United States Department of Labor
Employees' Compensation Appeals Board

D.M., Appellant	)	
and	)	**Docket No. 10-1193**
	)	**Issued: February 23, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Merrill, IA, Employer	)	

Appearances:
Alan J. Shapiro, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 26, 2010 appellant, through counsel, filed a timely appeal from the October 8, 2009 and February 25, 2010 merit decisions of the Office of Workers' Compensation Programs reducing his wage-loss compensation benefits based on the constructed position of light truck driver. 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 reduced appellant's compensation for wage loss to zero based on a capacity to earn wages in the constructed position of light truck driver.

FACTUAL HISTORY

On April 6, 2006 appellant, then a 49-year-old part-time postmaster relief supervisor, filed a traumatic injury claim alleging that on March 25, 2006 he sustained a slipped lumbar disc while sorting mail and off loading the cage. The Office accepted the claim for left L5 vertebra subluxation and lumbar disc protrusion at L4-5. It approved lumbar fusion surgery which was

performed on April 25, 2007.[1] By letter dated March 8, 2007, the Office placed appellant on the periodic rolls for temporary total disability.

In an October 8, 2007 functional capacity evaluation (FCE) report, Troy Herrich, a physical therapist, stated that appellant was capable of performing medium work. Appellant was found capable of occasional lifting/carrying of 50 pounds, frequent lifting/carrying of 20 pounds, constant carrying/lifting of 20 pounds, constant sitting with lumbar support, no more than 60 steps every 15 minutes and one hour of standing rotating with sitting of 5 to 10 minutes. The record contains an undated and unsigned work capacity form, with a notation that restrictions were noted "per FCE." On January 8, 2008 Dr. Grant H. Shumaker, a treating Board-certified neurosurgeon, reviewed the October 8, 2007 FCE. He concurred that appellant was capable of working at a medium capacity and stated that appellant "will be released to return to work with permanent restrictions." In an attached work restriction form, Dr. Shumaker noted medium restrictions which included occasional lifting of up to 50 pounds, frequent lifting of up to 25 pounds and constant lifting of up to 10 pounds.

On February 1, 2008 the Office referred appellant to a rehabilitation counselor for vocational rehabilitation. In March 4 and May, 2008 reports, the rehabilitation counselor noted that appellant received his General Educational Certificate or General Education Diploma in 1990 and had prior experience as truck driver or forklift driver. He identified light truck driver or forklift driver as possible employment positions.

On August 28, 2008 the rehabilitation counselor identified the position of light truck driver and forklift driver as within appellant's physical demands and vocational abilities. He noted that the Department of Labor, *Dictionary of Occupational Titles* job classification for both positions were within appellant's physical restrictions. Rehabilitation counselor further found that these positions were reasonably available within the commuting area.

On September 4, 2008 the Office notified appellant that it proposed to reduce his compensation for wage loss on the grounds that the medical and factual evidence established that he was no longer totally disabled for work, but rather was capable of earning wages as an assembler at $502.00 a week as a light truck driver. It allowed him 30 days to submit additional evidence or argument regarding his capacity to earn wages in the described position.

In a decision dated October 6, 2008, the Office reduced appellant's compensation for wage loss to zero effective October 6, 2008. It found that the position of light-duty truck driver was medically and vocationally suitable and represented his capacity to earn wages.

In an October 26, 2008 letter, appellant's counsel requested a telephonic hearing before an Office hearing representative, which was held on February 24, 2009.

By decision dated May 20, 2009, the Office hearing representative reversed the October 6, 2008 loss of wage-earning capacity decision. She remanded the case to provide Dr. Shumaker with a copy of the constructed position and obtain an opinion as to whether

[1] The employing establishment terminated appellant's employment due to a drug charge arrest effective January 12, 2007.

appellant was capable of the performing this position. The Office was also instructed to obtain an updated work capacity form.

Following the Office hearing representative's decision, the Office placed appellant on the periodic rolls for temporary total disability and requested clarification from the vocational rehabilitation counselor as to whether the constructed position required a license. It also provided a copy of the job description and physical restrictions for a light-duty truck driver for review by Dr. Shumaker.

In a June 2, 2009 memorandum, the vocational rehabilitation specialist stated that a commercial driver's license was not required for all light-duty truck drivers and that light-duty trucks were available within both manual or automatic transmission.

In response to the Office's June 4, 2009 request, Dr. Shumaker noted "per FCE or PT [physical therapy] eval[uation]" under the request for him to review the duties of the constructed position and provide an opinion as to whether appellant was capable of the performing the position. He advised that he had not seen appellant since January 9, 2008. In an attached work capacity evaluation form, Dr. Shumaker wrote "suggest [PT] to eval[uate] FCE [and] job description."

