United States Department of Labor
Employees' Compensation Appeals Board

R.S., Appellant	)	
and	)	**Docket No. 08-1111**
	)	**Issued: December 12, 2008**
DEPARTMENT OF THE ARMY, CORPS OF ENGINEERS, LOCK & DAM #13, Fulton, IL, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 4, 2008 appellant filed an appeal from decisions of the Office of Workers' Compensation Programs dated July 26, 2007 and January 8, 2008. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office met its burden of proof to reduce appellant's compensation benefits based on his capacity to earn wages as a sales attendant; and, (2) whether appellant met his burden of proof to establish that modification of the wage-earning capacity decision was warranted.

FACTUAL HISTORY

On June 15, 2005 appellant, then a 50-year-old lock and dam operator filed a Form CA-2, occupational disease claim, alleging that employment factors caused melanoma of the right

cheek.[1] He underwent surgery on June 23, 2005. By decision dated September 27, 2005, the Office denied the claim. On October 26, 2005 appellant requested a hearing and submitted additional medical evidence. By decision dated January 19, 2006, an Office hearing representative reversed the September 27, 2005 decision, and accepted that appellant sustained employment-related melanoma of the right cheek. In reports dated March 8 and April 6, 2006, Dr. Jonathan Bock, an otolaryngology resident physician, advised that appellant should avoid exposure to direct sunlight and recommended indoor work.

On April 10, 2006 the employing establishment informed appellant that it could not accommodate this restriction, and appellant stopped work. Appellant did not return and was placed on the periodic rolls. On June 2, 2006 a Dr. Justin Hill advised that the restriction that appellant stay out of sunlight was permanent[2] and on July 6, 2006, appellant was referred to Teresa A. McClain for vocational rehabilitation. On October 28, 2006 appellant filed an occupational disease claim for carpal tunnel syndrome and attached a work history showing that he had worked for the employing establishment since 1976.[3] On October 31, 2006 the Office accepted that appellant sustained employment-related bilateral carpal tunnel syndrome.[4]

On November 8, 2006 Ms. McClain identified the positions of cashier checker, sandwich maker/sandwich counter attendant and sales attendant as within the light strength category, within appellant's work restrictions and qualifications and reasonably available in the local labor market. By letter dated December 19, 2006, the Office proposed to reduce appellant's compensation benefits based on his capacity to earn wages as a sales attendant.[5] It noted that appellant's only medical restriction was that he could not work outdoors.

On December 22, 2006 appellant filed an occupational disease claim for degenerative disc disease, stating that the condition was caused by the lifting, pulling and carrying of securing lines associated with lockage's and working over 30 years standing on cement or steel.[6] He telephoned the Office on January 22, 2007 and asked that his carpal tunnel and degenerative disc claims be considered before a final reduction in his compensation was made. By decision dated January 24, 2007, it reduced appellant's compensation benefits, effective February 17, 2007, based on his capacity to earn wages as a sales attendant. On February 17, 2007 appellant requested a telephonic hearing and submitted additional medical evidence including a May 16, 2005 report from Dawn Turner, R.N., case manager, who noted appellant's complaints of back and leg problems. In an August 30, 2006 report, Dr. Andrews advised that appellant could work

[1] The physical requirements of appellant's job included outside work in extreme temperatures, heavy lifting and carrying, pushing and pulling.

[2] Dr. Hill's credentials cannot be ascertained.

[3] The Office adjudicated the carpal tunnel claim under file number. xxxxxx358.

[4] In an August 30, 2006 treatment note, Dr. William J. Andrews, a resident physician, noted electromyographic (EMG) findings of mild carpal tunnel syndrome.

[5] The physical demands for the sales attendant position require light strength with occasional lifting of 20 pounds and frequent lifting of 10 pounds, occasional stooping, reaching and frequent handling, fingering.

