United States Department of Labor
Employees' Compensation Appeals Board

M.L., Appellant	)	
and	)	**Docket No. 08-313**
	)	**Issued: September 12, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Cleveland, OH, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 13, 2007 appellant filed a timely appeal from the October 18, 2007 merit decision of an Office of Workers' Compensation Programs' hearing representative who affirmed a January 26, 2007 decision that reduced appellant's wage-loss compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits in this case.

ISSUE

The issue is whether the Office met its burden of proof in reducing appellant's wage-loss compensation benefits effective January 26, 2007 finding that the part-time constructed position of a telephone information clerk reasonably represented his wage-earning capacity.

FACTUAL HISTORY

On February 21, 1976 appellant, then a 34-year-old distribution clerk, sustained a low back injury while pushing a cart which came to a sudden stop. He stopped work and did not

return.[1] The Office accepted the claim for spondylolysis at L5 with S1 nerve root compression. It authorized surgery for a laminectomy L5 disc replacement surgery on January 11, 1978. Appellant was placed on the periodic rolls and received appropriate compensation benefits.

By letter dated July 21, 2005, the Office referred appellant to Dr. Michael J. Jurenovich, an osteopath and Board-certified orthopedic surgeon, for a second opinion examination. In a report dated August 24, 2005, Dr. Jurenovich reviewed appellant's history of injury and treatment and determined that he did not have lumbar disc disease. He advised that appellant could not return to his date-of-injury job with the employing establishment. Appellant walked with a slight limp and used a cane for ambulatory assistance but did not wear a back brace. Dr. Jurenovich noted that most of the examination was carried out while appellant was seated in a chair as his obesity made it difficult for him to get on the examining table. There was no muscle atrophy in either leg and straight leg raising was positive in both legs at 80 degrees. Dr. Jurenovich found that appellant could return to very limited duty with restrictions, two to four hours per workday. He advised that the work should be a sedentary desk job where appellant could get up and walk as needed.

On October 12, 2005 the Office requested that appellant provide a report from his treating physician addressing his ability to return to work. It also referred appellant for participation in the vocational rehabilitation program after confirming that the employing establishment was unable to accommodate his restrictions.

In an October 24, 2005 report, Dr. Ty Dahodwala, a chiropractor, opined that appellant could not work in any capacity. By letter dated November 17, 2005, the Office advised appellant that the report from Dr. Dahodwala was not probative as chiropractors were not defined as physicians, except for the treatment of a lumbar subluxation established by x-ray.

On December 16, 2005 the vocation rehabilitation counselor identified two potential positions for appellant, a telephone information clerk, DOT No. 237.367-046, with an average weekly salary of $200.00 per week based on 20 hours and food order clerk, DOT No. 209.567-014, with an average weekly salary of $191.20 based on 20 hours. The telephone information clerk duties were identified as answering telephone calls from customers, requesting current stock quotations and providing information requested on an electronic quote board and relaying calls to registered financial representatives and calling customers. The food order clerk duties included taking food and beverage orders over the telephone or intercom system and recording orders on a ticket, using time stamped devices, suggesting menus items and substitutions for items not available and answering questions regarding food or service. The positions were identified as sedentary and unskilled occupations which were reasonably available in appellant's commuting area on a full- or part-time basis.

On a March 7, 2006 Dr. Jurenovich reviewed the job descriptions. He stated that appellant could perform either position for four hours a day from a seated position.

[1] The record reflects that appellant has a nonwork-related heart condition, morbid obesity, angina, hemarthrosis of the right knee, low blood pressure, left shoulder surgery and bilateral knee surgery. He was also hospitalized in May 1976 for nonwork-related swelling of his left hand and in June 1982 for his heart condition.

On April 6, 2006 the Office requested that the employing establishment confirm appellant's grade and step level as of February 14, 2006 and the current salary for a distribution clerk. On April 27, 2006 the employing establishment confirmed that on February 14, 1976 appellant was a level 4, step 6 earning $10,287.00 per year and worked as a mail handler and not a clerk. It advised that his current salary would be $43,446.00. On November 29, 2006 the employing establishment indicated that the current salary would be $44,258.00 per year.

On December 20, 2006 the Office issued a notice of proposed reduction of benefits finding that appellant was capable of earning wages as a part-time telephone information clerk at the rate of $200.00 per week.[2] It afforded him 30 days in which to submit evidence or argument regarding his capacity to earn wages in the position described.

