United States Department of Labor
Employees' Compensation Appeals Board

C.A., Appellant	)	
and	)	**Docket No. 08-1524**
	)	**Issued: May 20, 2009**
U.S. POSTAL SERVICE, SAN FRANCISCO PERFORMANCE CLUSTER, San Francisco, CA, 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
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 30, 2008 appellant timely appealed a merit decision of the Office of Workers' Compensation Programs dated May 1, 2007 in which an Office hearing representative affirmed an earlier decision concerning his wage-earning capacity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

ISSUE

The issue is whether the Office properly reduced appellant's compensation effective February 19, 2006 based on its determination that the constructed position of a final assembler represented his wage-earning capacity.

FACTUAL HISTORY

This case has previously been before the Board on appeal.[1] The facts and history of the case are incorporated by reference. The relevant facts are briefly set forth below.

The Office accepted that on November 20, 1978 appellant, then 30-years-old, sustained a left knee strain when he slipped and fell on stairs while working as a letter carrier. He had a left hip arthroscopy on January 11, 1979 and left knee ligamentous reconstruction on September 17, 1979. Appellant underwent surgery in June 1981 for a nonwork-related ruptured quadriceps repair after he struck his knee on an object while attempting to catch a Frisbee. He has not worked since November 20, 1978. Appropriate wage-loss compensation and medical benefits were paid.

In a September 8, 2004 progress report, Dr. Michael Joyce, a Board-certified orthopedic surgeon, reported that appellant had increased stiffness and crepitus along with episodes of clunking in the knee. She provided an impression of post-traumatic degenerative arthritis of the left knee and chronic anterior cruciate ligament (ACL) insufficiency. Ice and a light exercise program were recommended.

In a September 13, 2004 report, Dr. C. David Bomar, a Board-certified orthopedic surgeon and Office referral physician, reviewed appellant's medical record, the statement of accepted facts and presented his examination findings. Range of motion of the left knee was 5 to 120 degrees with extensive crepitation with motion. Dr. Bomar noted that there was no instability in the medial or lateral planes and that the Lachman sign was negative with no joint effusion. He stated that there was no atrophy in the calf or thigh but recent x-rays showed a complete loss of the medial joint space with fairly severe osteoarthritis. Dr. Bomar diagnosed osteoarthritis of the left knee and stated that appellant would eventually require total knee replacement. He remarked that the November 1978 work injury aggravated the preexisting arthritis in the knee and increased appellant's symptoms. Dr. Bomar stated that appellant had not reached maximum medical improvement and major surgery would eventually have to be done. He opined that appellant was partially disabled from the employment injury. Dr. Bomar advised that appellant could work full time with restrictions of no prolonged walking, climbing stairs or ladders frequently or squatting and kneeling, but he could sit, stand, walk short distances, use his hands, bend and lift up to 30 pounds.

On October 3, 2004 the Office referred appellant to vocational rehabilitation. The rehabilitation counselor reported that, based on appellant's experience, education, medical restrictions and a labor market study, he was employable as a final assembler. In a January 27, 2005 letter, appellant objected to the rehabilitation and placement plan. He advised that he could only work four hours a day. Appellant noted that his preference to return to the employing establishment and referred to postal regulations stating that the employer would make an effort to reemploy an injured worker. He further stated that he found it inappropriate that he was coached not to disclose the vocational rehabilitation counseling to prospective employers.

[1] Docket No. 02-839 (issued August 26, 2002). The Board affirmed a February 1, 2001 Office decision denying merit review.

The job placement phase began on February 9, 2005. On February 10, 2005 the rehabilitation counselor advised that the employing establishment would not accommodate appellant's restrictions. On August 2, 2005 the counselor identified the position of Final Assembler, Department of Labor's *Dictionary of Occupational Titles*, (DOT) #713.687-018 to be suitable, both medically and occupationally, reasonably available in appellant's geographic area. The position description noted that the final assembler attached nose pads and temple pieces to optical frames, using hand tools by positioning parts in fixture to align screw holes. The position was listed as sedentary with physical demands of reaching, handling, fingering, near acuity and accommodation and unskilled, with a specific vocational preparation of less than one month. The rehabilitation counselor noted that the job market for final assemblers was in decline, but confirmed it was being performed in sufficient numbers on a full-time basis in appellant's community as to be reasonably available. The position had an hourly wage of $7.62 or $304.80 per week.

