United States Department of Labor
Employees' Compensation Appeals Board

E.G., Appellant	)	
and	)	**Docket No. 09-2033**
	)	**Issued: April 9, 2010**
DEPARTMENT OF THE AIR FORCE, AIR FORCE LOGISTIC CENTER, HILL AIR FORCE BASE, UT, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 4, 2009 appellant filed a timely appeal from the June 18, 2009 merit decision of the Office of Workers' Compensation Programs concerning a 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 properly reduced appellant's compensation effective June 18, 2009 based on his capacity to earn wages as an escort vehicle driver.

FACTUAL HISTORY

The Office accepted in February 2001 that appellant, then a 34-year-old painter, sustained de Quervain's disease of his right arm, bilateral ulnar nerve entrapment and tenosynovitis of his left hand and wrist due to the performance of his repetitive work duties over time. It authorized

surgical procedures performed in July 2001 and April 2002. Appellant stopped work for various periods and the Office paid him appropriate disability compensation.[1]

In a March 11, 2008 work restrictions report, Dr. Rita Bermudez, an attending Board-certified physical medicine and rehabilitation physician, opined that appellant was only partially disabled as a result of his employment injury. She indicated that he could work on a full-time basis with restrictions of sitting up to seven hours, operating a motor vehicle at work for up to five hours, performing repetitive wrist and elbow movements for up to four hours per day and occasionally pushing, pulling or lifting up to 20 pounds. In a September 30, 2008 report, Dr. Bermudez reviewed the descriptions of several driving positions provided by appellant's vocational rehabilitation counselor and opined that appellant was able to perform work as a chauffer or tractor-trailer driver with restrictions of no lifting over 20 pounds. The positions of chauffer and tractor-trailer driver were sedentary in nature and required driving for almost an entire eight-hour day.

Since the medical evidence established that appellant was partially disabled and capable of working, he was referred for vocational rehabilitation services on April 30, 2008. In December 2008, appellant's rehabilitation counselor reported that, based upon appellant's experience, education, medical restrictions and a December 2008 labor market survey, he was employable as an escort vehicle driver. The position of escort vehicle driver involved driving vehicles equipped with warning lights and signs to escort trucks hauling mobile homes on public thoroughfares. The driver maintained a specified distance between pilot vehicle and escort to provide warning to other motorists and to clear traffic at locations. The position was considered to be sedentary in nature with occasional lifting up to 10 pounds. Appellant's vocational rehabilitation counselor determined that a labor market survey showed that the position of escort vehicle driver was reasonably available in appellant's commuting area. The average entry pay level for this position was $377.20 per week.[2]

In a March 18, 2009 letter, the Office advised appellant of its proposal to adjust appellant's compensation based on his capacity to earn wages as an escort vehicle driver. It found appellant vocationally and physically capable of performing the position and provided him with an opportunity to submit evidence if he disagreed with the proposed action.

In a March 20, 2009 statement, appellant indicated that he did not agree with the determination that he could work as an escort vehicle driver. He asserted that his rehabilitation counselor did not adequately communicate with him. In an April 6, 2009 report, Dr. Bermudez indicated that she did not have sufficient time to provide an additional medical report. She noted that appellant was capable of working as a tractor-trailer driver.

[1] Appellant received compensation on the periodic rolls since December 2005. He also received schedule award compensation for permanent upper extremity impairment.

[2] The labor market survey indicated that entry level pay for the targeted position varied from $8.00 per hour to $10.73 per hour. Therefore, an average of these entry level rates was calculated at $9.43 per hour or $377.20 a week. In September 2008, the employing establishment offered appellant a light-duty job. There is no indication that he began working in this job.

In a June 18, 2009 decision, the Office adjusted appellant's compensation effective June 18, 2009 based on his capacity to earn wages as an escort vehicle driver. Based on this wage-earning capacity determination, the Office performed a calculation of appellant's future entitlement to Office compensation.

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] Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[4]

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

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 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. 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.[8]

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

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

[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).

[7] *Id.*

[8] *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).

In determining wage-earning capacity based on a constructed position, consideration is given to the residuals of the employment injury and the effects of conditions which preexisted the employment injury.[9] In determining wage-earning capacity based on a constructed position, consideration is not given to conditions which arise subsequent to the employment injury.[10]

ANALYSIS

In the present case, the Office accepted in February 2001 that appellant sustained de Quervain's disease of his right arm, bilateral ulnar nerve entrapment and tenosynovitis of his left hand and wrist due to the performance of his repetitive work duties overtime. Appellant stopped work and the Office paid him appropriate disability compensation.

The Office received information in early 2008 from Dr. Bermudez, an attending Board-certified physical medicine and rehabilitation physician, who found that appellant was not totally disabled for work and had a partial capacity to perform work for eight hours per day subject to specified work restrictions. Appellant's vocational rehabilitation counselor then determined that appellant was able to perform the position of escort vehicle driver and found that state employment services showed that the position was available in sufficient numbers so as to make it reasonably available within his commuting area.

The Board finds that the Office properly relied on the opinion of the rehabilitation counselor that appellant was vocationally capable of performing the escort vehicle driver position.[11] Moreover, a review of the medical evidence reveals that appellant was physically capable of performing the position. The position required sitting and driving for most of the eight-hour workday and required occasional lifting of up to 10 pounds. Appellant did not submit any evidence or argument showing that he could not physically perform the position of escort vehicle driver. In a September 30, 2008 report, Dr. Bermudez reviewed the descriptions of several driving positions provided by appellant's vocational rehabilitation counselor and opined that appellant was able to perform work as a chauffer or tractor-trailer driver with restrictions of no lifting over 20 pounds. The positions of chauffer and tractor-trailer driver were sedentary in nature and required driving for almost an entire eight-hour day. The requirements of the positions of chauffer and tractor-trailer driver are similar to those of the position of escort vehicle driver and therefore the medical evidence shows that appellant was physically capable of working as an escort vehicle driver.[12]

[9] *See Jess D. Todd*, 34 ECAB 798, 804 (1983).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(d) (December 1995).

[11] Appellant asserted that his rehabilitation counselor did not adequately communicate with him, but he did not provide support for this assertion.

[12] In March 2008, Dr. Bermudez indicated that appellant could only sit for seven hours per day and drive at work for five hours per day, but her September 2008 opinion superseded these restrictions. In an April 6, 2009 report, she again indicated that appellant was capable of working as a tractor-trailer driver.

The Office 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 escort vehicle driver represented appellant's wage-earning capacity.[13] The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of escort vehicle driver and that such a position was reasonably available within the general labor market of his commuting area. Therefore, the Office properly reduced appellant's compensation effective June 19, 2009 based on his capacity to earn wages as an escort vehicle driver.

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation effective June 18, 2009 based on his capacity to earn wages as an escort vehicle driver.

ORDER

IT IS HEREBY ORDERED THAT the June 18, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 9, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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