United States Department of Labor
Employees' Compensation Appeals Board

J.V., Appellant	)	
and	)	**Docket No. 10-886**
	)	**Issued: November 17, 2010**
U.S. POSTAL SERVICE, POST OFFICE, San Diego, CA, Employer	)	

Appearances:
Thomas Martin, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 2, 2010 appellant, through his representative, filed a timely appeal from an August 14, 2009 merit decision of the Office of Workers' Compensation Programs. 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 determined that appellant's wage-earning capacity was represented by the selected position of pharmacy technician.

FACTUAL HISTORY

On August 22, 2000 appellant, then a 41-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that he sustained a left shoulder injury causally related to his federal employment. The Office accepted the claim for a left shoulder strain. Appellant also filed a CA-2 form on December 14, 2001 for a right shoulder injury. The claim was accepted for a right shoulder strain. Appellant underwent left shoulder surgery on February 7, 2002 and right shoulder surgery on July 25, 2002. He returned to work in a light-duty position. On

September 22, 2005 appellant underwent right shoulder arthroscopic surgery. He stopped working and filed a claim for compensation (Form CA-7) as of March 4, 2006, indicating that the light-duty job was no longer available. Appellant again underwent left shoulder surgery on May 4, 2006.

Attending Orthopedic Surgeon Dr. Thomas Harris submitted a November 8, 2006 report providing results on examination. He diagnosed status post right shoulder arthroscopy and status post left shoulder arthroscopy. Dr. Harris stated that appellant had a "prophylactic disability precluding him from repetitive above shoulder level and repetitive heavy work." In a report dated October 8, 2007, he stated that he had previously failed to address appellant's bilateral elbow symptoms, specifically bilateral epicondylitis. Dr. Harris stated that appellant's work restrictions would be "a prophylactic disability between repetitive and forceful activities." In a January 23, 2008 report, he reported appellant having pain in the shoulders and elbows. Dr. Harris diagnosed bilateral overuse syndrome and bilateral tendinitis. In a note received on May 2, 2008, he indicated that appellant's work restrictions remained the same as reported on November 8, 2006 and October 8, 2007.

The Office referred appellant for vocational rehabilitation services. The rehabilitation specialist identified the position of pharmacy technician as a suitable position. In a Form CA-66 (job classification) dated March 4, 2008, the rehabilitation specialist indicated that the position of pharmacy technician in the Department of Labor, (*Dictionary of Occupational Titles*, No. 074.382-010) (DOT) was a light strength position with occasional lifting of up to 20 pounds. Other physical demands included constant reaching, handling and fingering. The rehabilitation specialist reported that the job was reasonably available in appellant's area, with wages from $480.00 to $720.00 per week ($12.00 to $18.00 per hour).

By letter dated July 28, 2008, the Office advised appellant that it proposed to reduce his compensation on the grounds that he had the capacity to earn wages of $560.00 per week ($14.00 per hour at 40 hours per week) as a pharmacy technician. It included a Form CA-816 computation of wage-earning capacity and advised him if he disagreed with the proposal to submit evidence within 30 days. By decision dated September 11, 2008, the Office reduced appellant's compensation based on a capacity to earn wages of $560.00 per week.

Appellant requested a hearing before an Office hearing representative. He submitted a report dated October 20, 2008 from Dr. Harris, who stated that he did not have a job description of the pharmacy technician position, but would like to receive one. Dr. Harris reported that he had discussed the job with appellant and he opined that appellant could not perform the position. In an October 29, 2008 report, he provided results on examination and stated that he still had not received a job analysis but any repetitive activity at or above shoulder level would cause discomfort.

In a report dated October 8, 2008, Dr. John Dorsey, an orthopedic surgeon, provided a history and results on examination. He diagnosed bilateral shoulder impingement syndrome, lateral epicondylitis of the elbows and wrist arthralgia. Dr. Dorsey stated that appellant was precluded from lifting more than 10 pounds, from forceful pushing or pulling activities, repetitive motion activities, reaching activities and work at or above shoulder level. He stated that he had reviewed the pharmacy technician position and the duties were to assist a pharmacist.