The Office subsequently received a January 9, 2007 x-ray of the lumbar spine, read by Dr. Ronald Petcher, a Board-certified radiologist, who diagnosed mild levoscoliosis with moderate accentuation of lordosis and osteopenia without compression fractures, definitive degenerative disc disease at L5-S1, narrowing of the L4-5 interspace, some degenerative disease of the lower facets and surgical clips in the right upper quadrant, most likely from cholecystectomy.

On January 17, 2007 the Office received a September 11, 2006 magnetic resonance imaging (MRI) scan of the lumbar spine, read by Dr. Bradley A. Blackburn, a Board-certified diagnostic radiologist. It revealed L1 disc herniation with associated canal stenosis and multilevel disc degeneration with associated foraminal encroachment and root impingement. A January 19, 2006 x-ray of the lumbar spine read by Dr. Paul Ruggieri, a Board-certified diagnostic radiologist, who revealed postoperative changes following a laminectomy at L5 and S1, right inferior facetectomy at L5, minimal spondylolisthesis, with mild right and severe left foraminal stenosis, mild canal and multilevel bony foraminal narrowing and a mild remote compression fracture of T12. An October 20, 2005 lumbar spine x-ray, read by Dr. Cesar Mendoza, Board-certified in internal medicine, who diagnosed spondylolysis at the L5-S1 nerve root. The Office also received a prescription for a high rise toilet seat and chemistry test results from September 27 to October 19, 2005.

By decision dated January 26, 2007, the Office finalized the proposed reduction of compensation benefits finding that appellant was partially disabled and had the capacity to earn wages as a part-time telephone information clerk. It noted that appellant did not provide additional medical evidence which addressed his ability to return to sedentary work for four hours per day.

By letter dated February 12, 2007, appellant's attorney requested a hearing, which was held on July 24, 2007. In reports dated January 10 and March 3, 2007, Dr. Lynn Sweet, an osteopath and Board-certified family practitioner, advised that appellant was totally disabled due to long-standing low back pain with radiculopathy. She indicated that appellant's "low back pain and immobility have completely eliminated his ability to be employed." Dr. Sweet added that appellant's pain was resistant to any therapeutic measures, which left him completely

[2] The Office also noted that appellant had the capacity to perform the duties of an order clerk and food and beverage clerk with wages of $192.20 per week.

disabled. The Office received a March 22, 2007 MRI scan of the lumbar spine from Dr. Petcher, a copy of January 19, 2006 diagnostic report from Dr. Ruggieri, a copy of an October 20, 2005 lumbar spine x-ray from Dr. Mendoza, a copy of Dr. Petcher's January 9, 2007 x-ray, a copy of the September 11, 2006 report from Dr. Blackburn, and a copy of an October 24, 2005 report from Dr. Ty Dahodwala.

In reports dated June 4 and July 2, 2007, Dr. Jeffrey D. Steier, a Board-certified psychiatrist and neurologist, indicated that he had treated appellant for significant peripheral neuropathy related to a gastric bypass surgery and for significant lower back problems, involving the L5-S1 nerve roots. He opined that appellant's inability to function was causing him to be completely disabled and his symptoms were unchanged. Dr. Steier also indicated that appellant had significant L5 foraminal stenosis more prominent on the left side and provide a copy of his July 3, 2007 electrodiagnostic report.

In an August 6, 2007 emergency room report, Dr. Susan Scarla, Board-certified in emergency medicine, noted that appellant fell after he bent over to water his dog and had increased back pain. She diagnosed acute lumbar strain.

In an August 15, 2007 report, Dr. Richard Carey, Board-certified in emergency medicine, noted that appellant had bumped his ribs bumping into a table at home and diagnosed a closed rib fracture.

By decision dated October 18, 2007, the Office hearing representative affirmed the January 26, 2007 wage-earning capacity decision.

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.[3]

Section 8115(a) of the Federal Employees' Compensation Act,[4] 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. 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

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

[4] 5 U.S.C. § 8115.

