United States Department of Labor
Employees' Compensation Appeals Board

R.C., Appellant	)	
and	)	**Docket No. 08-1911**
	)	**Issued: August 7, 2009**
DEPARTMENT OF JUSTICE, IMMIGRATION & NATURALIZATION SERVICE, San Diego, CA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 30, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' December 31, 2007 merit decision modifying his wage-earning capacity and a May 29, 2008 decision denying his request for a hearing. 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 modify appellant's wage-earning capacity effective January 20, 2008; and (2) whether the Office properly denied his request for a hearing under 5 U.S.C. § 8124(b)(1).

FACTUAL HISTORY

The Office accepted that on February 17, 1994 appellant, then a 53-year-old assistant area port director, sustained a lumbar strain with radiculoneuritis, herniated nucleus pulposus at L4-5 and aggravation of degenerative disc disease and osteoarthritis at L4-5. He was disabled

beginning March 8, 1994 and returned to work for the employing establishment on April 25, 1994. Appellant stopped work on July 14, 1994 and did not return.[1] On February 17, 1994 he underwent lumbar fusion surgery at L4-5.

In a June 7, 2000 decision, the Office adjusted appellant's wage-loss compensation to reflect his capacity to earn wages for eight hours per day in the constructed position of elementary school teacher. It determined that appellant could earn $421.85 per week in this position.

Appellant received extensive treatment for his condition from Dr. Travis A. Calvin, Jr., a Board-certified neurosurgeon. On February 19, 2004 he underwent further laminectomy and decompression surgery at L4-5 with posterior lumbar interbody fusion. Appellant was reinstated to temporary total disability status due to his surgery. On April 17, 2006 Dr. Thomas J. Sabourin, a Board-certified orthopedic surgeon, who served as an Office referral physician, stated that appellant's positive findings on examination showed that he continued to have residuals of the February 17, 1994 employment injury. However, appellant was able to work for four hours per day in a job that restricted him from lifting more than 15 pounds and driving more than an hour to or from work. On May 10, 2006 Dr. Travis determined that appellant continued to have employment-related residuals which rendered him totally disabled from work.

The Office found a conflict in medical opinion regarding appellant's capacity to work and referred him to Dr. Louis Lurie, a Board-certified orthopedic surgeon, for an impartial medical examination. On November 13, 2006 Dr. Lurie reviewed appellant's medical history, including his progress since his February 19, 2004 back surgery. He reported findings on examination, including positive straight leg raising and some limitation of back motion. There was no atrophy of the lower extremities. Dr. Lurie noted that appellant reported that he felt that he could work four hours per day at a job that did not require such duties as bending or lifting more than 15 pounds. He found that appellant continued to have residuals of his February 17, 1994 employment injury and stated, "The reason for this is on the basis of his history, [appellant's] physical examination showing positive straight leg raising, decreased sensation and weakness in his right lower extremity, and the x-rays showing the fact that the patient had need for pedicle screws for the L4-5 intervertebral disc space." Dr. Lurie indicated that appellant could not return to his regular work but could work four hours per day with restrictions on bending, lifting more than 15 pounds and driving an hour or more to or from work.[2]

Appellant participated in vocational rehabilitation efforts sponsored by the Office and, in April 2007, his vocational rehabilitation counselor determined that he was capable of working as an information clerk for four hours per day. The sedentary job did not require bending, lifting

[1] Appellant periodically worked as a teacher for private employers.

[2] In a December 11, 2007 report, an Office medical adviser indicated that he agreed with Dr. Lurie's findings regarding disability.

more than 10 pounds or driving an hour or more to or from work. The rehabilitation counselor determined that the position was reasonably available in appellant's commuting area.[3]

In a September 14, 2007 letter, the Office advised appellant that it proposed to modify his wage-loss compensation based on its determination that he was capable of earning wages in the constructed position of information clerk. The rehabilitation counselor found this position to be appropriate and reasonably available in appellant's commuting area. The duties of the information clerk position were within the work restrictions recommended by the impartial medical specialist, Dr. Lurie, whose opinion represented the weight of the medical evidence regarding appellant's ability to work.

