United States Department of Labor
Employees' Compensation Appeals Board

J.W., Appellant	)	
and	)	**Docket No. 09-2090**
	)	**Issued: September 21, 2010**
U.S. POSTAL SERVICE, POST OFFICE, White Stone, NY, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
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 August 14, 2009 appellant filed a timely appeal from a July 13, 2009 merit decision of the Office of Workers' Compensation Programs terminating his entitlement to monetary compensation for refusing suitable work. The Board also has jurisdiction over an October 21, 2008 Office decision denying his request for an oral hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's entitlement to monetary compensation effective June 27, 2008 on the grounds that he refused an offer of suitable work; and (2) whether the Office properly denied appellant's request for an oral hearing pursuant to 5 U.S.C. § 8124(b).

FACTUAL HISTORY

On August 11, 1997 appellant, then a 49-year-old tractor trailer operator, injured his left shoulder while cranking a landing gear on a trailer. The Office accepted the claim for

impingement syndrome left shoulder, left shoulder strain, left biceps tendon rupture and left brachial neuritis. It paid wage-loss compensation and authorized left shoulder surgeries of March 16, 1998, December 17, 2002 and February 3, 2004. Appellant returned to a modified tractor trailer operator position on August 14, 2006. On October 25, 2006 the Office found that his actual earnings as a modified tractor trailer operator fairly and reasonably represented his wage-earning capacity. It reduced his wage-loss compensation to zero as his actual earnings met or exceeded the current wages of the job held when injured. On December 19, 2006 appellant filed a claim for a recurrence (Form CA-2a) of total disability beginning December 8, 2006. In a March 23, 2007 decision, the Office accepted the recurrence claim.

In November 3 and 6, 2006 and January 22, 2007 reports, Dr. Jeffrey Rosen, a Board-certified orthopedic surgeon, advised that appellant was unable to return to work. Appellant was unable to take his medications when he had to drive to work due to side effects of drowsiness and imbalance. Moreover, he had shoulder pain at work when he did not take his pain medication. Dr. Rosen advised that appellant was restricted from repetitive activities, overhead lifting or reaching and carrying, lifting, pushing or pulling with the left upper extremity.

In a December 1, 2006 report, Dr. Todd R. Schlifstein, a Board-certified physiatrist, found that appellant was having difficulty at work secondary to increasing pain. He stated that appellant could not take his pain medication during the day due to its sedating effect. Dr. Schlifstein advised this effected appellant's work, travel and driving. He stated that appellant's pain at the end of the day increased dramatically and worsened because he could not take medication during the day for proper pain control.

To determine the nature and extent of residuals due to the work injury, the Office referred appellant, to Dr. Robert Allen Smith, a Board-certified orthopedic surgeon, and Dr. Gilbert S. Tausch, a Board-certified neurologist, for second opinion evaluations.

In a March 19, 2007 report, Dr. Smith reviewed appellant's medical and occupational history and set forth findings on examination. He advised that while appellant had some objective residuals he was not totally disabled. Dr. Smith opined that appellant could work in a light or sedentary position with no lifting of more than 20 pounds and no use of the left upper extremity for lifting or reaching above the horizontal. He further found that, other than use of appropriate medication, no further medical treatment was necessary.

In a March 29, 2007 report, Dr. Tausch noted the history of injury, review of appellant's medical records and set forth his examination findings. Appellant's neurological diagnoses were left-sided cervical radiculopathy at C5-6, carpal tunnel at the left wrist and a possible brachial plexus injury that could not be documented by electromyogram (EMG) or nerve conduction study. Dr. Tausch opined that the brachial nerve traction could be directly attributed to appellant's work injury, while the other conditions of cervical radiculopathy and carpal tunnel syndrome did not result from the work injury. He found that appellant could work with restrictions and perform the duties of the modified tractor trailer operator position. Dr. Tausch provided work restrictions.

