United States Department of Labor
Employees' Compensation Appeals Board

R.C., Appellant	)	
and	)	**Docket No. 08-2342**
	)	**Issued: September 25, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Columbus, OH, Employer	)	

Appearances:
Appellant, pro se
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 August 26, 2008 appellant filed a timely appeal from the June 2, 2008 decision of the Office of Workers' Compensation Programs' regarding 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 case.

ISSUE

The issue is whether the Office met its burden of proof in reducing appellant's compensation, effective November 25, 2007, based on the selected positions of a customer service specialist and telemarketer.

FACTUAL HISTORY

This case has previously been on appeal before the Board.[1] In a January 26, 2004 decision, the Board found that appellant failed to establish that he sustained a recurrence of

[1] Docket No. 03-1362 (issued January 26, 2004).

disability on August 17, 2001 causally related to his September 8, 1971 employment injury. The facts and history contained in the prior appeal are incorporated by reference.[2]

On March 25, 2003 the Office authorized a total knee revision to replace a loosening prosthesis. Appellant underwent surgery on May 30, 2003 and remained off work. He received compensation for total disability beginning May 30, 2003. In a July 12, 2004 report, Dr. John O'Leary, a treating Board-certified orthopedic surgeon, opined that there was no type of employment at the employing establishment which did not require standing and walking. On July 29, 2005 the Office referred appellant to a vocational rehabilitation counselor.

On August 3, 2005 the Office referred appellant to Dr. James H. Rutherford, a Board-certified orthopedic surgeon, for a second opinion to determine the extent of his work-related condition and disability. On August 30, 2005 Dr. Rutherford reviewed appellant's history of injury and treatment. He advised that appellant had reached maximum medical improvement and that his condition was permanent and stationary. Dr. Rutherford found that appellant could not return to his duties as a mail clerk but could perform sedentary work for eight hours per day with restrictions. Appellant could engage in occasional standing and walking as well as occasional lifting and carrying up to 10 pounds. Dr. Rutherford found that appellant could not stoop, climb or crawl for a work activity, although he could occasionally bend. Appellant could drive to transport himself but he could not drive heavy equipment.

In an April 24, 2006 report, Dr. O'Leary opined that appellant was unable to work as he was totally disabled. The Office found a conflict in opinion between Drs. O'Leary, and Rutherford, regarding appellant's work ability and restrictions.

On August 17, 2006 the Office referred appellant, together with a statement of accepted facts and the medical record, to Dr. Mark Holt, a Board-certified orthopedic surgeon, for an impartial medical evaluation.

In an August 31, 2006 report, Dr. Holt addressed appellant's history of injury and treatment. He diagnosed postrevision right total knee arthroplasty with arthrofibrosis. Appellant had extension of 15 to 20 degrees and flexion to 75 degrees. There was no tenderness to palpation in the knee and no effusion. Dr. Holt opined that appellant's current right knee condition was stable and related to the September 8, 1971 employment injury and that appellant was no longer in need of medical care. He reviewed the work restrictions recommended by Dr. Rutherford and the April 24, 2006 report of Dr. O'Leary. Dr. Holt opined that appellant was capable of working with restrictions for eight hours per day, five days a week. The restrictions should include no climbing, kneeling, squatting and skipping. Appellant could not operate a motor vehicle at work and had 2½ hour limits on his ability to walk and stand, per 8-hour shift. Dr. Holt recommended that appellant be allowed to "self[-]regulate the amount of standing and walking that he performs on a continuous basis." He also recommended that appellant be allowed to change positions and sit down as needed. Appellant was able to push, pull and lift no more than 10 pounds, for 2½ hours in an 8-hour day. Dr. Holt recommended that appellant be

[2] Appellant's claim was accepted for traumatic infrapatellar bursitis, right knee tear of the lateral and medial meniscus with surgery post-traumatic osteoarthritis and chondromalacia. It was also accepted for a malfunction of an orthopedic device following a knee replacement.

allowed to sit in chairs with adjustable height "so that he could vary the height of the chair for his comfort."