Appellant submitted several reports dated between September and November 2007, in which Dr. Calvin checked a "yes" box indicating that appellant remained totally disabled due to his employment injury.

In a December 31, 2007 decision, the Office adjusted appellant's compensation to reflect that he was capable of earning wages in the constructed position of information clerk. It performed a *Shadrick* calculation which adjusted his compensation effective January 20, 2008.[4]

In a letter dated April 7, 2008, received by the Office on April 11, 2008, appellant requested a hearing before an Office hearing representative. He asserted that he had depression which prevented him from requesting a hearing in a timely manner.

In a May 29, 2008 decision, the Office denied appellant's hearing request. It found that his request was untimely. It exercised its discretion and denied the request by finding that the case could be addressed by submitting additional medical evidence to establish a greater loss of wage-earning capacity with a request for reconsideration.

LEGAL PRECEDENT -- ISSUE 1

Under the Federal Employees' Compensation Act,[5] once a loss of wage-earning capacity is determined, a modification of such a determination is not warranted unless there is a material change in the nature and extent of the employment-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was in fact erroneous.[6] The burden of proof is on the party attempting to show the award should be modified.[7] Once the Office has accepted a claim it has the burden of justifying modification of

[3] The position paid between $8.50 and $14.75 per hour. Appellant's attempts to find work were unsuccessful.

[4] The Office found that appellant could earn $219.20 per week.

[5] 5 U.S.C. §§ 8101-8193.

[6] *George W. Coleman*, 38 ECAB 782, 788 (1987); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

[7] *Jack E. Rohrabaugh*, 38 ECAB 186, 190 (1986).

compensation benefits.[8] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[9]

Under section 8115(a) of the Act, 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 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.[10] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[11] 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.[12] The fact that an employee has been unsuccessful in obtaining work in the selected position does not establish that the work is not reasonably available in his commuting area.[13] Once an appropriate position has been established, application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.[14]

Section 8123(a) of the Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[15] In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[16]

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[8] *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

[9] *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

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

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

[12] *Id.* The commuting area is to be determined by the employee's ability to get to and from the work site. *See Glen L. Sinclair*, 36 ECAB 664, 669 (1985).

[13] *See Leo A. Chartier*, 32 ECAB 652, 657 (1981).

[14] *See Dennis D. Owen*, 44 ECAB 475, 479-80 (1993); *Wilson L. Clow, Jr.*, 44 ECAB 157, 171-75 (1992); *Albert C. Shadrick*, 5 ECAB 376 (1953).

[15] 5 U.S.C. § 8123(a).

[16] *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

ANALYSIS -- ISSUE 1

The Office accepted that on February 17, 1994 appellant sustained a lumbar strain with radiculoneuritis, herniated nucleus pulposus at L4-5 and aggravation of degenerative disc disease and osteoarthritis at L4-5. On February 17, 1994 he underwent lumbar fusion surgery at L4-5. In a June 7, 2000 decision, the Office adjusted appellant's wage-loss compensation to reflect his capacity to earn wages for eight hours a day in the constructed position of elementary school teacher. On February 19, 2004 appellant underwent further laminectomy and decompression surgery at L4-5 with posterior lumbar interbody fusion. He was reinstated to temporary total disability status due to his surgery.

The Board finds that the Office properly modified its determination of appellant's wage-earning capacity by showing that there was a material change in the nature and extent of appellant's employment-related condition.

The Office properly determined that there was a conflict in the medical opinion between Dr. Calvin, an attending Board-certified neurosurgeon, and Dr. Sabourin, a Board-certified orthopedic surgeon, acting as an Office referral physician, regarding appellant's ability to work.[17] In order to resolve the conflict, it referred appellant, pursuant to section 8123(a) of the Act, to Dr. Lurie, a Board-certified orthopedic surgeon, for an impartial medical examination.

On November 13, 2006 Dr. Lurie reported findings on examination and concluded that appellant continued to have residuals of his February 17, 1994 employment injury based on his history, his physical examination showing positive straight leg raising, decreased sensation and weakness in his right lower extremity, and the x-rays showing the fact that he had need for pedicle screws for the L4-5 intervertebral disc space. He advised that appellant could not return to his regular work but could work four hours per day with restrictions on bending, lifting more than 15 pounds and driving an hour or more to or from work.