On November 10, 2005 the Office received two medical reports from appellant's attending physician, Dr. Richard P. Dibala, a Board-certified family practitioner. In a February 10, 2005 report, Dr. Dibala noted that appellant's previous physician, Dr. Joyce, found him disabled. He reported that appellant had a back injury in the mid-1970s that required hospitalization for eight days including traction. Dr. Dibala stated that appellant had frequent disabling recurrences of back pain involving the sciatica, exacerbated by progressive obesity. He indicated that other conditions included a significant knee injury with torn ligaments and cartilage, subsequent surgeries and a subsequent secondary injury involving the quadriceps tendon requiring surgical repair. Dr. Dibala indicated that appellant had been seen on three occasions for increasing difficulty with his back pain and sciatica. He noted lumbosacral spine films from December 2004 showed significant degenerative joint disease with disc space narrowing at multiple levels and osteophyte formation. Dr. Dibala stated, "it is probable that his initial injury in the 1970s has initiated this significant degenerative process which has markedly limited the patient's activity and physical capacities." He indicated that appellant could not perform a sedentary job which involved eight hours of sitting given his degree of back pain. Dr. Dibala advised that appellant might be able to perform work that allowed occasional to frequent changes in position without requiring prolonged standing. He recommended a four-hour trial work period. In an October 31, 2005 report, Dr. Dibala opined that appellant was "best suited to part-time work or certainly no more than a trail at an eight hour a day job which would need to include significant sitting but with interspersed break times during which time he could change position." A copy of the December 2, 2004 report of x-rays of the lumbar spine revealed degenerative disc disease at T11-12, T12-L1, L4-5 and L5-S1 with osteophytes and no evidence of spondylolysis or spondylolisthesis.

In a November 21, 2005 letter, appellant argued that neither the statement of accepted facts nor Dr. Bomar's second opinion evaluation referenced his preexisting back condition, which the Office had accepted under the Office file numbers xxxxxx024 and xxxxxx359. He maintained that his physician in San Francisco had provided a four-hour work assessment and stated that there was a medical conflict. Appellant noted that his back condition had worsened after becoming sedentary. He also disagreed with the suitability of the position stating that he could not sit for extended periods due to back pain and increased instability of his left knee. Appellant further stated that he did not receive 90 days of placement assistance.

In a December 30, 2005 notice of proposed reduction of compensation, the Office found the selected position of final assembler represented appellant's wage-earning capacity.[2] It found that appellant's on-going back condition was unrelated to the accepted lumbar strains under case file numbers xxxxxx359 (December 28, 1977) and xxxxxx024 (March 11, 1975). The Office found Dr. Dibala's reports lacked probative value to relate appellant's current back complaints to the prior back claims for lumbar strain. It noted that appellant was provided 90 days placement assistance. The Office found that the factual and medical evidence established that appellant had the capacity to earn wages as a final assembler and allowed him 30 days to submit additional evidence or argument if he disagreed with the proposed action.

In a January 27, 2006 letter, appellant reiterated his previous arguments and resubmitted his November 21, 2005 statement. He also submitted a copy of an October 11, 994 x-ray examination of his lumbosacral spine, which contained an impression of degenerative disc disease most accentuated at the L5-S1 level.

By decision dated February 7, 2006, the Office reduced appellant's wage-loss compensation, effective February 19, 2006, finding that the position of final assembler represented his wage-earning capacity. It noted that appellant's current weekly pay rate for the job and step when injured was $376.81. The Office found that appellant was capable of earning $304.80 per week, that the adjusted wage-earning capacity per week was $135.65, that the percentage of new wage-earning capacity was 36 percent, that the loss in wage-earning capacity amount per week was $241.16, leaving appellant with a compensation rate of $180.87 or $374.25 per week when increased by applicable cost-of-living adjustments. This resulted in a new compensation rate every four weeks of $1,497.00 beginning February 19, 2006.

Appellant disagreed with the Office's decision and requested an oral hearing, which was held February 28, 2007. The record reflects the Office informed appellant of his hearing date in a letter dated January 26, 2007.