[6] The Office adjudicated the back claim under file number xxxxxx567.

eight hours a day with the restriction that he not repetitively move his wrists. In an October 26, 2006 report, Dr. A. Paul Rauwolf, Board-certified in family medicine, noted that appellant was being evaluated for a long history of hamstring spasms that caused considerable pain. He advised that preliminary evaluation indicated back problems that could require surgery and that appellant had been referred for a neurosurgical consultation. Dr. Rauwolf provided restrictions of no repetitive lifting or bending with a 20-pound weight limitation. In a December 7, 2006 report, Dr. Albert J. Fenoy, a neurosurgeon, noted a chief complaint of low back pain and hamstring tightness, worse with exertion and a past medical history including malignant melanoma, carpal tunnel syndrome and lumbar radiculopathy. In a February 5, 2007 report, Dr. Chandan G. Reddy, a neurosurgeon, advised that appellant was restricted to no repetitive motion of hands and wrists due to his carpal tunnel syndrome and no standing or walking for more than four hours a day due to his degenerative disc disease. For both conditions, appellant had a lifting restriction of five pounds. In a February 26, 2007 treatment note, Dr. Reddy advised that EMG testing revealed no evidence of lumbosacral radiculopathy, and magnetic resonance imaging (MRI) scan demonstrated diffuse disc desiccation at L1-2, diffuse disc bulging at L3-4, L4-5 spinal stenosis due to anterolisthesis of L4 on L5, and a protruded disc at L5-S1. He noted appellant's 30-year history of working as a lock and dam operator where he handled barge lines and weights exceeding 45 pounds and a three-year history of leg pain. Dr. Reddy diagnosed bilateral carpal tunnel syndrome and herniated disc at L5-S1 and provided a restriction of no lifting greater than 5 pounds until appellant had back surgery and a life-time lifting restriction of 15 pounds.

On March 22, 2007 the Office accepted that appellant sustained employment-related displacement of lumbar intervertebral disc without myelopathy. On April 24, 2007 appellant underwent an L4-5 posterior lumbar interbody fusion procedure. In a June 1, 2007 report, Dr. Reddy advised that he first saw appellant on October 25, 2006 when he was totally disabled and that his total disability status should be extended until September 2007.

By decision dated June 28, 2007, an Office hearing representative found that the Office erroneously reduced appellant's compensation benefits because it assumed that appellant's carpal tunnel syndrome and back conditions arose subsequent to the accepted melanoma condition when the medical evidence supported that appellant experienced symptoms of these conditions in 2004 and 2003 respectively. The hearing representative concluded that the medical record did not show that the selected position of sales attendant was suitable with respect to the carpal tunnel and back conditions, and reversed the January 24, 2007 decision. By decision dated July 26, 2007, a second Office hearing representative found that the June 28, 2007 decision was erroneous because the evidence of record established that appellant's carpal tunnel syndrome and lumbar degenerative disc disease arose subsequent to the accepted melanoma condition, and therefore the Office was not required to consider these conditions with regard to the suitability of the selected position. The June 28, 2007 decision was vacated and the January 24, 2007 decision was affirmed.

On August 22, 2007 appellant requested reconsideration and submitted additional medical evidence including a February 2, 2004 cervical spine MRI scan that noted a history of numbness and pain in his upper extremities and intermittent right leg pain. Degenerative disc disease of the cervical spine was diagnosed. In a September 10, 2007 report, Dr. Rauwolf noted that appellant had been treated for what appeared to be cervical radiculopathy for several years

prior to the diagnosis of carpal tunnel, which was diagnosed by an EMG in December 2005. He opined that it was very likely that appellant's carpal tunnel had been present during this period and was concealed by the cervical radiculopathy. Dr Rauwolf attached a March 28, 2001 treatment note that noted a several year history of low back pain and appellant's complaint that he found it difficult to lift properly on his job. He diagnosed low back pain and lateral epicondylitis. In a January 27, 2004 report, Dr. Rauwolf noted that appellant developed the sudden onset of upper extremity numbness and pain in both arms after carrying sheet rock and doing overhead work.[7]

By decision dated October 9, 2007, the Office denied modification of the prior decision. On October 23, 2007 appellant again requested reconsideration, arguing that his three accepted medical conditions had occurred concurrently during his 34½ years of federal employment. He submitted a March 28, 2001 lumbar spine x-ray that noted a history of chronic low back pain aggravated by standing and walking and demonstrated degenerative joint disease and retrolisthesis at L5 relative to L4 and S1. A May 16, 2005 lumbar spine x-ray showed no significant change. By decision dated January 8, 2008, the Office denied modification of the prior decision.[8]

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[9] 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.[10]

Section 8115 of the Federal Employees' Compensation Act[11] and Office regulations provide that wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity or the employee has no actual earnings, his wage-earning capacity 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.[12]

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[7] On August 10, 2007 appellant filed a schedule award claim under file number xxxxxx793, the melanoma claim By decision dated September 18, 2007, the Office denied the schedule award claim. He did not file an appeal with the Board of this decision.