By letter dated September 14, 2006, the Office advised appellant that the report of Dr. Holt resolved the conflict regarding his ability to work. Appellant was advised that the rehabilitation office would be contacting him regarding reemployment efforts.

On March 27, 2007 the employing establishment informed the rehabilitation counselor that it could not accommodate appellant's restrictions. The rehabilitation counselor noted that he would develop a plan to employ appellant in the private sector.

In an April 2, 2007 report, Dr. O'Leary examined appellant's right knee and determined that he had -5 to 95 degrees of motion. Appellant related that his pain was at an acceptable level, with "mostly pretibial pain towards the outside part of his leg." There was no neurologic abnormality, swelling or tenderness. Dr O'Leary opined that appellant was disabled. He indicated that appellant could perform some type of sedentary work with a "maximum of two hours of standing or walking that would be two hours combined in the standing position and six hours sedentary. This would have to be intermittent as well. I do not believe that he could do two hours straight of standing or walking." He completed a work capacity evaluation. Regarding whether appellant could work for eight hours daily, Dr O'Leary responded that appellant "must only stand or walk intermittently a total of two hours a day. Can work sedentary position a total of six hours a day." He noted that the maximum weight that appellant could lift, pull or push, was about 10 pounds. Dr O'Leary also advised that appellant needed to be able to self-regulate with regard to standing and walking.

On August 8, 2007 the vocational counselor identified the constructed positions of full-time customer service specialist and telemarketer as being reasonably representative of appellant's restrictions. He identified the customer service specialist and telemarketer positions listed in the Department of Labor's *Dictionary of Occupational Titles*, DOT Nos. 299.367-010 and 299.357-014 and provided the required 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. He determined that these positions were available in sufficient numbers both full time and part time so as to make it reasonably available within appellant's commuting area with wages from $360.00 per week. The vocational counselor also advised that, while the job was being performed in sufficient numbers as to make it reasonably available in appellant's commuting area, he added that one employer was available for each of the particular positions. He further added that sedentary entry level jobs in "the exclusive Marion, Ohio City are practically nonexistent." The vocational rehabilitation counselor noted that the position was part time and it was likely that a position could be secured when there were any openings with the assistance of the Office. He also indicated that the positions were consistent with the medical restrictions. The rehabilitation counselor also provided a job description for the position of a telemarketer and customer service specialist. The descriptions of the positions were sedentary and included lifting of no more than 10 pounds on an occasional basis. Regarding the customer service specialist, the vocational counselor noted that the physical demands of light did not apply as the job was "customized to the sedentary level to meet the injured workers' needs." Regarding the telephone position, the counselor indicated that there was only one employer and it was part time.

On September 14, 2007 the employing establishment confirmed that appellant's current pay rate for his date-of-injury position was between $8.50 and $13.00 per hour. The employing establishment noted that it was $10.00 per hour in the Pittsburgh area.[3]

On October 18, 2007 the Office notified appellant that it proposed to reduce his compensation for wage loss as the medical and factual evidence established that he was no longer totally disabled. He had the capacity to earn wages as a customer service specialist and telemarketer at the rate of $360.00 per week. It explained that the impartial medical examiner's August 31, 2006 report constituted the weight of medical opinion and the identified positions were within the medical limitations outlined by Dr. Holt. Appellant was advised that the rehabilitation counselor had reported that based upon his experience, education, medical restrictions and a labor market survey, he was employable as a customer service specialist and a telemarketer. The Office informed appellant that his vocational rehabilitation counselor had documented that customer service specialist and telemarketer positions were reasonably available in his commuting area and that the entry pay level for the position was $360.00 per week. It advised that this represented 90 percent of his wage-earning capacity. The Office noted the physical requirements of the position required no physical demand of the lower extremities and were deemed to be vocationally suitable and consistent with the accepted work tolerance limitations. The Office provided a calculation sheet regarding his salary. It indicated that his pay rate when his disability recurred on May 30, 2003 was $778.00 per week; the current adjusted pay rate for his job on the date of injury was $400.00 per week, he was currently capable of earning $360.00 per week, the pay rate for a customer service specialist and telemarketer. The Office determined that appellant had a 90 percent wage-earning capacity that resulted in an adjusted wage-earning capacity of $700.56 per week. It found that he had a loss of wage-earning capacity of $77.84 per week. The Office stated that, based upon an augmented three-fourths compensation rate, appellant's compensation would be $58.38 per week. It subtracted the health deductions of $63.75 week and concluded that appellant would receive $255.00 every four weeks. Appellant was provided 30 days to submit additional evidence or argument in support of any objection to the proposed reduction.

