United States Department of Labor
Employees' Compensation Appeals Board

K.K., Appellant	)	
and	)	**Docket No. 07-786**
	)	**Issued: September 25, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Havertown, PA, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 29, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated January 12, 2007 reducing his compensation.[1] Pursuant to 20 C.F.R. §§ 501.2 and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly reduced appellant's compensation effective August 7, 2005, based on its determination that the full-time constructed position of dispatcher, maintenance service represented his wage-earning capacity.

[1] The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those decisions issued within one year prior to the filing of the appeal. *See* 20 C.F.R. §§ 501.3(d)(2). The Office's February 20, 2007 schedule award decision, which was issued after the filing of this appeal, is the subject of ECAB Docket No. 07-982 and a separate decision will issue on that appeal.

FACTUAL HISTORY

This is the second time this case has been before the Board on appeal. By order dated September 26, 2006, the Board remanded the case to the Office for reconstruction of the record and appropriate development, in order to obtain a copy of a November 2005 decision referenced by the Office in its last merit decision.[2]

On February 27, 2002 appellant, a 29-year-old mail carrier, filed a traumatic injury claim alleging that he injured his lower back while lifting a tray. His claim was accepted for aggravation of a herniated lumbar disc and he was placed on the periodic rolls.

On November 13, 2002 appellant's treating physician, Dr. Richard Levenberg, a Board-certified orthopedic surgeon, opined that appellant was disabled. In a second opinion report dated December 17, 2002, Dr. Steven J. Valentino, a Board-certified osteopath specializing in orthopedic surgery, opined that appellant's accepted condition had resolved. In order to resolve the conflict of medical opinion, the Office referred appellant to Dr. Andrew J. Collier, Jr., a Board-certified orthopedist, for an impartial medical examination. In a March 26, 2003 report, Dr. Collier opined that appellant suffered residuals from his accepted February 27, 2002 injury, and was unable to perform the duties of his date-of-injury job. He indicated that appellant was able to work light duty, four to six hours per day, in a mainly sedentary position.

On May 20, 2003 the Office referred appellant to a rehabilitation counselor for vocational rehabilitation services. In a report dated August 18, 2003, the rehabilitation counselor indicated that appellant had completed vocational testing with Steven Gummerman, Ph.D. In a vocational evaluation dated August 6, 2003, Dr. Gummerman opined that appellant's postinjury transferable skills would permit him to work as a dispatcher or in other sedentary positions.

On September 16, 2003 appellant underwent authorized L5-S1 lumbar surgery. On December 2, 2003 appellant's vocational rehabilitation status was changed to "service interrupted" until March 2, 2004. After reinjuring himself during physical therapy, he underwent a second authorized back surgery to remove a disc fragment at L5, and herniated disc surgery on January 23, 2004. Appellant's "service interrupted" status was then extended to June 2, 2004.

In a March 18, 2004 work ability report, Dr. Levenberg indicated that appellant could return to work on April 1, 2004 in a sedentary position with restrictions, including: no pushing or pulling; no weight-bearing; no repetitive kneeling or squatting; no repetitive typing or keying; no repetitive bending; no climbing; and no lifting more than five pounds. In a note dated March 18, 2004, Dr. Levenberg stated that appellant's wound was well healed and that he was neurovascularly unchanged. He found no evidence of infection, spasm or sciatic nerve root tension. In a June 23, 2004 work capacity evaluation, Dr. Levenberg provided restrictions, which included pushing, pulling and lifting a maximum of 10 pounds. Appellant was precluded from walking or standing for more than four hours, and from reaching, operating a motor vehicle, squatting, kneeling or climbing.

[2] Docket No. 06-775 (issued September 26, 2006).

After reviewing Dr. Levenberg's work restrictions and appellant's transferable skills, the rehabilitation counselor, Susan Snedden, developed a reemployment placement plan. On July 28, 2004 appellant signed an individual rehabilitation plan agreeing to search for jobs as a dispatcher in his geographical region. On August 13, 2004 appellant's status was changed to "placement new employer," and a three-month job placement search was approved. In a vocational rehabilitation report for the period July 17 to August 17, 2004, Ms. Snedden noted that appellant had extensive work history in the dispatching field.

The record reflects that the vocational counselor notified appellant of numerous available dispatch positions, indicating that she had contacted the prospective employers on his behalf. On October 18, 2004 appellant was advised of the availability of the position of central station dispatcher, Security Alarm Monitoring, Woodlyn, PA. On October 21, 2004 he was informed of the position of central station response call center operator, Vector Security, Plymouth Meeting, PA. On January 12, 2005 appellant was told of the availability of the position of central station dispatcher, Security Alarm Monitoring, Woodlyn, PA. On January 20, 2005 the vocational counselor identified the position of central response call center operator at Vector Security, Plymouth Meeting, PA. On February 23, 2005 the counselor informed appellant that the position of dispatcher was currently available at Quaker City & Community Cab in Philadelphia, PA. On February 24, 2005 appellant was informed of an available position of police dispatcher with the Whitemarsh Township Police Department in Lafayette Hill, PA. The counselor noted that appellant had been inconsistent in his follow through on potential jobs identified, even though in most cases, she had downloaded employment applications for appellant, and sent him addressed, stamped envelopes in which to enclose his application and resume.

