United States Department of Labor
Employees' Compensation Appeals Board

R.P., Appellant	)	
and	)	**Docket No. 07-166**
	)	**Issued: January 11, 2008**
DEPARTMENT OF AGRICULTURE, Plainview, TX, Employer	)	

Appearances:
Gordon Reiselt, 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 October 24, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated September 29, 2006, which denied modification of the Office's May 16, 2005 wage-earning capacity determination. 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 properly determined appellant's wage-earning capacity based on the constructed position of a medical records clerk; and (2) whether appellant has met his burden of proof to establish that modification of the wage-earning capacity determination was warranted.

FACTUAL HISTORY

On May 24, 2001 appellant, then a 46-year-old food inspector, injured his left shoulder when he slipped on a piece of meat and fell at work. The Office accepted his claim for right

shoulder strain, right shoulder impingement syndrome and lumbar strain. Appellant was placed on the periodic rolls and received appropriate compensation.

By letter dated October 7, 2004, the Office referred appellant for a second opinion to Dr. John Krause, a Board-certified orthopedic surgeon. In an October 26, 2004 report, Dr. Krause opined that appellant's shoulder condition had not resolved; however, his lumbar strain resolved. He also noted preexisting degenerative changes. Dr. Krause advised that appellant could return to work with permanent restrictions, including no reaching above the shoulder, no pushing greater than 20 pounds and no climbing. He completed a work capacity evaluation and indicated that appellant could do no climbing or reaching above the shoulder, no pushing or lifting over 20 pounds and no pulling greater than 15 pounds. By decision dated November 18, 2004, the Office denied authorization for further lumbar treatment.

On November 29, 2004 the Office referred appellant to a vocational rehabilitation counselor for an initial interview and vocational assessment of his skills and abilities, as the employing establishment was unable to accommodate his restrictions. The counselor found several jobs that appellant was able to perform that were available in the area and which paid around $320.00 per week. On January 7, 2005 the Office advised appellant that he would receive 90 days of job placement assistance to obtain employment. Appellant was advised that his compensation would be reduced even if he did not obtain employment.

Through contact with the vocational counselor, the Office determined that the constructed position of a medical records clerk, was suitable to appellant's restrictions and reasonably represented his wage-earning capacity. In a March 23, 2005 job classification report, the vocational counselor identified a medical records clerk position listed in the Department of Labor, *Dictionary of Occupational Titles*, DOT No. 245.362-010. He provided 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. The vocational counselor determined that this position was in accord with appellant's medical restrictions, background, education and experience. He noted that three to six months training was required and noted that appellant was in a medical records position while on light duty. The vocational counselor also noted that the physical demands were within appellant's restrictions. The vocational counselor documented a reasonable labor market for a medical records clerk position and noted that it was available in sufficient numbers so as to make it reasonably available within appellant's commuting area with a weekly wage of $320.00 per week. He provided a job description for the position which was comprised of sedentary requirements related to compiling and maintaining records of hospitals or other health care facilities, use of the computer and clerical duties.

On April 11, 2005 the Office confirmed that the current rate of pay for a food inspector, appellant's date-of-injury job, was $19.64 per hour.

By letter dated April 15, 2005, the Office advised appellant that it proposed to reduce his compensation. The Office found that the medical and factual evidence established that he was no longer totally disabled but rather partially disabled. The Office noted that placement services were authorized for 90 days, however, appellant had not secured a position. The Office found that appellant had the capacity to earn wages as a medical records clerk at the rate of $320.00 per

week. Appellant was advised that the vocational rehabilitation counselor had found that, based upon his experience, education, medical restrictions and a labor market survey, he was employable as a medical records clerk. The Office informed appellant that the counselor documented that the medical records clerk positions were reasonably available in his commuting area and that the entry pay level for the position was $320.00 per week. Appellant was advised that the physical requirements of the position were light in nature and that they did not exceed his accepted work tolerance restrictions and were consistent with the work restrictions provided by Dr. Krause.

In an April 15, 2005 report, Dr. S. Ali Mohamed, a preventive medicine specialist, and Dr. Rolando F. Rodriguez, an internist, noted treating appellant for his back and shoulder pain. They advised that appellant could not perform his job safely and should not return to work until his condition improved.

