United States Department of Labor
Employees' Compensation Appeals Board

A.V., Appellant	)	
and	)	**Docket No. 07-889**
	)	**Issued: July 25, 2007**
DEPARTMENT OF THE ARMY, NATIONAL GUARD BUREAU, Johnston, IA, 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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 12, 2007 appellant filed a timely appeal from the November 9, 2006 merit decision of the Office of Workers' Compensation Programs which reduced his compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review this reduction.

ISSUE

The issue is whether the Office properly reduced appellant's compensation to reflect his capacity to earn wages as a sales manager.

FACTUAL HISTORY

On March 27, 2003 appellant, then a 54-year-old material handler, injured his right ankle and foot in the performance of duty: "I was helping guide a skid of refrigerated food out of the walk-in cooler when the clear plastic door flap knocked a box off the skid. I lunged forward to try and catch it and turned my foot on the uneven surface." The Office accepted his claim for aggravation of right plantar fasciitis and aggravation of right posterior tibial tendon dysfunction.

Appellant took disability retirement effective October 4, 2003 and received compensation for temporary total disability on the periodic rolls.

The Office referred appellant, together with the case record and a statement of accepted facts, to Dr. Keith W. Riggins, a Board-certified orthopedic surgeon, for a current physical evaluation and opinion on medical restrictions related to the accepted injury. On June 13, 2005 Dr. Riggins related appellant's history and reviewed the medical evidence, including the reports of the attending physician and the results of a functional capacities evaluation on May 24, 2005. He described appellant's current symptoms and his findings on physical examination. Dr. Riggins diagnosed nonanatomic pain symptoms and physical findings.[1] He stated that he was unable to establish a finite organic diagnosis to explain appellant's symptom complex and it was his opinion that the diagnoses of plantar fasciitis and posterior tibial dysfunction did not account for the symptom complex present. Nonetheless, Dr. Riggins reported that appellant was not capable of returning to the full duties of his date-of-injury position. He concluded, however, that appellant was capable of returning to purely sedentary activities. Dr. Riggins completed a work capacity evaluation indicating that appellant was capable of working eight hours a day with certain limitations: no bending or stooping; no squatting, kneeling or climbing and 20 minutes' standing.

The Office rehabilitation specialist completed an occupational profile for the position of sales manager in the state of Iowa. The rehabilitation specialist provided the job description and physical demands for the position of sales manager from the Department of Labor's *Dictionary of Occupational Titles*. The rehabilitation specialist reported that the job was sedentary, fell within appellant's medical, educational and vocational abilities and was being performed in sufficient numbers so as to make it available to appellant within his commuting area. The rehabilitation specialist confirmed availability through Iowa Workforce Development, which also provided current wage data. The specialist indicated direct contact with employers and the area State Employment Office.

On July 13, 2006 the Office issued a notice of proposed reduction of compensation. The Office found that appellant had the capacity to earn wages as a sales manager. The Office noted the nature of appellant's injury, his current medical limitations, his education, his federal employment and his past experience as a retail clerk and manager.

Appellant advised that the most money he ever made was about $15.00 an hour as a material handler with the Federal Government. He stated that he did not have the skill or education to make the wages reported. Appellant added that the last time he had anything to do with sales was August 1992, when he "got burned out" after trying to be a manager for 17 years. He stated that he was not a good manager and could not be a manager or supervisor mentally or physically. Appellant disagreed that he could work full time, unless he could find a way to control his pain. He also noted that he was hospitalized in March and underwent surgery in April for removal of the lymph nodes on the right side of his neck and one-third of his tongue.

[1] Dr. Riggins also diagnosed radiculopathy suspected, not proven, but withdrew this on July 25, 2005 after receiving the results of a July 6, 2005 electromyogram and nerve conduction study which was reported to be within normal limits.

On August 21, 2006 appellant's attending physician, Dr. Bryan M. Trout, a Board-certified podiatric surgeon, reported that appellant could work eight hours a day in a sedentary position. Permanent physical restrictions included lifting 10 pounds and no repetitive pushing, pulling, stooping, bending, climbing, kneeling, squatting or lifting.

In a decision dated November 9, 2006, the Office finalized the proposed reduction of compensation. Finding that appellant was capable of performing the duties of sales manager, the Office reduced his compensation to zero effective October 29, 2006 on the grounds that he had the capacity to earn more wages as a sales manager than his date-of-injury job currently paid.

LEGAL PRECEDENT

Section 8115(a) of the Federal Employees' Compensation Act provides that 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. If the actual earnings of the employee do not fairly and reasonably represent his wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity as appears reasonable under the circumstances 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 availability of suitable employment, and other factors or circumstances which may affect his wage-earning capacity in his disabled condition.[2]

When the Office makes a medical determination of partial disability and of the 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's *Dictionary of Occupational Titles* or otherwise available in the open labor market, that fits the employee's capabilities in light of 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. 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.[3]

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

ANALYSIS

The current medical evidence establishes that appellant's March 27, 2003 employment injury no longer totally disables him for work. Both the Office referral physician and the attending physician agree that appellant is capable of working eight hours a day in a sedentary position. Both reports medical restrictions that are consistent with the physical demands of the

[2] 5 U.S.C. § 8115(a).

[3] *Hattie Drummond*, 39 ECAB 904 (1988); *see Albert C. Shadrick*, 5 ECAB 376 (1953); 20 C.F.R. § 10.403.

[4] *Harold S. McGough*, 36 ECAB 332 (1984).

selected sales manager position, as described in the Department of Labor's *Dictionary of Occupational Titles*.

The Office rehabilitation specialist is an expert in the field of vocational rehabilitation, and the Office may rely on his or her opinion as to whether the selected job is vocationally suitable and reasonably available.[5] The rehabilitation specialist determined that the position of sales manager fell within appellant's medical, educational and vocational abilities. The rehabilitation specialist also confirmed the position's wage data and availability through Iowa Workforce Development.

The Board finds that the Office has met its burden of proof. The Office gave due regard to the factors specified in section 8115(a), of the Act and properly determined that appellant has the capacity to earn wages as a sales manager. The Office correctly reduced appellant's compensation by comparing his wage-earning capacity to the current pay of his date-of-injury position.[6] Appellant's hospitalization and surgery is not a factor. When determining the loss of wage-earning capacity resulting from an accepted employment injury, any subsequent impairment unrelated to the accepted injury is excluded from consideration.[7] Besides, Dr. Trout indicated that this did not prevent appellant from working eight hours a day in a sedentary position. The Board will affirm the Office's November 9, 2006 decision.

CONCLUSION

The Board finds that the Office has met its burden of proof to reduce appellant's compensation to reflect his capacity to earn wages in the selected position of sales manager.

[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8.b(2) (December 1995).

[6] *See Albert C. Shadrick, supra* note 3; *see also* 20 C.F.R. § 10.403.

[7] *William H. Woods*, 51 ECAB 619 (2000).

ORDER

IT IS HEREBY ORDERED THAT the November 9, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 25, 2007
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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