United States Department of Labor
Employees' Compensation Appeals Board

H.N., Appellant	)	
and	)	**Docket No. 09-1628**
	)	**Issued: August 19, 2010**
DEPARTMENT OF AGRICULTURE, FOOD SAFETY & INSPECTION SERVICE, Minneapolis, MN, 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
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 10, 2009 appellant filed a timely appeal from an Office of Workers' Compensation Programs' May 20, 2009 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 to reduce appellant's compensation based on its determination that the selected position of an information clerk represented his wage-earning capacity as of June 7, 2009.

FACTUAL HISTORY

On August 17, 1992 appellant, then a 45-year-old food inspector, filed an occupational disease claim for a repetitive strain injury to hands and wrists. The Office accepted bilateral carpal tunnel syndrome, bilateral tenosynovitis of the hands/wrists, left thumb arthritis and aggravation of right thumb arthritis. Appellant also underwent authorized surgeries including an

endoscopic release of the left hand on November 18, 1993 and a similar procedure on the right wrist on July 23, 1994. A trapezium arthroplasty of the left wrist was performed on September 12, 1995 and a transposition of the left ulnar nerve on July 24, 2000. Appellant received wage-loss compensation and was placed on the periodic rolls.[1]

On February 21, 2005 appellant accepted a part-time position as a newspaper distribution clerk, working 26 hours a week at $6.50 an hour. On June 30, 2005 the Office reduced his compensation to reflect his actual earnings in his part-time job. On July 1, 2005 it requested that his physician provide updated work restrictions. The Office noted that, although appellant had returned to part-time employment for 20 hours a week, it did not represent his true earning capacity as the work hours were less than in his previous employment. On October 2, 2005 appellant retired.

On June 25, 2007 appellant elected to receive compensation benefits from the Office in lieu of benefits from the Office Personnel Management. The record reflects that he stopped his part-time employment in 2008, due to his inability to lift.[2] Appellant subsequently reported income from self-employment as he had purchased a trailer park in 2008 and rented lots.

In an April 8, 2008 report, Dr. Charles Feagin, an attending Board-certified surgeon, diagnosed bilateral carpal tunnel syndrome and left ulnar nerve neuropathy. He advised that appellant had carpal metacarpal arthritis in both thumbs due to his accepted conditions. Dr. Feagin explained that appellant "cannot do any type of work that requires anything other than sedentary use of his hands. If you can find him that type of job, please find him a job. I do not have any plans for any current treatment because I think he has reach[ed] maximum medical condition." He noted that appellant would need periodic injections.

On April 21, 2008 the Office referred appellant to Dr. James Caney Owen, Jr., a Board-certified orthopedic surgeon, for a second opinion evaluation. In a June 30, 2008 report, Dr. Owen noted appellant's history and found that appellant had current objective findings of bilateral carpal tunnel syndrome. He advised that appellant reached maximum medical improvement. Dr. Owen noted that appellant had hypotonicity of the thenar muscles bilaterally and had decreased sensation in the ulnar nerve distribution of the left hand. He also found signs of interpositional arthroplasty of the thumb carpometacarpal joints bilaterally. Dr. Owen stated that appellant could not return to his duties as a food service inspector; however, he was capable of performing sedentary work, eight hours a day with restrictions of no repetitive motion of the arms, a weight limit of 10 pounds and no repetitive pinching. He provided a completed work restriction evaluation form listing appellant's full-time work restrictions.

On July 11, 2008 the Office provided Dr. Feagin with a copy of Dr. Owen's report. It requested that he comment on appellant's work restrictions. Dr. Feagin did not respond.

[1] The record reflects that appellant's claims under File Nos. xxxxxx857, xxxxxx571, xxxxxx551 and xxxxxx512 were placed under master File No. xxxxxx772.

[2] The exact date that he stopped is unclear; however, it appears to be early in 2008.

On September 10, 2008 the Office requested clarification from Dr. Owen with regard to appellant's work restrictions. Specifically, whether Dr. Owen intended that appellant have a 10- to 15-pound restriction on pushing, pulling and lifting or a one-pound limitation on lifting. In a September 23, 2008 duty status report, Dr. Owen advised that appellant had a 10- to 15-pound restriction on pushing, lifting and pulling.

