United States Department of Labor
Employees' Compensation Appeals Board

T.K., Appellant	)	
and	)	**Docket No. 08-914**
	)	**Issued: January 14, 2009**
DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, Miami, FL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 6, 2008 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated May 30, 2007 reducing his compensation based on a constructed loss of 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.

ISSUE

The issue is whether the Office met its burden of proof in reducing appellant's compensation based on its determination that the constructed position of a paralegal represented his wage-earning capacity effective June 10, 2007.

FACTUAL HISTORY

This is the fourth appeal before the Board. In a July 11, 2006 decision, the Board reversed the Office's January 11, 2005 decision, which found that appellant's earnings as an

insurance investigator fairly and reasonably represented his wage-earning capacity.[1] The Board found that the Office improperly relied upon the opinion Dr. Patrick J. Barry as he was not the physician selected to act as the impartial specialist.[2] The Board found that there was unresolved conflict in the medical opinion evidence between Dr. Michael A. Abrahams, an attending Board-certified orthopedic surgeon, and Dr. D. Barry Lotman, a second opinion Board-certified orthopedic surgeon, with regard to appellant's work restrictions and the extent of his residuals. On July 25, 2007 the Board issued an order dismissing appeal.[3] The Board found that it lacked jurisdiction as the Office had not issued an adverse final decision within a year of appellant's November 26, 2006 appeal. In an order dated January 30, 2008, the Board again dismissed appellant's appeal as the Office had not issued a final decision on his wage-earning capacity.[4] The facts of the case as set forth in the Board's prior decision are hereby incorporated by reference.

On August 3, 2006 the Office referred appellant to Dr. Norman Moskowitz, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence. In a report dated August 25, 2006, Dr. Moskowitz stated that appellant's preexisting ankle and big toe conditions had been aggravated by the employment injury. He recommended that appellant be returned to an administrative position with the employing establishment with restrictions. Dr. Moskowitz found that appellant could return to duty on a full-time basis for eight hours a day. In an August 25, 2006 work restriction (Form OWCP-5c), he advised that appellant could work eight hours per day with restrictions of no sitting, walking or standing more than four hours per day, no pushing or pulling more than 15 pounds, no lifting more than 10 pounds, two 15-minute breaks in the morning and two 15-minute breaks in the afternoon.

On September 29, 2006 appellant was referred for vocational rehabilitation. In November 13, 2006 report, the vocational rehabilitation counselor noted appellant's physical restrictions, educational background and conducted a skills assessment. The vocational rehabilitation counselor identified several positions, including paralegal, which fit within appellant's skill assessment, education and physical restrictions. Job placement efforts were conducted from November 14, 2006 through February 21, 2007, focusing primarily on sedentary jobs, such as paralegal, security officer, fraud investigator and legal investigator.

[1] Docket No. 06-503 (issued July 11, 2006).

[2] On May 14, 2001 appellant, a 40-year-old special agent, filed a traumatic injury claim alleging that on April 27, 2001 he sustained injuries to his right knee, left wrist, right ankle and lower back due to an automobile accident. The Office accepted the claim for right knee open wound, lumbar sprain/strain, right ankle strain/sprain and left wrist strain/sprain, which was subsequently expanded to include closed fracture of the right metatarsal and right chondromalacia of the patella. It authorized right knee arthroscopic surgery, which was performed on November 12, 2002 and right ankle arthroscopic surgery, which was performed on January 14, 2003. By letter dated January 27, 2003, the Office placed appellant on the periodic rolls for temporary total disability. On June 4, 2003 appellant had metatarsophalangeal arthroscopic surgery.

[3] Docket No. 07-407 (issued July 25, 2007).

[4] Docket No. 07-1734 (issued January 30, 2008).

In a January 26, 2007 supplemental note, Dr. Moskowitz noted his review upon a second physical evaluation and found that the position duties and restrictions for the position of paralegal were within appellant's physical restrictions.

As placement efforts did not result in employment, on February 21, 2007 the vocational rehabilitation counselor identified the position of paralegal as suitable to appellant's training and physical capabilities. The position required him to demonstrate research skills of the law, investigate facts and prepare documents to assist lawyers. The position was classified as a light job with a strength level of occasional pulling up to 20 pounds and frequent lifting of up to 10 pounds. The physical demands of the position required frequent reaching, handling and fingering. It noted that the job could include frequent standing and walking and that accommodation was occasional. The vocational rehabilitation counselor noted that the job was reasonably available in appellant's commuting area with wages of $820.80 per week.

On April 4, 2007 the employing establishment informed the Office that on the date of injury appellant was a GS-12 with a base pay of $53,571.00 per year and had also earned $13,392.75 per year in availability pay as a special agent. The current salary for appellant's date-of-injury position was $66,604.00 per year with availability yearly pay of $16,651.00.

On April 5, 2007 the Office advised appellant that it proposed to reduce his wage-loss compensation based on his capacity to earn $820.80 a week as a paralegal, a light-duty position within Dr. Moskowitz' August 25, 2006 restrictions.

In a letter dated April 9, 2007, appellant contended that the Office failed to consider his preexisting conditions of hypertension and polycystic kidney disease when considering the suitability of the paralegal position. On April 11, 2007 he contended that the position of paralegal was inconsistent with the physical restrictions noted by Dr. Moskowitz.