[8] On March 24, 2008 the Office combined appellant's claims numbered xxxxxx793, xxxxxx358 and xxxxxx567 with the former being the master file.

[9] *James M. Frasher*, 53 ECAB 794 (2002).

[10] 20 C.F.R. §§ 10.402, 10.403; *John D. Jackson*, 55 ECAB 465 (2004).

[11] 5 U.S.C. §§ 8101-8193.

[12] 5 U.S.C. § 8115; 20 C.F.R. § 10.520; *John D. Jackson*, *supra* note 10.

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 for selection of a position listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open market, that fits that 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.[13] Finally, application of the principles set forth in *Albert C. Shadrick*[14] will result in the percentage of the employee's loss of wage-earning capacity.[15]

In determining an employee's wage-earning capacity based on a position deemed suitable, but not actually held, the Office must consider the degree of physical impairment, including impairments resulting from both injury-related and preexisting conditions, but not impairments resulting from post injury or subsequently acquired conditions. Any incapacity to perform the duties of the selected position resulting from subsequently acquired conditions is immaterial to the loss of wage-earning capacity that can be attributed to the accepted employment injury and for which appellant may receive compensation.[16]

Office procedures state that when selecting a position to represent wage-earning capacity, the Office must determine whether the medical evidence establishes that the claimant is able to perform the job, taking into consideration medical conditions due to the accepted work-related injury or disease and any preexisting medical conditions.[17]

ANALYSIS -- ISSUE 1

In this case, when the Office proposed to reduce appellant's compensation on December 19, 2006 based on his ability to earn wages as a sales attendant, he had two accepted injuries, malignant melanoma and bilateral carpal tunnel syndrome. Office procedures provide that the Office must determine if a claimant is medically capable of performing the selected position, taking into consideration medical conditions due to the accepted work-related injury.[18] It, however, did not consider appellant's bilateral carpal tunnel syndrome in finding that the sales attendant position fit his medical restrictions but merely indicated that due to his malignant melanoma, he could not work outdoors. This, therefore, would not be a case where either condition would be considered "preexisting" as both were accepted as employment related at the time the Office proposed to reduce appellant's compensation benefits. Nonetheless, in

[13] *James M. Frasher, supra* note 9.

[14] 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.403.

[15] *James M. Frasher, supra* note 9.

[16] *John D. Jackson, supra* note 10.

[17] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-earning Capacity*, Chapter 2.814.8(d) (December 1993).

[18] Federal (FECA) Procedure Manual, *supra* note 17.

appellant's September 10, 2007 report, Dr. Rauwolf advised that it was very likely that appellant's carpal tunnel syndrome had been concealed by his preexisting diagnosis of cervical radiculopathy, and thus provides medical reasoning that appellant's carpal tunnel syndrome predated the melanoma diagnosis by several years.

The Board therefore finds that the Office should have considered both appellant's malignant melanoma and carpal tunnel syndrome conditions prior to reducing his compensation. Proceedings under the Act are not adversarial in nature. It shares responsibility in the development of the evidence and has an obligation to see that justice is done.[19] As the Office did not substantiate that appellant could perform the duties of the selected position based on the two work-related injuries that were accepted at the time it reduced his compensation, it did not meet its burden of proof.[20] In light of the Board's ruling on the first issue, the second issue is moot.

CONCLUSION

The Board finds that the Office did not meet its burden of proof to establish that the constructed position of sales attendant fairly and reasonably represented appellant's wage-earning capacity.

[19] *William B. Webb*, 56 ECAB 156 (2004).

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

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 8, 2008 and July 26, 2007 be reversed.

Issued: December 12, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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