Dr. Dorsey further stated, "The position requires extensive pushing and pulling activities including repetitive motion activities especially reaching above the shoulder level. It [is] my professional opinion that [appellant] due to his severe shoulder problems and the weight restriction of the 10 pounds is precluded from performing the position of the pharmacy technician. Even the task of filling prescription bottles but does not require extensive overhead lifting requires repetitive arm movement that is precluded by the injuries that he has sustained."

By decision dated August 14, 2009, the Office hearing representative affirmed the September 11, 2008 Office decision. The hearing representative found that appellant had not established that the selected job was outside his work restrictions.

LEGAL PRECEDENT

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction in such benefits.[1]

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.[2]

When the Office makes a medical determination of partial disability and of 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's DOT or otherwise available in the open market, that fits the employee's capabilities with regard to his or her physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the labor market should be made through contact with the state employment service or other applicable service.[3] 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.[4]

ANALYSIS

The Office made a determination that the position of pharmacy technician, DOT No. 074.382-010, was medically and vocationally suitable pursuant to 5 U.S.C. § 8115.

[1] *Carla Letcher*, 46 ECAB 452 (1995).

[2] *See Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); *see also* 5 U.S.C. § 8115(a).

[3] *See Dennis D. Owen*, 44 ECAB 475 (1993).

[4] 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.403.

As to whether the position was within appellant's work restrictions, it is, as noted above, the Office's burden of proof to establish the position represented his wage-earning capacity. The Office hearing representative fails to acknowledge that it is the Office's burden of proof. She concluded that appellant did not establish that the selected job was outside of his established work limitations. It is not appellant's burden to establish that the job is outside work limitations, it is the Office's burden to establish that the selected position is within his work restrictions.

Office procedures state that, unless the medical evidence is "clear and unequivocal" that the selected position is medically suitable, the Office should send a job description to an appropriate physician for an opinion as to whether the claimant can perform the position.[5] The CA-66 form describes the pharmacy technician position as requiring 20 pounds of lifting occasionally with constant reaching, handling and fingering. It is not clear that the position was within the existing work limitations provided by Dr. Harris, which briefly referred to no repetitive heavy work and no repetitive above shoulder work. The Office should have provided a job description to Dr. Harris and requested a medical opinion as to whether appellant could perform the position. In his October 20 and 29, 2008 reports, Dr. Harris noted that he did not have a copy of the job description.

On appeal, appellant's representative argues that appellant was not physically capable of performing the duties of a pharmacy technician, based upon the restrictions provided by Dr. Dorsey. Appellant submitted a detailed report dated October 8, 2008 from Dr. Dorsey, who indicated that he did have a copy of the duties of the selected position and opined that appellant could not perform the position. The Office hearing representative suggested that the lifting requirements of the job on the labor market survey described a lifting requirement of less than 10 pounds, while appellant described a more strenuous job but the lifting requirement is not based on what he describes or on what the hearing representative believes is reported on a labor market survey, it is based on the job description in the DOT.[6] For the DOT No. 074.382-010 the stated lifting requirement was 20 pounds occasionally. Dr. Dorsey provided a 10-pound lifting restriction, which was not within the stated requirements. The Office hearing representative stated that Dr. Dorsey's described conditions were not established as employment related but it is not clear from his report what specific restrictions would be causally related to federal employment. Again, it is the Office that has the burden to establish that the work restrictions were not preexisting or work related.

For the above reasons, the Board finds that the Office did not meet its burden of proof to establish that the selected position was medically suitable. The Office did not properly follow its procedures in reducing appellant's compensation under 5 U.S.C. § 8115(a).

CONCLUSION

The Board finds that the Office did not meet its burden of proof to establish the selected position of pharmacy technician represented appellant's wage-earning capacity.

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

[6] *See Ralph W. Cade*, 21 ECAB 405 (1970).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 14, 2009 is reversed.

Issued: November 17, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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