In an August 25, 2009 report, the rehabilitation counselor identified light truck driver and forklift driver positions, which were within appellant's restrictions and reasonably available within the commuting area. The weekly salary for a light truck driver was $502.00 and the weekly salary for the forklift driver was $485.60.

On September 8, 2009 the Office notified appellant that it proposed to reduce his compensation for wage loss on the grounds that the medical and factual evidence established that he was no longer totally disabled for work, but rather was capable of earning wages as an assembler at $502.00 a week as a light truck driver. It allowed him 30 days to submit additional evidence or argument regarding his capacity to earn wages in the described position.

By decision dated October 8, 2009, the Office reduced appellant's compensation for wage loss to zero effective October 6, 2008. It found that the position of light-duty truck driver was medically and vocationally suitable and represented his capacity to earn wages.

In an October 18, 2009 letter, appellant's counsel requested a telephonic hearing before an Office hearing representative, which was held on January 12, 2010.

By decision dated February 25, 2010, Office hearing representative affirmed the October 8, 2009 loss of wage-earning capacity decision.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[2] An injured employee who is either unable to return to

[2] *T.F.*, 58 ECAB 128 (2006).

the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.[3]

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 the employee's wage-earning capacity or if the employee has no actual wages, the wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, the employee's usual employment, age, 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.[4]

The Office must determine appellant's medical condition and work restrictions before selecting an appropriate position that reflects his vocational wage-earning capacity. The Board has stated that the medical evidence upon which the Office relies must provide a detailed description of his condition.[5] Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.[6]

ANALYSIS

The Office accepted that appellant sustained left L5 vertebra subluxation and lumbar disc protrusion at L4-5 due to a March 25, 2006 employment injury and approved lumbar fusion surgery, which was performed on April 25, 2007.[7] By letter dated March 8, 2007, it placed him on the periodic rolls for temporary total disability and reduced his compensation to zero effective October 8, 2009 based on its finding that he had the capacity to earn wages in the selected position of light truck driver.

On January 8, 2008 Dr. Shumaker, a treating Board-certified neurosurgeon, concurred with the October 8, 2007 FCE and released appellant to work within permanent specified restrictions. A work capacity evaluation form noted restrictions. The vocational rehabilitation expert found that the position of light truck driver was suitable to appellant's medical restrictions. The Office hearing representative subsequently instructed the Office to provide Dr. Shumaker with a copy of the constructed position and obtain an opinion as to whether appellant was capable of the performing this position. In response to the Office's June 4, 2009 request regarding appellant's ability to perform the duties of the constructed position, Dr. Shumaker wrote "per FCE or PT eval" but stated that he had not seen appellant since

[3] 20 C.F.R. §§ 10.402, 10.403.

[4] 5 U.S.C. § 8115(a); *see N.J.*, 59 ECAB 171 (2007); *T.O.*, 58 ECAB 377 (2007); *Dorothy Lams*, 47 ECAB 584 (1996).

[5] *See William H. Woods*, 51 ECAB 619 (2000).

[6] *Carl C. Green, Jr.*, 47 ECAB 737 (1996).

[7] The employing establishment terminated appellant's employment due to a drug charge arrest effective January 12, 2007.

January 9, 2008. In an attached work capacity evaluation form, he wrote "suggest [PT] to eval[uate] FCE [and] job description." The rehabilitation counselor again identified light truck driver and forklift driver as within appellant's restrictions and that they were reasonably available within the commuting area.

The Board finds that the medical evidence of record does not establish the Office failed to establish that appellant was capable of performing the duties of the selected position. Once the Office undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.[8] It relied upon the opinion of Dr. Shumaker to determine appellant's capacity to perform the physical requirements and duties of the selected position. The response provided by Dr. Shumaker is not adequate to determine appellant's capacity for such work. His response to the inquiry is ambiguous. It is not clear whether Dr. Shumaker was making reference to the 2007 FCE or recommending further evaluation of appellant. As it is unclear from the record whether he found the position of light truck driver within appellant's restrictions, the Office should have further developed the evidence by requesting clarification from him or seeking an opinion from another physician to resolve the issue. The Board finds that the Office did not establish that appellant had the capacity to perform the constructed position of a light truck driver.

Accordingly, the case will be remanded to the Office for further evidentiary development regarding the extent and degree of any injury-related disability and the status of his employment-related conditions. After such development of the case record as the Office deems necessary, an appropriate decision shall be issued.

CONCLUSION

The Board finds that the Office did not meet its burden of proof in reducing appellant's wage-loss compensation benefits effective October 8, 2009.

[8] *Richard F. Williams*, 55 ECAB 343 (2004).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 25, 2010 and October 8, 2009 are reversed.

Issued: February 23, 2011
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