By decision dated May 16, 2005, the Office finalized the proposed reduction of compensation. Appellant was advised that his compensation would be reduced effective May 15, 2005.

On June 17, 2005 appellant requested reconsideration. By decision dated August 8, 2005, the Office denied modification of its May 16, 2005 decision.

In a September 15, 2005 report, Dr. James W. Simmons, a Board-certified orthopedic surgeon, diagnosed a herniated nucleus pulposus, a right shoulder rotator cuff tear, partial, and a right shoulder rotator cuff tendinitis/impingement. He recommended evaluation by a shoulder specialist and opined that appellant's right shoulder conditions were related to his original injury. Dr. Simmons opined that it appeared that appellant's right shoulder condition was exacerbated by physical therapy and may have resulted in the rotator cuff tear.

The Office received reports dating from July 2005 to May 2006 from Drs. Rodriguez and Eddie L. Cerday, a Board-certified anesthesiologist. They diagnosed right shoulder internal derangement syndrome, right shoulder post surgery and myofascial pain syndrome. Drs. Rodriguez and Cerday also noted that appellant needed a referral to a shoulder surgeon for further evaluation. They continued to treat appellant and submit periodic reports.

On August 4, 2006 appellant requested reconsideration. Appellant's representative alleged that his right shoulder condition had worsened and that he had developed bilateral carpal tunnel syndrome, which resulted in material worsening of his condition such that he was incapable of performing the duties of a medical records clerk.

By decision dated September 29, 2006, the Office denied modification of the May 16, 2005 loss of wage-earning capacity decision. The Office determined that the evidence failed to demonstrate a material change in the nature and extent of appellant's injury-related condition which precluded him from performing the position of medical records clerk.

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.[1]

Section 8115(a) of the Federal Employees' Compensation Act,[2] provides 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.[3] 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.[4] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[5] 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.[6] 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.[7]

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.[8] Finally, application of the principles set forth

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[1] *See Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C § 8115(a). *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

[2] 5 U.S.C. § 8115.

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

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

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

[6] *Id.*

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

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

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

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.[10]

ANALYSIS -- ISSUE 1

The medical evidence includes an October 26, 2004 report from Dr. Krause, a Board-certified orthopedic surgeon, who noted that appellant could return to work with restrictions that included no reaching above the shoulder, no pushing greater than 20 pounds and no climbing. Dr. Krause also completed a work capacity evaluation and provided restrictions for appellant, which also indicated that appellant could not lift anything greater than 15 pounds.

The Office referred appellant for vocational rehabilitation counseling and an initial interview on January 7, 2005. In a memorandum also dated January 6, 2005, the vocational rehabilitation counselor identified three jobs that appellant was capable of performing and which were available in the area. On January 7, 2005 the Office informed appellant that he had 90 days to secure employment or his compensation would be reduced based on his capacity to earn wages. Although appellant returned to work briefly on January 20, 2005 as an electrician helper, the record indicates this was a temporary job that ended. Thus, this position was not a proper basis for calculating appellant's wage-earning capacity.[11] Thereafter, the Office's vocational rehabilitation counselor continued job placement services. On March 23, 2005 the rehabilitation counselor identified the medical records clerk position as an available job that appellant was capable of performing.

On April 15, 2005 the Office proposed to reduce appellant's compensation, noting that he had not secured a position despite placement services. Because appellant was unable to secure employment, the vocational rehabilitation counselor identified the position of a medical records clerk, that fit appellant's work capabilities. The Office determined that appellant had the capacity to earn wages as a medical records clerk, based on the October 26, 2004 work capacity evaluation provided by Dr. Krause. In its May 16, 2005 decision, the Office reduced appellant's compensation effective May 15, 2005.

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

[10] *John D. Jackson*, 55 ECAB 465 (2004).

[11] A temporary job will be considered unsuitable unless the claimant was a temporary employee when injured and it will also be considered unsuitable, for wage-earning capacity purposes, when the temporary position will terminate in less than 90 days. *See Joyce R. Gill*, 49 ECAB 658 (1998); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.4(b)(3) (July 1997).