The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Lurie, the impartial medical specialist selected to resolve the conflict in the medical opinion. The report of Dr. Lurie establishes that appellant was able to work as an information clerk, a sedentary position that only required lifting up to 10 pounds.[18]

[17] On April 17, 2006 Dr. Sabourin noted that appellant's positive findings on examination showed that he continued to have residuals of the February 17, 1994 employment injury. He found, however, that appellant was able to work for four hours per day in a job that restricted him from lifting more than 15 pounds and driving more than an hour to or from work. In contrast, Dr. Calvin determined on May 10, 2006 that appellant continued to have employment-related residuals which rendered him totally disabled for work.

[18] Appellant submitted several reports, dated between September and November 2007, in which Dr. Calvin checked a "yes" box indicating that he was totally disabled due to his employment injury. The Board has held, however, that when a physician's opinion on causal relationship consists only of checking "yes" to a form question, that opinion has little probative value and is insufficient to establish causal relationship. *Lillian M. Jones*, 34 ECAB 379, 381 (1982). These reports reiterate Dr. Calvin's stated opinion on appellant's disability and, thus, are insufficient to overcome the opinion of the impartial medical specialist or create a new conflict as Dr. Calvin was on the side of the conflict that the impartial medical specialist resolved. *William Morris*, 52 ECAB 400, 404 (2002).

The Office properly relied on the opinion of the rehabilitation counselor to find that appellant was vocationally capable of performing the information clerk position. It considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment, age and employment qualifications, in determining that the position of information clerk represented appellant's wage-earning capacity.[19] Appellant did not submit any evidence or argument showing that he could not vocationally or physically perform the information clerk position. The weight of the evidence of record establishes that he had the requisite physical ability, skill and experience to perform the position of information clerk and that such a position was reasonably available within the general labor market of appellant's commuting area.[20] As noted above, the Office established that there was a material change in the nature and extent of the employment-related condition. Therefore, it properly modified its determination of appellant's wage-earning capacity.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act, concerning a claimant's entitlement to a hearing before an Office representative, provides in pertinent part: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[21] As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.[22] The date of filing is fixed by postmark or other carrier's date marking.[23]

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[24] Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right to a hearing,[25] when the request is made after the 30-day period for requesting a hearing,[26] and when the request is for a second hearing on the same issue.[27]

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[19] *See Clayton Varner*, 37 ECAB 248, 256 (1985).

[20] The Office also properly applied the *Shadrick* formula.

[21] 5 U.S.C. § 8124(b)(1).

[22] *Ella M. Garner*, 36 ECAB 238, 241-42 (1984).

[23] *See* 20 C.F.R. § 10.616(a).

[24] *Henry Moreno*, 39 ECAB 475, 482 (1988).

[25] *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

[26] *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

[27] *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

ANALYSIS -- ISSUE 2

Appellant's April 7, 2008 hearing request was made more than 30 days after issuance of the Office's December 31, 2007 decision. Thus, he was not entitled to a hearing as a matter of right. The Office properly found that appellant was not entitled to a hearing as a matter of right because his April 2008 hearing request was not made within 30 days of the Office's December 31, 2007 decision.[28]

The Office also has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right. In the May 29, 2008 decision, it properly exercised its discretion by finding that the issue in the case could be addressed by submitting additional medical evidence to establish a greater loss of wage-earning capacity. The Board has held that the only limitation on the Office's authority is reasonableness; abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.[29] In the present case, the Office did not abuse its discretion in denying appellant's untimely request for a hearing.

CONCLUSION

The Board finds that the Office met its burden of proof to modify its determination of appellant's wage-earning capacity effective January 20, 2008. The Board further finds that the Office properly denied appellant's request for a hearing under section 8124 of the Act.

[28] Appellant asserted that he had depression which prevented him from filing in a timely manner. He did not submit medical evidence supporting this assertion.

[29] *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' May 29, 2008 and December 31, 2007 decisions are affirmed.

Issued: August 7, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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