United States Department of Labor
Employees' Compensation Appeals Board

R.S., Appellant	)	
and	)	**Docket No. 09-1935**
	)	**Issued: July 1, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Sayre, PA, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 27, 2009 appellant, through his representative, filed a timely appeal from the July 8, 2009 merit decision of the Office of Workers' Compensation Programs which affirmed the reduction of his compensation based on his wage-earning capacity in a constructed position. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.

ISSUES

The issues are: (1) whether the Office properly determined appellant's wage-earning capacity in the constructed position of dispatcher; and (2) whether the Office hearing representative properly denied the representative's request for a subpoena.

FACTUAL HISTORY

On July 21, 2003 appellant, then a 32-year-old letter carrier, sustained an injury in the performance of duty when he stepped into a hole and twisted his right ankle and left knee. The Office accepted his claim for right ankle and left knee sprain with a temporary aggravation of

underlying degenerative joint disease. Appellant stopped work on September 5, 2003 and received compensation for temporary total disability on the periodic rolls. On work capacity evaluation forms, Dr. Dermot Reynolds, the attending orthopedic surgeon, reported that appellant was unable to perform his usual job but could work full time with restrictions.[1]

On December 14, 2007 an Office rehabilitation counselor found, based on the medically determinable residuals of the injury and taking into consideration all significant preexisting impairments and pertinent nonmedical factors, that appellant was able to perform the duties of a dispatcher motor vehicles. The rehabilitation counselor performed a labor market survey and determined that the job was being performed in sufficient numbers as to make it reasonably available to appellant within his commuting area. The rehabilitation counselor found that appellant was capable of earning an entry-level wage of $422.50 a week as a dispatcher.

On June 3, 2008 the Office notified appellant that it proposed to reduce his compensation for wage loss because he had the capacity to earn $422.50 a week as a dispatcher, a position that was medically and vocationally suitable for him.

Appellant's representative argued that the Office rehabilitation counselor failed to provide any explanation of how appellant met the specific vocational preparation for the selected position. He added that appellant had long-standing issues with depression and anxiety, conditions he alleged the work injury aggravated.[2]

On October 9, 2008 Dr. Suresh V. Undavia, a second-opinion psychiatrist, evaluated appellant and offered a principal diagnosis of a mild mood disorder secondary to chronic alcohol abuse and secondary to chronic pain syndrome, as well as a diagnosis of continuing alcohol abuse. He concluded that appellant had no psychiatric disability other than alcoholism.

In a decision dated November 12, 2008, the Office reduced appellant's wage-loss compensation based on his capacity to earn wages in the constructed position of dispatcher. It noted that the rehabilitation counselor was an expert who found that appellant's prior experience qualified him to perform many different types of customer service positions. The Office added that there was no rationalized medical opinion relating appellant's preexisting emotional conditions to the 2003 work injury.

On January 30, 2009 the Office rehabilitation counselor performed an updated labor market survey and found that the outlook for dispatcher jobs was not favorable, especially at the mean wage. "This is most likely why wages for advertised positions are so much less." The Office rehabilitation counselor concluded that appellant could earn an entry-level wage of $380.00 a week.

[1] Dr. Reynolds indicated that appellant was able to walk for two hours, stand for one hour and was unable to squat or kneel. Climbing was notated "limited stairs."

[2] Appellant's representative referred to an October 26, 2005 report from Dr. Jeffrey Donner, a clinical psychologist who saw appellant in consultation with the Office rehabilitation counselor. Dr. Donner reported that appellant's depressive symptomatology would probably be helped by supportive psychotherapy and ongoing pharmacological support. "He might have some difficulty with motivation and meeting the demands of his new occupational direction, if his depression continues progressing in the wrong direction."

Appellant requested a telephone hearing before an Office hearing representative. He requested a subpoena for Dr. Undavia: "Her [sic] report is so replete with errors as to call into question whether the report is actually about claimant or someone else." Appellant's representative contended that the Office has not provided Dr. Undavia with any medical records regarding his treatment for depression.

On March 12, 2009 an Office hearing representative denied the requested subpoena. She explained that the physician provided a review of the medical records and that the errors appellant's representative alleged appeared to be responses to the physician's report, not error on the part of the physician.

In a decision dated July 8, 2009, an Office hearing representative affirmed the reduction of appellant's compensation for wage loss. The hearing representative found that the medical evidence supported that he was physical capable of performing the dispatcher position and that the position was vocationally appropriate.

On appeal, appellant contends that the Office did not meet its burden to establish that the selected position was medically or vocationally suitable. He notes that Dr. Undavia was not provided with psychiatric or psychological progress notes and that work-related pain contributed to appellant's emotional issues. Appellant's representative argues that the Office had extensive reports from mental health providers explaining that appellant was totally disabled by a consequential emotional condition.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.[3] "Disability" means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.[4]

Section 8115(a) of the Act provides that 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. If the actual earnings of the employee do not fairly and reasonably represent his wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity as appears reasonable under the circumstances is determined with due regard to the nature of his injury, the degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors or 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 given the nature of the employee's injuries

[3] 5 U.S.C. § 8102(a).