The Board finds that the medical evidence establishes that appellant was capable of performing the duties required for the selected position of medical records clerk. In the October 26, 2004 work capacity evaluation, Dr. Krause advised that appellant could return to a full day of light-duty work with restrictions which included that he could do no climbing or reaching above the shoulder; no pushing or lifting over 20 pounds and no pulling greater than 15 pounds. Although Drs. Mohamed and Rodriguez, on April 15, 2005, advised that appellant could not perform his job safely and should not return to work until his condition improved, the physicians did not specifically address whether appellant could perform the duties of the selected medical records clerk position.

The Office vocational rehabilitation counselor determined that appellant was able to perform the position of a medical records clerk as he had previously held this position when he returned to light duty. He provided a job description which was comprised of sedentary requirements related to compiling and maintaining records of hospitals or other health care facilities, use of the computer and clerical duties and determined that the position fell within appellant's medical restrictions. The Office vocational rehabilitation counselor noted that the position was available in sufficient numbers so as to make it reasonably available within appellant's commuting area and that the wage of the position was $320.00 per week.

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 medical records clerk represented his wage-earning capacity.[12] The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of medical records clerk and that such a position was reasonably available within the general labor market of appellant's commuting area. The Office therefore properly determined that the position of medical records clerk reflected appellant's wage-earning capacity and using the *Shadrick* formula,[13] reduced his compensation effective May 15, 2005.

Appellant has not submitted any evidence to support that such positions were not reasonably available in the general labor market.

LEGAL PRECEDENT -- ISSUE 2

It is well settled that, once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[14] Once the wage-earning capacity of an injured employee is properly determined, it remains undisturbed regardless of actual earnings or lack of earnings.[15] A modification of such a 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

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

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

[14] *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

[15] *Roy Mathew Lyon*, 27 ECAB 186, 190-98 (1975).

erroneous.[16] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[17]

ANALYSIS -- ISSUE 2

Appellant has not submitted any evidence to show that the original May 16, 2005 determination regarding his wage-earning capacity was erroneous. Furthermore, appellant has not alleged nor is there any indication from the record that he has been retrained or otherwise vocationally rehabilitated. Thus, the only remaining avenue for modification is by demonstrating a material change in the nature and extent of appellant's injury-related condition. Appellant, however, has failed in this regard as well.

The majority of evidence appellant submitted in support of his request for modification pertains to various medical reports submitted by Drs. Rodriguez and Cerday, who diagnosed right shoulder internal derangement syndrome and right shoulder post surgery with myofascial pain syndrome. However, they did not address appellant's ability to work in general or, more specifically, address whether his current shoulder conditions precluded him from performing the duties of a medical records clerk. The reports did not address a worsening of appellant's accepted work-related conditions or his inability to perform the position of medical records clerk. Other medical reports submitted by appellant did not address a worsening of appellant's accepted work-related conditions or specifically address his ability to perform the position of medical records clerk.

Additionally, the record contains reports from a social worker. However, social workers are not physicians, and these reports do not constitute probative medical evidence.[18]

For the above-noted reasons, these reports are insufficient to modify the Office's May 16, 2005 loss of wage-earning capacity determination.

Appellant has not met his burden on modification. He has failed to submit any rationalized medical opinion evidence explaining why an employment-related condition prevented him from performing the position of a medical records clerk. Accordingly, the Board finds that the Office properly denied modification of its May 16, 2005 determination regarding appellant's wage-earning capacity. As noted above, the burden of proof is on the party attempting to show a modification of the wage-earning capacity. In this case, appellant has not submitted any medical evidence establishing a material change in the nature and extent of his injury-related conditions.

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[16] *Tamra McCauley*, 51 ECAB 375, 377 (2000); *Elmer Strong*, 17 ECAB 226, 228 (1965).

[17] *Id.*

[18] 5 U.S.C. § 8101(2) of the Act provides as follows: (2) physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. A report may not be considered as probative medical evidence if there is no indication that the person completing the report qualifies as a physician as defined in 5 U.S.C. § 8101(2); *Phillip L. Barnes*, 55 ECAB 426 (2004).

CONCLUSION

The Board finds that the Office met its burden of proof in reducing appellant's compensation based on its determination that the constructed position of a medical records clerk represented his wage-earning capacity effective May 15, 2005. The Board also finds that appellant did not meet his burden of proof to establish that modification of the wage-earning capacity determination was warranted.

ORDER

IT IS HEREBY ORDERED THAT the September 29, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 11, 2008
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