By decision dated November 21, 2007, the Office reduced appellant's compensation effective November 25, 2007, based on his ability to work as a full-time customer service specialist and a telemarketer, which was found to be medically and vocationally suitable.

In a November 23, 2007 statement, appellant noted that he was enclosing a copy of Dr. O'Leary's April 2, 2007 report, who advised that he could only work a six-hour sedentary position. Appellant explained that the two hours of walking and standing were not meant to be added to the six hours of work, but they were meant to be included in the six hours. He contended that the constructed positions were not reasonably available in his community. On December 1, 2007 appellant argued that he was a regular clerk and the computation of his pay was not correct. He also alleged that there was a job at the employing establishment, which was within his restrictions; however, it was not offered to him.

[3] Pittsburgh is location of the employing establishment's administrative offices servicing the region where appellant was injured.

By letter dated December 3, 2007, appellant requested a hearing, which was held on March 17, 2008.

In disability certificates dated December 27, 2007 and January 10, 2008, Dr. O'Leary noted that appellant was off work from November 10, 2007 to January 10, 2008, for postoperative recovery of his right knee surgery. Appellant would be out of work through July 7, 2008 as a result of his right knee surgery. In a January 10, 2008 report, Dr. O'Leary stated that appellant "would only be capable of sedentary employment where he is sitting down and not required to stand and walk, move around, lift, carry or push or pull any heavy carts or objects." He indicated that he did "not believe that he will ever return to anything close to his former position of employment."

By decision dated June 2, 2008, the Office hearing representative affirmed the Office's November 21, 2007 decision, as modified.[4]

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.[5]

Section 8115(a) of the Federal Employees' Compensation Act,[6] 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 that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.[7] If the actual earnings do not fairly and reasonably represent wage-earning capacity or if the employee has no actual earnings, her wage-earning capacity is determined with due regard to the nature of her 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.[8] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[9] The job selected for determining wage-earning capacity must be a job

[4] The Office hearing representative found that, while the Office referred to suitability pursuant to 5 U.S.C. § 8106(c)(2), the Office properly relied upon the vocational rehabilitation counselor's labor market survey and the selected positions of a customer service specialist and telephone sales representative were medically and vocationally suitable and represented appellant's wage-earning capacity. He also found that the positions were reasonably available within his commuting area and appropriate to appellant's physical and vocational capabilities.

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

[6] 5 U.S.C. § 8115.

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

[8] *See Pope D. Cox, supra* note 5; 5 U.S.C. § 8115(a).

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

reasonably available in the general labor market in the commuting area, in which the employee lives.[10] 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.[11]

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.[12] 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.[13]

Section 8123(a), in pertinent part, provides that if there is a 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.[14]

ANALYSIS

Appellant's claim was accepted for traumatic infrapatellar bursitis, right knee tear of the lateral and medial meniscus with surgery post-traumatic osteoarthritis and chondromalacia. It was also accepted for a malfunction of an orthopedic device following a knee replacement.

