatarsal joint. However, he did not specifically address whether appellant was disabled from performing the duties of the commercial drafter position. Dr. Partlow did not note any change in appellant's injury-related condition that would render him unable to perform the position of commercial drafter. As he did not specifically address appellant's ability to perform the selected position, his report does not support a modification of appellant's wage-earning capacity.

In a June 20, 2006 report, Dr. Dawson noted that appellant reported completing a computer engineering program but did not think he could work in that area as he was unable to work 40 hours per week. However, he merely repeated appellant's opinion as to his ability to perform the position of a commercial drafter without providing his own opinion regarding whether appellant could perform the duties of the selected position of commercial drafter. To the extent that Dr. Dawson is providing his own opinion, he did not provide any medical rationale explaining why appellant was disabled from a position of a commercial drafter.[17]

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 wage-earning capacity determination would be warranted. The evidence from Drs. Partlow and Dawson do not indicate that the position of commercial drafter 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, appellant 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 commercial drafter reflects appellant's wage-earning capacity effective January 30, 2006. The Board further finds that appellant did not submit sufficient medical evidence, following the Office's January 31, 2006 decision, to justify modification of the Office's loss of wage-earning capacity determination.

[16] *Id.*

[17] *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).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated August 23 and January 31, 2006 are affirmed.

Issued: August 22, 2007
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