[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).

capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives.[7] 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.[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's *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]

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 postinjury 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.[11]

ANALYSIS

On August 24, 2005 Dr. Jurenovich, a Board-certified orthopedic surgeon, who noted appellant's history of injury and treatment and determined that he could return to limited duty with physical restrictions, two to four hours per workday. He recommended a sedentary desk job where appellant could get up and walk round as needed. In a March 7, 2006 report, Dr. Jurenovich indicated that he had reviewed the job description for a telephone information clerk and concluded that appellant could perform the position four hours a day from a seated position.

Appellant provided reports from Dr. Dahodwala, a chiropractor, who advised that he could not work in any capacity. The Board finds that this report is not probative as the chiropractor is not considered a physician. Section 8101(2) of the Act[12] provides that the term

[7] *Id.*

[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] 5 ECAB 376 (1953).

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

[12] 5 U.S.C. § 8101(2).

physician includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist and subject to regulation by the Secretary.[13] Without a diagnosis of a subluxation based on x-ray, a chiropractor is not a physician under the Act. His opinion on appellant's capacity for work does not constitute competent medical evidence.[14]

The Office referred appellant for vocational rehabilitation counseling after the employing establishment advised the Office that it could not accommodate appellant's restrictions. On December 16, 2005 the vocational rehabilitation counselor stated that he had identified two jobs that appellant would be capable of performing and which were available in the area. One of them was a telephone information clerk, DOT No. 237.367-046, with an average weekly salary of $200.00 per week based on 20 hours. This position was identified as sedentary and unskilled occupations which were reasonably available in appellant's commuting area on a full or part-time basis.

The employing establishment confirmed that on February 14, 1976 appellant was a level 4, step 6 earning $10,287.00 per year and worked as a mail handler and not a clerk. The current salary for the same level and step was identified as $44, 258.00 per year.

On December 20, 2006 the Office issued a notice of proposed reduction of benefits finding that appellant was capable of earning wages as a part-time telephone information clerk at the rate of $200.00 per week. It afforded him 30 days in which to submit evidence or argument regarding his capacity to earn wages in the position described. Appellant submitted several reports dating from October 20, 2005 to August 15, 2007. However, these reports merely provided findings and did not offer any opinion as to whether appellant was capable of performing the duties required for the selected position of a telephone information clerk for four hours per day.

Appellant also provided reports from Dr. Sweet and Dr. Steier. Both physicians opined that appellant was totally disabled due to long-standing low back pain with radiculopathy. They indicated that appellant was completely disabled and unable to work. However, neither physician noted that they had reviewed the duties required of a telephone information clerk. Moreover, neither physician provided a rationalized explanation regarding the basis of their opinions on appellant's total disability.[15] These reports do not establish that appellant was unable to perform the duties of a telephone information clerk on a part-time basis. Other medical reports submitted by appellant do not specifically address whether he was totally disabled from the selected position of part-time telephone information clerk.

The Board finds that the evidence establishes that appellant was capable of performing the duties required for the selected position of a telephone information clerk for four hours per day. As noted, Dr. Jurenovich advised that appellant could return to limited duty for four hours

[13] *See* 20 C.F.R. § 10.311.

[14] *Jay K. Tomokiyo*, 51 ECAB 361 (2000).

[15] *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).

per day in a sedentary desk job where appellant could get up and walk around as needed. He then reviewed the position requirements and confirmed that appellant could perform the duties of a telephone information clerk for four hours per day from a seated position. The Office vocational rehabilitation counselor determined that appellant was able to perform the position of a telephone information clerk. He provided a job description which was comprised of sedentary requirements related to the use of telephone and answering the telephone and determined that the position fell within appellant's medical restrictions. The counselor noted that the position was available in sufficient numbers on a part-time basis so as to make it reasonably available within appellant's commuting area and that the wage of the position was $200.00 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 telephone information clerk represented his wage-earning capacity.[16] The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of telephone information 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 telephone information clerk reflected appellant's wage-earning capacity and using the *Shadrick* formula,[17] reduced his compensation effective January 26, 2007.

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

CONCLUSION

The Board finds that the Office met its burden of proof in reducing appellant's wage-loss compensation benefits effective January 26, 2007 based on its determination that the part-time constructed position of a telephone information clerk reasonably represented appellant's wage-earning capacity.

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

[17] 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.403.

ORDER

IT IS HEREBY ORDERED THAT the October 18, 2007 decision of the Office of Workers' Compensation Programs' hearing representative is affirmed.

Issued: September 12, 2008
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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