The Office determined that a conflict of medical opinion arose between appellant's physicians and the second opinion examiners. It referred him to Dr. Michael C. Raklewicz, a

Board-certified orthopedic specialist, for an impartial medical examination. In an October 12, 2007 report, Dr. Raklewicz reviewed the history of injury and appellant's medical treatment. He found that appellant was able to drive, as he drove about an hour and a half to come to the appointment and was able to use his left arm to clean himself. Dr. Raklewicz provided examination findings and determined that appellant's cervical spondylosis was not due to the work injury. He stated that appellant had residuals of the left shoulder injury with a chronic ruptured biceps tendon, a repaired rotator cuff and subacromial tendinitis and bursitis for which he had permanent limited use. Dr. Raklewicz stated that appellant could perform the tasks of his modified tractor trailer operator position, such as issuing vehicle service schedules, answering telephones, completing forms, copying, filing and other administrative tasks. Appellant was observed when he was dressing and was able to get his t-shirt on with full 180-degree abduction of his left arm over his head, seemingly without pain. Dr. Raklewicz stated, "this, with the fact that [appellant] has no atrophy in the left upper extremity and no symptoms of increased sweat pattern, clearly demonstrates that [he] has magnification of symptoms." He provided physical restrictions for appellant.

On November 13, 2007 the Office advised the employing establishment that Dr. Raklewicz' opinion established that appellant could work. It requested that the employer offer him a position within the physician's recommended restrictions.

On November 21, 2007 the employing establishment offered appellant a modified motor vehicle position with duties of issuing motor vehicle service schedules and keys, occasional answering of telephones with his right hand, to complete forms with basic arithmetic and filing, copying and other administrative clerical duties as assigned.[1] It noted the assignment was for eight hours a day from 4:00 a.m. to 12:00 p.m. No reaching or working above the shoulder level was required and appellant would not be required to push, pull or lift more than 20 pounds.

In a January 2, 2008 letter, the Office notified appellant that it had reviewed the modified motor vehicle position and found it suitable to his physical limitations. It directed him to accept the position within 30 days or provide a written explanation for rejecting the offer; otherwise, his monetary compensation entitlement would be terminated.

Additional evidence was received. In a December 21, 2007 attending physician's report, Dr. Rosen reiterated that appellant was totally disabled as he was unable to lift his left arm. In a July 30, 2007 report, he indicated that appellant reached maximum medical improvement with respect to the left arm and had permanent disability with respect to the left shoulder and brachial neuritis. Dr. Rosen found that appellant was unable to work without taking medications to help alleviate pain. He indicated that the side effects of medication prevented appellant from driving or operating machinery.

In a December 10, 2007 report, Dr. Schlifstein advised that appellant was under his care for pain management of frozen shoulder, upper extremity causalgia and brachial plexopathy. He indicated that appellant experienced severe pain and discomfort and extreme difficulty

[1] The Board notes that this is the same position for which a loss of wage-earning capacity was issued on October 25, 2006 with a different title.

performing regular duties of daily living secondary to his condition. Dr. Schlifstein advised that appellant was permanently and totally disabled.

In a March 18, 2008 letter, the Office advised appellant that his refusal to accept or report to work for the offered position was not valid. He was provided an additional 15 days to accept the offered position without penalty or his benefits would be terminated. Appellant's physician's submitted additional progress reports advising that appellant was totally disabled.

On June 17, 2008 the employing establishment verified that appellant's refusal of the offered position continued and that it remained available to him.

In response to the Office's April 15, 2008 request to complete a form work-capacity evaluation, Dr. Raklewicz set forth appellant's restrictions on June 18, 2008. He advised that appellant reached maximum medical improvement and could work eight hours a day with restrictions. The restrictions included no pushing, pulling or lifting more than 20 pounds and no reaching above the shoulder for more than four hours per day.

In a June 30, 2008 decision, the Office terminated appellant's monetary compensation effective June 27, 2008 on the grounds he failed to accept suitable work.

On September 3, 2008 appellant requested a telephone hearing. In an October 21, 2008 decision, the Office denied his request for a hearing as untimely.

