United States Department of Labor
Employees' Compensation Appeals Board

H.M., Appellant	)	
and	)	**Docket No. 10-110**
	)	**Issued: July 20, 2010**
DEPARTMENT OF ENERGY, BONNEVILLE POWER ADMINISTRATION, Spokane, WA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 14, 2009 appellant filed a timely appeal from the April 23, 2009 merit decision of the Office of Workers' Compensation Programs, which found that he had the capacity to earn wages as a receptionist. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.

ISSUE

The issue is whether the Office properly reduced appellant's compensation to reflect a capacity to earn wages in the constructed position of receptionist.

FACTUAL HISTORY

On the prior appeal,[1] the Board found that the Office properly reduced appellant's compensation from June 15, 2003 to May 5, 2004 to reflect what would probably have been his

[1] Docket No. 04-2182 (issued August 19, 2005).

wage-earning capacity had he properly completed his data clerk training program. The facts of this case as set forth in the Board's prior decision are hereby incorporated by reference.[2]

On October 16, 2006 Dr. John Merrill-Steskal, appellant's Board-certified family physician, completed a work capacity evaluation stating that he could work eight hours a day but "needs to be sedentary." He specified appellant's work restrictions.

On July 30, 2008 an Office rehabilitation counselor determined that appellant was able to perform the job of receptionist, a sedentary position that could be alternated with standing and walking and one that typically provided some training on the job. She noted that appellant possessed the skills to work as a receptionist, as he had received three months' training in the Work Systems Program through the Mid-Columbia Council of Governments on July 18, 2008. The rehabilitation counselor noted that appellant received training in keyboarding, telephone/call center operation, reception, office planning, cashiering, filing, 10-key internet use and Microsoft Word software. Further, appellant had an Associates degree in math and science and completed a one-year certificate program as an electronics technician.

The Office rehabilitation counselor conducted a labor market survey and found that the position of receptionist was performed in such numbers as to be reasonably available to appellant within his commuting area. Obtaining wage survey data from the Oregon Labor Market Information System, she determined that the entry-level wage for receptionists within appellant's commuting area was $9.84 per hour, or $393.60 per week.

On November 28, 2008 the Office provided Dr. Merrill-Steskal with the physical requirements of the receptionist position and asked whether it was medically suitable for appellant's work restrictions. Dr. Merrill-Steskal replied "yes." On December 11, 2008 he saw appellant for follow-up and discussed the matter with him: "Discussed that I agree that he can be receptionist work [sic] and suspect he can do more than that."

An updated labor market survey on February 15, 2009 slightly modified the entry-level wage for receptionist to $9.82 per hour, or $392.80 per week.

On March 12, 2009 the Office notified appellant that it proposed to reduce his compensation for wage loss due to his accepted injury. It found that the factual and medical evidence established that he was no longer totally disabled for work but was instead partially disabled and had the capacity to earn wages as a receptionist at the rate of $392.80 per week.

On March 26, 2009 appellant wrote "to rebut your whole idea." He related disagreements he had with the Office and the employer dating back to 1993, including the reduction in his compensation for not cooperating with vocational rehabilitation services. Appellant noted that he was previously turned down for all the receptionist jobs he interviewed

[2] On June 10, 1988 appellant, then a 47-year-old electrician, sustained injuries in a motor vehicle accident. The Office accepted his claim for scalp laceration and compression fracture of the T12 vertebra, though a magnetic resonance imaging scan showed that the defect was wedging related to juvenile osteochondrosis rather than a fracture. In 1992 appellant filed an occupational disease claim relating to his left hip. The Office accepted that claim for strains, herniated discs at L4-5 and L5-S1, lumbar disc displacement and thoracic disc displacement. Appellant stopped work on May 23, 1995 and received compensation for total disability.

for because of his age and the fact that he had back problems and was not bilingual. He believed he was discriminated against and should have his 1997 job returned.

In a decision dated April 23, 2009, the Office reduced appellant's compensation under 5 U.S.C. § 8115 to reflect his capacity to earn wages as a receptionist.

On appeal, appellant reiterated the arguments raised on March 26, 2009. He expressed concern over the unemployment rate and competition from kids just out of school. Appellant was seen at a Veterans Administration (VA) hospital spine clinic on September 24, 2009 and was told that he had a problem with his lower back and would have to have a magnetic resonance imaging scan and physical therapy.

LEGAL PRECEDENT

Section 8115(a) of the Federal Employees' Compensation 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.[3]

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

When the Office makes a medical determination of partial disability and of the specific work restrictions, it may refer the employee's case to an Office wage-earning capacity specialist for selection of a position, listed in the Department of Labor, *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 *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.[5]

ANALYSIS

Following appellant's employment injury, the Office paid compensation for total disability. The October 16, 2006 work capacity evaluation completed by Dr. Merrill-Steskal,

[3] 5 U.S.C. § 8115(a).

[4] *Harold S. McGough*, 36 ECAB 332 (1984).

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

appellant's family physician, advised that he could work eight hours a day at a sedentary job. After the Office received evidence that appellant was no longer totally disabled for work, it obtained his specific work restrictions. The Office rehabilitation counselor selected a position available in the open labor market that fit appellant's capabilities in light of his physical limitations, education, age and prior experience. Based on the medically determinable residuals of the accepted employment injury and taking into consideration all significant preexisting impairments and pertinent nonmedical factors, the rehabilitation counselor found that appellant was able to perform the job of receptionist. She confirmed that such work was reasonably available to appellant within his commuting area, and she confirmed an entry-level wage of $392.80 per week. The Office's rehabilitation counselor is an expert in such matters, so the vocational suitability of the receptionist position is established.[6]

Moreover, Dr. Merrill-Steskal approved the medical suitability of the receptionist position. The Office provided him with the physical limitations of the position, and he declared that appellant was capable of performing receptionist work and volunteered that he suspected he could do "more than that." There is no contemporaneous medical evidence to the contrary. The medical suitability of the receptionist position is established by appellant's attending physician.

The Board finds that the Office followed standardized procedures and gave due regard to relevant factors in determining appellant's wage-earning capacity as appears reasonable under the circumstances. The evidence establishes that appellant's employment injury no longer totally disables him for work. Appellant is capable of earning entry-level wages as a receptionist. The Board finds that the Office met its burden to reduce his monetary compensation and will affirm the Office's April 23, 2009 decision.

On appeal, appellant listed several disagreements with how his case was handled through the years, but these matters have no bearing on the Office's April 23, 2009 finding that he has the capacity to earn wages as a receptionist. It makes no difference whether a physical capacity evaluation in 1994 was never approved or whether he dropped out of school when his mother became ill. The circumstances of appellant's failure to complete his data clerk training program are immaterial, except to show that the Office turned to a constructed position when placement efforts did not succeed.

Appellant's reference to the unemployment rate and competition from kids just out of school goes to the issue of availability.[7] The rehabilitation counselor, again an expert in the field, conducted a targeted labor market survey within appellant's commuting area. The fact that appellant was unsuccessful in obtaining a receptionist position does not mean the position is not being performed in sufficient numbers within his commuting area to be considered unavailable.[8] Appellant's appointment at the VA hospital spine clinic on September 24, 2009 is immaterial to whether the Office properly reduced his compensation for total disability on April 23, 2009.

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

[7] *See Kenneth Tappen*, 49 ECAB 334 (1998).

[8] *See Marilyn J. Carter*, 49 ECAB 661 (1998).

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation to reflect his capacity to earn wages in the constructed position of receptionist.

ORDER

IT IS HEREBY ORDERED THAT the April 23, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 20, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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