In an August 16, 2006 report, Dr. Joyce noted that appellant had long-term disability since 1981 and that he continued to experience painful episodes of knee instability. He reported transitions from sedentary activities such as sitting to ambulation was particularly difficult. Dr. Joyce also reported that appellant's attempt to accommodate to his knee symptoms have consequently led to an ongoing aggravation of long-standing low back pain. He diagnosed left knee end stage osteoarthritis with chronic ACL insufficiency and indicated that appellant required a left knee replacement. Dr. Joyce indicated that appellant had been released to a sedentary work level and specific permanent restrictions included a maximum four-hour workday due to the combination of arthritis and instability. He provided an impairment rating of 50 percent left lower extremity.[3]

By decision dated May 1, 2007, an Office hearing representative affirmed the February 7, 2006 Office decision.

[2] The December 30, 2005 letter and notice superseded an earlier notice of October 25, 2005.

[3] There is no schedule award issue before the Board in the present appeal.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[4] 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.[5]

Section 8115 of the Federal Employees' Compensation Act[6] 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 or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, usual employment, age, qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect the wage-earning capacity in his or her disabled condition.[7] The Office must initially determine a claimant's medical condition and work restrictions before selecting an appropriate position that reflects his or her wage-earning capacity. The medical evidence upon which the Office relies must provide a detailed description of the condition.[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 for selection of a position listed in the Department of Labor's DOT 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.[9] Finally, application of the principles set forth in *Albert C. Shadrick*[10] will result in the percentage of the employee's loss of wage-earning capacity.[11] Office regulations provide that the employee's wage-earning capacity in terms of percentage is obtained by diving the employee's actual earnings or the pay rate of the position selected by the Office, by the current pay rate for the job held at the time of the injury.[12]

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

[5] 20 C.F.R. §§ 10.402 and 10.403; *John D. Jackson*, 55 ECAB 465 (2004).

[6] 5 U.S.C. §§ 8101-8193.

[7] *Id*. at § 8115; 20 C.F.R. § 10.520; *John D. Jackson, supra* note 5.

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

[9] *James M. Frasher, supra* note 4.

[10] 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.403.

[11] *James M. Frasher, supra* note 4

[12] 20 C.F.R. § 10.403(d).

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 impairment results 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.[13]

ANALYSIS

Appellant's claim was accepted by the Office for sprain/strain of left knee/leg. The record reveals he had accepted lumbosacral strains of December 28, 1977 (case file number xxxxxx359) and March 11, 1975 (case file number xxxxxx024). By decision dated February 7, 2006, the Office reduced his compensation effective February 19, 2006. The Board finds that the Office properly reduced appellant's compensation based on his capacity to perform the duties of a final assembler.

In finding that appellant was physically capable of performing the duties of a final assembler, the Office relied on the September 13, 2004 opinion of Dr. Bomar, an Office referral physician, who evaluated appellant for his accepted left knee sprain/strain. Dr. Bomar found that appellant was partially disabled as a result of the employment injury but was able to work full time. He indicated that appellant had permanent restrictions of no prolonged walking, climbing stairs or ladders frequently or squatting and kneeling, but he was able to sit, stand, walk short distances, use his hands, bend and lift up to 30 pounds. The Board finds that Dr. Bomar's opinion is sufficiently well rationalized to establish that appellant is medically capable of working full time in the constructed position, which is a sedentary position that has the physical demands of reaching, handling, fingering, near acuity and accommodation.

Although appellant submitted medical reports from Drs. Dibala and Joyce, their reports do not support that he was unable to perform the duties of the selected position due to his employment injuries or any preexisting conditions as they failed to provide an opinion regarding his ability to perform the duties of the selected position. In his February 10, 2005 report, Dr. Dibala noted that appellant had disabling recurrences of back pain involving the sciatica, exacerbated by progressive obesity. He reported that appellant had been seen in his office three times for increasing difficulty with his back pain and sciatica. Dr. Dibala further noted lumbosacral spine films from December 2004 showed significant degenerative joint disease with disc space narrowing at multiple levels and osteophyte formation. While he stated, "it is probable that his initial injury in the 1970s has initiated this degenerative process which has markedly limited the patient's activities and physical capacities," he failed to refer to any medical history or findings to support his conclusion, which is speculative in nature.[14] Thus, Dr. Dibala's opinion is of diminished probative value to support that appellant continues to suffer disabling residuals of his accepted lumbosacral strains. Moreover, in his October 31, 2005

[13] *John D. Jackson, supra* note 5.