On April 22, 2009 appellant requested reconsideration. He submitted additional reports from Dr. Rosen and Dr. Schlifstein. Both physicians reiterated that appellant was totally disabled due to his left shoulder condition. Dr. Rosen stated that appellant could not work because of the side effects of pain medication and the need to drive. In a July 11, 2008 report, Dr. Schlifstein stated that appellant continued with pain, sedation medication and was permanently disabled. A January 12, 2008 x-ray report noted old post-traumatic changes about the left acromial joint without significant change from a February 18, 2005 x-ray, except for soft tissue prominence which was now seen superior to the distal left clavicle.

By decision dated July 13, 2009, the Office denied modification of the June 30, 2008 decision.

LEGAL PRECEDENT -- ISSUE 1

Once the wage-earning capacity of an injured employee is properly determined, it remains undisturbed regardless of actual earnings or lack of earnings.[2] A modification of such a determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was in fact erroneous. The burden is on the Office to establish that there has been a change so as to affect the employee's capacity to earn wages in the job

[2] *Sharon C. Clement*, 55 ECAB 552, 555 (2004).

determined to represent her earning capacity. Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn and not on actual wages lost.[3]

In addition, Chapter 2.814.11 of the Office's procedure manual contains provisions regarding the modification of a formal loss of wage-earning capacity. The relevant part provides that a formal loss of wage-earning capacity will be modified when: (1) the original rating was in error; (2) the claimant's medical condition has changed; or (3) the claimant has been vocationally rehabilitated. Office procedures further provide that the party seeking modification of a formal loss of wage-earning capacity decision has the burden to prove that one of these criteria has been met. If the Office is seeking modification, it must establish that the original rating was in error, that the injury-related condition has improved or that the claimant has been vocationally rehabilitated.[4]

ANALYSIS -- ISSUE 1

The Office terminated appellant's compensation benefits effective June 27, 2008 on the grounds that he refused an offer of suitable work. However, it did not meet its burden of proof to terminate appellant's compensation for refusing suitable work. Following his injury and treatment, appellant returned to work at modified duty. He had actual earnings after he returned to work on August 14, 2006 and the Office issued a formal loss of wage-earning capacity decision on October 25, 2006. The Office did not address this loss of wage-earning capacity decision or otherwise formally modify this determination prior to the time of the suitable work determination on June 30, 2008.

Board precedent holds that a formal loss of wage-earning capacity decision remains undisturbed unless appropriately modified.[5] Office procedures provide that an acceptable reason for refusing an offer of suitable work is that the claimant has found other work that fairly and reasonably represents his wage-earning capacity.[6] The Office's October 25, 2006 decision found that appellant's actual earnings fairly and reasonably represented his wage-earning capacity. Office procedures provide that, where a claimant stops work after reemployment and where a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss. The Office is to evaluate the request according to the customary criteria for modifying a formal wage-earning capacity decision. The procedures provide that a penalty decision under 5 U.S.C. § 8106(c) should not be issued.[7] Following the 2006 wage-earning capacity determination, appellant stopped work and received compensation. The Office accepted a recurrence of disability and

[3] *Id.*

[4] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11 (July 1997).

[5] *Supra* note 2 (the Board reversed an Office decision terminating compensation for refusal of suitable work where there was a previous loss of wage-earning capacity determination, based on the claimant's actual earnings, which the Office had not appropriately modified).

[6] *See supra* note 4 at Chapter 2.814.5(a) (July 1997).

[7] *See supra* note 4 at Chapter 2.814.9(a) (December 1995).

began development that led to the termination of monetary compensation under section 8106(c). It did not follow its procedures directing that the matter be evaluated according to the customary criteria for modifying a formal wage-earning capacity decision.

As the Office did not appropriately consider appellant's loss of wage-earning capacity, the suitable work termination was an abuse of discretion under the procedure manual.

CONCLUSION

The Board finds that the Office improperly terminated appellant's wage-loss compensation on the grounds that he refused an offer of suitable work.[8]

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated July 13, 2009 is reversed.[9]

Issued: September 21, 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

[8] Due to the disposition of this case, the second issue, pertaining to the denial of appellant's hearing request, is rendered moot.

[9] Appellant's attorney filed a brief with the Board on September 16, 2010. In view of the Board's disposition, it will not address the arguments raised by appellant's attorney on appeal.