Appellant submitted reports from his attending physician, Dr. O' Leary, who opined that he was unable to work and was totally disabled. The Office referred appellant to Dr. Rutherford, a second opinion physician, who concluded that appellant could work eight hours per day with restrictions. To resolve the conflict the Office referred appellant to Dr. Holt for an impartial medical evaluation.[15] Dr. Holt opined that appellant was capable of working with restrictions for eight hours per day, five days a week. He indicated that appellant should not climb, kneel, squat or skip. Dr. Holt also indicated that appellant could not operate a motor vehicle at work and advised that there were 2½ hour limits on his ability to walk and stand, per 8-hour shift. He advised that appellant be allowed to "self[-]regulate the amount of standing and walking that he performs on a continuous basis." Dr. Holt also indicated that appellant needed to "self-regulate the need to change position and sit down. Furthermore, he indicated that appellant could push, pull and lift no more that 10 pounds, for 2½ hours in an eight-hour day. Dr. Holt recommended

[10] *Id.*

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

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

[13] *Id. See Albert C. Shadrick*, 5 ECAB 376 (1953).

[14] 5 U.S.C. § 8123(a).

[15] *Id.*

that appellant sit in chairs that have an adjustable height "so that he could vary the height of the chair per his comfort." The impartial medical examiner's report established that appellant could work within restrictions for up to eight hours daily.[16] Thereafter, the Office referred appellant for vocational rehabilitation.

The vocational rehabilitation counselor identified two positions that were suitable and in accordance with appellant's restrictions. He identified a customer service specialist and telemarketer position as being sedentary and within his physical limitations. In particular, it was noted that they required no physical demands of the lower extremities and an occasional lifting requirement of no more than 10 pounds. The rehabilitation counselor indicated that these positions fell within appellant's work restrictions and were reasonably available in appellant's commuting area. 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 $360.00 per week. Evidence from the rehabilitation counselor also establishes that appellant has the appropriate knowledge, training and background to perform the selected position. The Board finds that the sedentary customer service specialist and telemarketer positions conform to work restrictions set forth by Dr. Holt.

However, the Office did not adequately consider the reasonable availability of the constructed positions of customer service specialist and telemarketer.[17] The Board notes that there is conflicting information from the rehabilitation counselor on whether selected positions were reasonably available in the open labor market. While the Board has held that a lack of current job openings does not equate to a finding that the position was not performed in sufficient numbers to be considered reasonably available, the Office must provide evidence that a selected position is performed in sufficient numbers in the geographical area to be reasonably available.[18] The vocational rehabilitation counselor advised on August 8, 2007 that the positions were reasonably available. However, in the same documents he also provided contradictory information regarding the availability of the positions at issue. He advised that only one job was available for the customer service specialist and noted that the job was "customized to the sedentary level to meet the injured worker's abilities and needs."[19] The vocational counselor also indicated that entry level jobs in Marion, Ohio, where appellant lived were "practically nonexistent." The Board also notes that the rehabilitation counselor stated that there was only one employer for the telemarketer position and it was a part-time position while the wage-earning capacity determination was based on a full-time position. The rehabilitation counselor's

[16] It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on proper factual and medical background, must be given special weight. *Phillip H. Conte*, 56 ECAB 213 (2004).

[17] *See James R. Verhine*, 47 ECAB 460) (1996); *supra* note 9. The Board also notes that the Office did not indicate why it based appellant's constructed wage-earning capacity decision on his ability to perform the duties of two selected positions. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(e)(1) (December 1995) (contemplates that the Office will select "a" position from those listed by the rehabilitation counselor).

[18] *See Alfred R. Hafer*, 46 ECAB 553 (1995).

[19] *See supra* note 11 (the Office may not select a makeshift or odd lot position or one not reasonably available on the open labor market).

equivocal statements regarding the availability of the two positions to undermine the finding that the positions were reasonably available. The Board finds that the weight of the evidence does not establish that such positions were reasonably available within the general labor market of appellant's commuting area.

As it has not been established that either the constructed position of customer service specialist or telemarketer position are reasonably available on the open labor market in appellant's commuting area, the Office did not meet its burden of proof to reduce appellant's compensation.

CONCLUSION

The Board finds that the Office did not meet its burden of proof in reducing appellant's compensation effective November 25, 2007.

ORDER

IT IS HEREBY ORDERED THAT the June 2, 2008 decision of the Office of Workers' Compensation Programs' hearing representative is reversed.

Issued: September 25, 2009
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