In notes dated August 4, 2004, Dr. Levenberg reiterated that appellant was cleared for sedentary work only.

In a closure report dated March 9, 2005, the rehabilitation specialist noted that the 90-day job placement period had expired, and that, as of the date of the report, he had not obtained employment. The rehabilitation counselor submitted job classifications for the positions of "dispatcher, maintenance service," and "dispatcher, service or work," as listed in the Department of Labor, *Dictionary of Occupational Titles* (DOT). Strength levels for both positions were characterized as sedentary, requiring occasional lifting of up to 10 pounds. Physical demands of the positions included frequent reaching and handling. Ms. Snedden reviewed these constructed positions and found that they should be the target jobs of choice in determining appellant's wage-earning capacity, stating that the work was within appellant's vocational abilities. The counselor noted that he had an extensive work history in the dispatching field, and would have an excellent chance for hire, if he maintained consistent follow-through on the positions referred. The rehabilitation specialist noted that she had taken into consideration all significant preexisting impairments and pertinent nonmedical factors. The specialist further found that these positions were reasonably available within appellant's commuting area with average weekly wages of $340.00 and $480.00 respectively.[3]

[3] The vocational counselor's determination regarding reasonable availability was based on July 14, 2004 and March 4, 2005 conversations with Tony Bucciarelli, program manager, State Office of Employment Security, Philadelphia, PA.

On June 22, 2005 the Office issued a notice of proposed reduction of compensation, on the grounds that appellant was no longer totally disabled and had the capacity to earn the wages of a dispatcher, maintenance service, at the rate of $340.00 per week. The record contains a wage-earning capacity computation reflecting a weekly pay rate when injured of $720.40; current weekly pay rate for job when injured of $780.40 (effective January 1, 2005); constructed wage-earning capacity of $340.00 per week; percentage of new wage-earning capacity of 44 percent; adjusted wage-earning capacity amount per week of 313.86; loss in wage-earning capacity (LWEC) of 406.54; gross weekly compensation rate of $304.91 (increased by cost-of-living adjustment to $315.58 per week); and new compensation rate every four weeks of $1,262.33.

By letter dated July 22, 2005, appellant's representative contended that the proposed reduction was inappropriate on several counts. He alleged: (1) that the vocational counselor fraudulently reported that the position of dispatcher, maintenance service was reasonably available in appellant's commuting area, stating that the state employment bureau does not maintain the data identified by the counselor; (2) that the selected position was not within appellant's work restrictions, because it requires frequent reaching and handling and occasional fingering; (3) that vocational testing was not performed; and (4) that it is unclear whether the position was available in appellant's commuting area.

By decision dated August 2, 2005, the Office finalized its reduction of compensation effective August 7, 2005. The Office found that the full-time position of "dispatcher, maintenance service" was medically and vocationally suitable and represented appellant's wage-earning capacity of $340.00 per week. A final wage-earning capacity computation reflected a weekly pay rate when injured of $720.40; current weekly pay rate for job when injured of $780.40 (effective January 1, 2005); constructed weekly earning capacity of $340.00 per week; percentage of new wage-earning capacity of 44 percent; adjusted wage-earning capacity amount per week of $313.86; loss in wage-earning capacity (LWEC) of $406.54; gross weekly compensation rate of $304.91 (increased by cost-of-living adjustment to $325.58 per week); and new compensation rate every four weeks of $1,302.32. The record does not reflect that a copy of the August 2, 2005 decision was sent to appellant's representative.

On August 9, 2005 appellant, through his representative, requested a review of the written record. The representative contended that the August 2, 2005 decision should be set aside on the grounds that the Office had failed to send him a copy of the decision. In an undated letter, received by the Office on November 28, 2005, appellant informed the Office that he was working 5 days per week, 30 to 40 hours per week, at King Transportation in King of Prussia, PA. Appellant submitted a duty status report dated November 30, 2005 from Dr. Charles Kish, a treating physician, reflecting that he was able to work eight hours per day with restrictions. Appellant was precluded from climbing; from kneeling more than one hour per day; from fine manipulation more than six hours per day; and from reaching above shoulder level, twisting, bending or stooping more than four hours per day. He was also restricted from lifting or carrying more than 25 pounds continuously or 40 pounds intermittently. In a December 1, 2005 "work-related injury report," Dr. Kish indicated that appellant was capable of performing "[m]edium [d]uty: Frequent carrying 25 pounds, max[imum] lifting 50 pounds at

once." He stated that appellant was able to bend, squat and reach occasionally, but that he could never crawl or climb.