[4] 20 C.F.R. § 10.5(f).

[5] 5 U.S.C. § 8115(a).

and the degree of physical impairment, his usual employment, the employee's age and vocational qualifications and the availability of suitable employment. When the Office makes a medical determination of partial disability and of the specific work restrictions, it should refer the employee's case 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 the employee's capabilities in light of 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.[6]

ANALYSIS -- ISSUE 1

Appellant's attending orthopedic surgeon, Dr. Reynolds, reported that appellant was no longer totally disabled for work. Appellant could work full time with restrictions. The restrictions Dr. Reynolds imposed on April 6, 2005 remained unchanged. This medical evidence established that appellant was partially disabled for work due to residuals of his accepted right ankle and left knee sprains.

Having found appellant partially disabled, the Office properly referred him to a wage-earning capacity specialist for selection of a suitable position available in the open labor market. The rehabilitation counselor found that the position of dispatcher was medically and vocationally suitable. The job classification shows it to be a sedentary position within the restrictions established by Dr. Reynolds. The rehabilitation counselor explained that appellant's prior employment experience and education satisfied the specific vocational preparation of the position. The rehabilitation counselor determined the position's prevailing wage rate and its availability in the open labor market from information obtained from the state department of labor and market research.[7]

The Board finds that the Office has met its burden to show that appellant is no longer totally disabled for work and has the capacity to earn wages in the constructed position of dispatcher. A reduction in his compensation was therefore warranted. However, after the Office's November 12, 2008 decision, the Office rehabilitation counselor performed an updated labor market survey and discovered that the outlook for dispatcher positions was not favorable, especially at the mean wage. On January 25, 2009 he found that appellant was capable of earning entry-level wages of $380.00 a week, not the $422.50 as previously reported.

While a reduction of appellant's compensation for wage loss was warranted, the updated labor market survey calls into question the extent of that reduction. The hearing representative did not address this evidence in her July 8, 2009 decision affirming the reduction of appellant's compensation. The Board will therefore set aside the Office's July 8, 2009 decision and remand

[6] *Hattie Drummond*, 39 ECAB 904 (1988); *see Albert C. Shadrick*, 5 ECAB 376 (1953).

[7] *See Leo A. Chartier*, 32 ECAB 652 (1981) (the fact that an employee has been unsuccessful in obtaining jobs in the selected position does not establish that the work is not reasonably available in the area).

the case for further development. The Office shall determine whether it should reduce appellant's compensation for wage loss based on the entry-level wage prevailing on or about December 14, 2007 or the entry-level wage prevailing on or about January 25, 2009. After such further development as may be necessary, the Office shall issue an appropriate final decision on the extent of the reduction in appellant's compensation for wage loss.

Appellant's representative argues that the Office did not provide Dr. Undavia with psychiatric or psychological progress notes. As the hearing representative noted, however, the record contained no such notes. The issue of whether the Office should accept appellant's emotional condition or should accept appellant's claim for the condition of total knee replacement is not presently before the Board.[8] It further developed and duly considered appellant's psychological condition and whether it disabled him from work. Appellant has not established bias in Dr. Undavia's opinion.

LEGAL PRECEDENT -- ISSUE 2

Section 8126 of the Act provides that the Secretary of Labor, on any matter within her jurisdiction under this subchapter, may issue subpoenas for and compel the attendance of witnesses within a radius of 100 miles.[9] The implementing regulations provide:

> "A claimant may request a subpoena, but the decision to grant or deny such a request is within the discretion of the hearing representative. The hearing representative may issue subpoenas for the attendance and testimony of witnesses and for the production of books, records, correspondence, papers or other relevant documents. Subpoenas are issued for documents only if they are relevant and cannot be obtained by other means and for witnesses only where oral testimony is the best way to ascertain the facts."[10]

Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from established facts and similar criteria. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.[11]

ANALYSIS -- ISSUE 2

On March 12, 2009 an Office hearing representative denied the representative's request to subpoena Dr. Undavia. Responding to the counsel's contention that the physician's report was replete with errors, the hearing representative observed that any errors arose from the information appellant gave Dr. Undavia. The hearing representative also explained that the Office provided Dr. Undavia with the medical evidence of record. As appellant did not establish

[8] *See* 20 C.F.R. § 501.2(c).

[9] 5 U.S.C. § 8126(1).

[10] 20 C.F.R. § 10.619.

[11] *Dorothy Bernard*, 37 ECAB 124 (1985).

that, oral testimony was the best way to ascertain the facts, the Board finds no abuse of discretion in the hearing representative's denial of a subpoena.[12]

CONCLUSION

The Board finds that this case is not in posture for decision on the weekly wage the Office should use for determining appellant's wage-earning capacity in the constructed position of dispatcher. Further development is warranted. The Board also finds that the Office hearing representative properly denied the representative's request for a subpoena.

ORDER

IT IS HEREBY ORDERED THAT the July 8, 2009 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Issued: July 1, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[12] A decision to deny a subpoena can only be appealed as part of an appeal of any adverse decision which results from the hearing. 20 C.F.R. § 10.619(c).