By decision dated May 30, 2007, the Office reduced appellant's wage-loss compensation based on his ability to earn $820.80 a week as a paralegal effective June 10, 2007. It noted that the decision did not affect his medical benefits, which remained open for coverage of treatment.[5]

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.[6] 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

[5] On August 15, 2008 the Office issued a decision denying appellant's request for modification of the May 30, 2007 loss of wage-earning capacity decision. As appellant requested an appeal before the Board on February 6, 2008, any decision issued by the Office on the same issue that is pending before the Board on appeal, is null and void since the Office and the Board may not have concurrent jurisdiction over the same issue. *See D.S.*, 58 ECAB ___ (Docket Nos. 06-1408 & 06-2061, issued March 1, 2007); *Russell E. Lerman*, 43 ECAB 770 (1992).

[6] 20 C.F.R. §§ 10.402, 10.403 (2006); *see Alfred R. Hafer*, 46 ECAB 553 (1995).

represent his or her wage-earning capacity.[7] 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 employment, the availability of suitable employment and other factors and circumstances which may affect wage-earning capacity in his or her disabled condition.[8]

The Office must initially determine appellant's medical condition and work restrictions before selecting an appropriate position that reflects his vocational wage-earning capacity. The medical evidence on which it relies must provide a detailed description of appellant's condition.[9] Additionally, a wage-earning capacity determination must be based on a reasonably current medical evaluation.[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 post-injury or subsequently acquired conditions.[11] 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. Additionally, 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]

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, *Dictionary of Occupational Titles* (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.[13] 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.[14]

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[7] *J.C.*, 58 ECAB ___ (Docket No. 07-1165, issued September 21, 2007).

[8] 5 U.S.C. § 8115(a); *see T.O.*, 58 ECAB ___ (Docket No. 06-1458, issued February 20, 2007). *Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

[9] *M.A.*, 59 ECAB ___ (Docket No. 07-349, issued July 10, 2008); *Samuel J. Russo*, 28 ECAB 43 (1976).

[10] *M.A.*, *supra* note 9; *Carl C. Green, Jr.*, 47 ECAB 737, 746 (1996).

[11] *James Henderson, Jr.*, 51 ECAB 268 (2000).

[12] *Id.*

[13] *See Luis R. Flores*, 54 ECAB 250 (2002).

[14] 20 C.F.R. § 10.403(d); *see also William H. Woods*, 51 ECAB 619 (2000); *Albert C. Shadrick*, 5 ECAB 376 (1953).

ANALYSIS

On May 30, 2007 the Office reduced appellant's wage-loss compensation effective June 10, 2007. It determined that the constructed position of paralegal was medically and vocationally suitable and represented his wage-earning capacity of $820.80 per week. The issue of whether an employee has the physical ability to perform the constructed position is primarily a medical question that must be resolved by the medical evidence.[15] The Board finds that the medical evidence does not support a finding that the selected position of paralegal is within appellant's physical limitations.

The Office selected Dr. Moskowitz to resolve the conflict in medical opinion between Drs. Abrahams and Lotman regarding appellant's work restrictions and the extent and degree of any employment-related residuals. As the medical evidence demonstrated that appellant was no longer totally disabled for work, the Office referred him to a vocational rehabilitation counselor. Based on his skill set, education and physical restriction, the counselor did not conduct vocational testing and proceeded with an assisted placement program. As appellant was not hired, the counselor selected the position of paralegal as listed in the Department of Labor, DOT. The paralegal position was classified as light, with occasional pulling up to 20 pounds and contained frequent activities such as fingering and handling, lifting of up to 10 pounds, standing and walking.

The requirements of the position identified by appellant's vocational rehabilitation counselor exceed appellant's restrictions. On August 25, 2006 Dr. Moskowitz concluded that appellant could work eight hours per day with restrictions of no sitting, walking or standing more than four hours per day, no pushing or pulling more than 15 pounds and no lifting more than 10 pounds. He also indicated that appellant should be permitted to take, two 15-minute breaks in the morning and two 15-minute breaks in the afternoon. On January 26, 2007 Dr. Moskowitz conducted a supplemental physical examination, reviewed the paralegal position and concluded that appellant was capable of performing the position. However, the physical demands of pulling more than 15 pounds and frequent walking and standing had been prohibited in the physician's August 25, 2006 report and the attached work restriction form he completed. While Dr. Moskowitz indicated that appellant was capable of performing the paralegal position in the January 26, 2007 report, he did not address the physical demands or explain whether appellant's condition had changed and that he could perform more frequent walking and standing. Dr. Moskowitz' opinion is inconsistent since he found appellant capable of working with restrictions on pulling more than 15 pounds and no walking or standing more than four hours with breaks, but subsequently found that appellant was capable of pulling up to 20 pounds and performing frequent standing and walking without breaks. Therefore, Dr. Moskowitz' opinion is of diminished probative value.[16]

In its May 30, 2007 decision, the Office found that the position of paralegal 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. The Board

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

[16] *Betty M. Regan*, 49 ECAB 496 (1998).

finds that the Office did not meet its burden of proof 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 decision of the Office of Workers' Compensation Programs dated May 30, 2007 is reversed.

Issued: January 14, 2009
Washington, DC

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

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

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