[14] *See Frank Luis Rembisz*, 52 ECAB 147 (2000) (medical opinions based on an incomplete history or which are speculative or equivocal in character have little probative value).

report, he opined that appellant could work in an eight-hour day sedentary position, provided he could take breaks to change his position. This is consistent with Dr. Bomar's restrictions.

In his August 16, 2006 report, Dr. Joyce indicated that appellant had specific permanent restrictions, which included a maximum four-hour workday due to the combination of arthritis and instability. He reported that it was difficult for appellant to transition from sedentary activities such as sitting to ambulation and that attempts to accommodate his knee symptoms has led to an ongoing aggravation of low back pain. However, Dr. Joyce did not provide objective findings or medical rationale explaining how or why appellant could not perform standing and sitting activities intermittently over an eight-hour period. The Board has held that a medical opinion that is not fortified by medical rationale is of diminished probative value.[15] Without more explanation of how Dr. Joyce came to his opinion, it is of diminished probative value and insufficient to cause a medical conflict with Dr. Bomar over the number of hours appellant could work. The medical evidence thus establishes that appellant has the physical capacity to work eight hours a day as a final assembler within the restrictions noted by Dr. Bomar.[16]

On August 2, 2005 the rehabilitation counselor provided updated labor market survey information. The rehabilitation counselor provided a job description for the final assembler position, noted that it was a sedentary position and found that appellant fit the educational requirements, that the position was within his medical restrictions and was available in sufficient numbers so as to make it reasonably available within his commuting area, at a weekly wage of $7.62 or $304.80 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 final assembler represented his wage-earning capacity.[17] The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform this position and that it was reasonably available within the general labor market of his commuting area. Also, the Office followed the established procedures under the *Shadrick* decision in calculating appellant's employment-related loss of wage-earning capacity. Appellant did not contend that the Office erred in its mathematical calculations of his wage-earning capacity. The Board has reviewed these calculations and finds them to be correct.

On appeal, appellant contended that he could not medically perform the selected final assembler position. He, however, did not submit sufficient medical evidence to establish that he was not capable of working eight hours a day in a sedentary position. Appellant further argued that: there was a conflict in medical opinion regarding the number of hours he was able to perform in a sedentary position; his preexisting back condition was not considered; and the constructed position was not reasonably available. As noted, Dr. Joyce's opinion was insufficiently reasoned to create a conflict regarding whether appellant could perform the duties

[15] *Brenda L. DuBuque*, 55 ECAB 212 (2004).

[16] *See Gayle Harris*, 52 ECAB 319 (2001).

[17] *James M. Frasher*, *supra* note 4.

of the selected position and the record indicates that appellant's preexisting conditions were considered in determining whether he could return to work.

Appellant contends that the selected position was not reasonably available as the rehabilitation counselor only identified one opening for a final assembler without experience. The Board has previously noted that where there is probative evidence of record regarding reasonable availability, such as from a state employment agency, this evidence will not be contradicted by evidence as to a lack of current referrals for the selected position.[18] In this case, the rehabilitation counselor properly noted that, while the job market for final assemblers was in decline, he confirmed that the position was being performed in sufficient numbers on a full-time basis in appellant's community as to make it reasonably available to appellant. Moreover, the Board has held that the mere fact that appellant is not able to secure a job in the selected position does not establish that the work is not available or suitable.[19]

Appellant further contends that he was not accorded 30 days notice prior to the scheduling of the hearing of February 28, 2007. The Office's letter of January 26, 2007, however, provide appellant with 31 days notice of the scheduled hearing date of February 28, 2007.

Thus, the Office's February 7, 2006 decision reducing appellant's compensation based on his ability to earn wages in the constructed position of a full-time final assembler is proper under the law and facts of this case.

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation effective February 19, 2006 based on its determination that the constructed position of final assembler represented his wage-earning capacity.

[18] *Carla Letcher*, 46 ECAB 452 (1995).

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

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated May 1, 2007 is affirmed.

Issued: May 20, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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