On September 29, 2008 the Office referred appellant to a vocational rehabilitation counselor to search for employment in the private sector within his restrictions.[3]

In a November 17, 2008 report, the vocational rehabilitation counselor noted that appellant had self-employment from his trailer park but he made no more than minimum wage and did not show a profit from self-employment. She explained that the Alabama state employment services determined that job openings for general property managers and lodging and facility managers were not performed in significant numbers in the area where appellant lived. The vocational rehabilitation counselor advised that there were approximately five openings a year in the area where appellant lived. She advised that selective job placement assistance was needed.

The vocational rehabilitation counselor identified the position of information clerk as being within appellant's work tolerance limitations. It was a sedentary position comprised of occasionally lifting up to 10 pounds a third of the time. The vocational rehabilitation counselor noted that the Department of Labor, *Dictionary of Occupational Titles* (DOT) description of the information clerk position included: answering inquiries from persons entering the establishment; providing information regarding activities conducted at the establishment and location of departments, offices and employees within the organization; informing customers of the location of store merchandise in retail establishments; providing information concerning services, such as laundry and valet services, in hotel; receiving and answering requests for information from company officials and employees; calling people and answering inquiries and keeping a record of questions asked. She found an hourly wage of $7.89 or $315.60 a week. The vocational rehabilitation counselor noted that appellant had previous sales experience and benefited from on-the-job training and classroom instruction. Appellant operated a lodging trailer rental park and had very good communication and basic math skills. Regarding the position's availability, the vocational rehabilitation counselor contacted the Alabama Department of Industrial Relations on November 4, 2008 and confirmed the availability of jobs within a 30- to 50-mile radius of the individual's home. She listed businesses with recent openings that included Willstaff, Olan Mills Portraits and Picture Me Portrait Studios.

On December 8, 2008 the Office informed appellant that the position of information clerk (DOT No. 237.367.022) was within his physical capacity at the wage of $7.89 an hour. Appellant would receive 90 days of placement assistance to help locate such a position. The Office advised him that, at the end of the 90-day period, his compensation would be reduced based upon his ability to earn wages of $16,411.00 a year.

In a March 17, 2009 closing report, the vocational rehabilitation counselor advised the Office that job placement efforts had been unsuccessful.

[3] The employer advised that it could not accommodate appellant's work limitations.

On March 31, 2009 the Office advised appellant that the vocational rehabilitation counselor had provided 90 days of job placement services and found that the information clerk job remained reasonably available with the local labor market and compatible with his current work tolerance limitations. On April 8, 2009 the employing establishment confirmed that appellant's pay rate for his date-of-injury position was $30,442.00 a year and the current rate for his date-of-injury position was $51,594.00 a year.

On April 17, 2009 the Office notified appellant that it proposed to reduce his wage-loss compensation as the medical and factual evidence established that he was no longer totally disabled, but rather partially disabled with the capacity to earn wages as an information clerk, DOT No. 237.367-022 at the wage rate of $315.60 a week. It explained that the constructed position was within his medical limitations as specified by Dr. Owen. Based upon appellant's experience, education, medical restrictions and the labor market survey, he was found employable as an information clerk, which was reasonably available in his commuting area at the entry pay level of $315.60 a week. In an attached work sheet, the Office found that his pay rate when his disability recurred on September 12, 1995 was $600.87 a week; the current adjusted pay rate for his job on the date of injury was $992.18 a week and he was currently capable of earning $315.60 a week, as an information clerk. It determined that appellant had a 32 percent wage-earning capacity of $192.28 a week. The Office determined that he had a loss of wage-earning capacity of $408.59 a week. At the three-fourths augmented compensation rate, appellant would receive wage-loss benefits of $306.44 a week, increased by cost-of-living adjustments to $418.00 a week, less health deductions of $329.16 and life insurance premiums of $27.40 every four weeks, or net compensation of $1,315.44 every four weeks.

In an April 23, 2009 statement, appellant disagreed with the proposed reduction. He contended that the job market had collapsed and the unemployment rate in Alabama had gone from five percent to nine percent. Appellant stated that it was 9.2 percent in his home county and there were no available jobs. He noted that employers advised him that they could not hire him because of his work restrictions.

In a May 20, 2009 decision, the Office reduced appellant's compensation as of June 7, 2009, based on his ability to work full time in the constructed information clerk position.