By decision dated December 22, 2005, the Office hearing representative affirmed the Office's November 7, 2005 decision, finding that appellant was not unfairly prejudiced by the Office's failure to send a copy of the decision to his representative. Appellant, through his representative, appealed the December 22, 2005 decision.

By order dated September 26, 2006, the Board remanded the case to the Office for reconstruction of the record and appropriate development, in order to obtain a copy of a November 2005 decision referenced by the Office in its December 22, 2005 decision.[4]

On August 9, 2006 Dr. Levenberg indicated that appellant should continue to work in a sedentary position. He also stated that appellant was "approved to work for his current job at Thomas Jefferson University Hospital" in the dispatch department. In an accompanying work capacity evaluation, Dr. Levenberg indicated that appellant could work with the following restrictions: no lifting more than 20 pounds; no reaching above the shoulder; no twisting, bending, stooping, pushing, pulling, squatting, kneeling or climbing. He also indicated that appellant should be permitted to take 15-minute breaks, 5 to 6 times per day. On August 29, 2006 Dr. Levenberg reiterated his opinion that appellant would require permanent sedentary work restrictions due to his work-related injury.

In accordance with the Board's September 26, 2006 order, the Office reviewed the file in an attempt to locate the November 7, 2005 decision referenced by the hearing representative in his December 22, 2005 decision. In a January 12, 2007 decision, the Office concluded that the reference to a November 7, 2005 decision was a typographical error, and that no such decision existed. The Office reissued its August 2, 2005 decision finalizing appellant's reduction of compensation effective August 7, 2005.

LEGAL PRECEDENT

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] 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

[4] Docket No. 06-775 (issued September 26, 2006).

[5] 20 C.F.R. §§ 10.402, 10.403 (2006); *see Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

employment, the availability of suitable employment, and other factors and circumstances which may affect wage-earning capacity in his or her disabled condition.[6]

The Office must initially determine appellant's medical condition and work restrictions before selecting an appropriate position that reflects appellant's vocational wage-earning capacity. The medical evidence on which the Office relies must provide a detailed description of appellant's condition.[7] Additionally, a wage-earning capacity determination must be based on a reasonably current medical evaluation.[8]

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

ANALYSIS

On January 12, 2007 the Office reissued its August 2, 2005 decision finalizing appellant's reduction of compensation effective August 7, 2005. The Office determined that the selected position of "dispatcher, maintenance services" was medically and vocationally suitable, and represented appellant's wage-earning capacity of $340.00 per week. The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by the medical evidence.[10] The Board finds that the medical evidence does not support a finding that the selected position of "dispatcher, maintenance services" is within appellant's physical limitations.

The requirements of the position identified by appellant's vocational rehabilitation counselor exceed appellant's restrictions. On June 23, 2004 Dr. Levenberg restricted appellant from pushing, pulling or lifting more than ten pounds, from walking or standing for more than

[6] 5 U.S.C. § 8115(a) (2000); *see Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

[7] *Samuel J. Russo*, 28 ECAB 43 (1976).

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

[9] *Albert C. Shadrick*, 5 ECAB 376 (1953); 20 C.F.R. § 10.403(d).

[10] *Robert Dickinson*, 46 ECAB 1002 (1995).

four hours, and from reaching, operating a motor vehicle, squatting, kneeling or climbing. On August 9, 2006 he indicated that appellant could work with the following restrictions: no lifting more than 20 pounds; no reaching above the shoulder; no twisting, bending, stooping, pushing, pulling, squatting, kneeling or climbing. He also indicated that appellant should be permitted to take 15-minute breaks, five to six times per day. On December 1, 2005 Dr. Kish indicated that appellant was able to bend, squat and reach occasionally, but that he could never crawl or climb. The rehabilitation counselor submitted job classifications for the positions of "dispatcher, maintenance service," and "dispatcher, service or work," as listed in the Department of Labor, DOT. Although strength levels for both positions were characterized as sedentary, requiring occasional (up to one-third of the time) lifting of up to 10 pounds, the physical demands of the positions included frequent (from one-third to two-thirds of the time) reaching, which was prohibited by both Dr. Levenberg and Dr. Kish. Furthermore, the position descriptions did not provide for frequent breaks, as required by Dr. Levenberg.

In its August 2, 2005 decision, which was reissued on January 12, 2007, the Office found that the position of "dispatcher, maintenance service" was within appellant's physical restrictions. However, the medical evidence does not establish that appellant has the physical capacity to perform the duties of the constructed position. Accordingly, the Office did not meet its burden of proof in this case to reduce appellant's compensation benefits pursuant to 5 U.S.C. § 8115.

CONCLUSION

The Board finds that the Office did not meet its burden to reduce appellant's compensation benefits pursuant to 5 U.S.C. § 8115.

ORDER

IT IS HEREBY ORDERED THAT the January 12, 2007 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 25, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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