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.[4]

Section 8115(a) of the Federal Employees' Compensation Act[5] 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

[4] *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).

[5] 5 U.S.C. § 8115.

in the absence of evidence showing they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.[6] 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.[7] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[8] 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.[9] 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.[10]

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 DOT 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.[11] 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.[12]

ANALYSIS

Appellant's claim was accepted for bilateral carpal tunnel syndrome, bilateral tenosynovitis of the hands/wrists, left thumb arthritis and aggravation of right thumb arthritis. He underwent authorized surgeries for these conditions.

In 2008, appellant's attending physician, Dr. Feagin, advised that appellant could not do any type of work that required other than sedentary use of his hands. Dr. Owen, a second opinion physician, examined appellant and found that he had reached maximum medical improvement. He determined that he could perform sedentary work, eight hours a day with restrictions of no repetitive motion of the arms and a weight limit of 10 pounds and no repetitive pinching. Dr. Owen clarified the work restrictions on September 23, 2008, advising that

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

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

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

[9] *Id.*

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

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

[12] *Id. See Shadrick*, 5 ECAB 376 (1953).

appellant had a 10- to 15-pound restriction on pushing, lifting and pulling. The Board finds that Dr. Owen's opinion is based on an accurate medical history and thorough clinical findings on examination. Dr. Owen found that appellant could work with restrictions that included a 10- to 15-pound limitation on pushing, lifting and pulling for up to eight hours daily. When asked to comment on Dr. Owen's opinion, Dr. Feagin did not respond.

The vocational rehabilitation counselor identified positions that were suitable and in accordance with appellant's restrictions. While appellant was self-employed as a trailer park owner, he did not show a profit from self-employment or make more than minimum wage. As his actual earnings were not found to fairly and reasonably represent his wage-earning capacity, the vocational rehabilitation counselor proceeded to identify an appropriate position that conformed to appellant's capabilities.[13] The vocational rehabilitation counselor identified the information clerk position as sedentary with occasional lifting of up to 10 pounds for a third of the time and within his physical limitations. The Board finds that the information clerk position conforms to work restrictions set forth by Dr. Owen.

Because the weight of the evidence establishes that appellant had the requisite physical ability, skill and experience to perform the position of information clerk, the Office properly referred appellant to its rehabilitation counselor for the selection of a position that fit his capabilities in light of his physical limitations, education, age and experience. The rehabilitation counselor determined that the information clerk position was performed in sufficient numbers to make it reasonably available to appellant within his commuting area at the weekly pay rate of $315.60. The Board has found that the record must establish that jobs for a selected position are reasonably available in the general labor market in the commuting area in which the employee lives.[14] On November 4, 2008 the vocational rehabilitation counselor contacted the Alabama Department of Industrial relations and confirmed the availability of jobs within a 30- to 50-mile radius of the individual's residence. The fact that appellant was not successful in securing employment does not establish that the constructed position is not vocationally suitable.[15]

The Office calculated appellant's wage-earning capacity by properly applying the principles set forth in *Albert C. Shadrick.* It compared the earnings he could earn as an information clerk, based solely on his employment-related injuries, to the current pay rate of his date-of-injury position and found that his wage-earning capacity was 32 percent. The Board notes that appellant remains entitled to wage-loss compensation of 68 percent. The Office met its burden of proof to establish that the constructed position of information clerk reflected appellant's wage-earning capacity effective June 7, 2009.

On appeal, appellant contests the reduction of his compensation and contends that the position is not reasonably available in his commuting area. As noted above, the position was determined to be reasonably available within his commuting area. The vocational rehabilitation

[13] The Office cannot use a selected position as the basis for a wage-earning capacity determination unless it first finds that actual earnings do not reasonably and fairly represent the employee's capacity. *See Sherman Preston*, 56 ECAB 607 (2005).

[14] *See Dim Njaka*, 50 ECAB 424 (1999).

[15] *Lawrence D. Price*, 54 ECAB 590 (2003).

counselor found that there were enough people performing the position in the general labor market, making it reasonably available.

CONCLUSION

The Board finds that the Office met its burden of proof to reduce appellant's compensation based on its determination that the position of information clerk represented his wage-earning capacity.

ORDER

IT IS HEREBY ORDERED THAT the May 20, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 19, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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