United States Department of Labor
Employees' Compensation Appeals Board

D.T., Appellant	)	
and	)	**Docket No. 10-1012**
	)	**Issued: January 6, 2011**
DEPARTMENT OF THE INTERIOR, BADLANDS NATIONAL PARK, Interior, SD, Employer	)	

Appearances:
Appellant, pro se
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 1, 2010 appellant filed a timely appeal from an August 27, 2009 merit decision of the Office of Workers' Compensation Programs reducing his compensation benefits.[1] 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 based on its determination that his actual earnings as a seasonal visitor use assistant fairly and reasonably represented his wage-earning capacity.

[1] Under the Board's *Rules of Procedure*, the 180-day time period for determining jurisdiction is computed beginning on the day following the date of the Office's decision. *See* 20 C.F.R. § 501.3(f)(2). As the Office's decision was issued August 27, 2009, the 180-day computation begins on August 28, 2009. Since using March 1, 2010, the date the appeal was received by the Clerk of the Board, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is February 23, 2010, which renders the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

FACTUAL HISTORY

On August 28, 2007 appellant, then a 47-year-old temporary seasonal maintenance mechanic, filed a claim for an injury to his lower back occurring on August 24, 2007 in the performance of duty. The Office accepted a lumbar sprain. Appellant received continuation of pay until October 13, 2007, when his temporary, seasonal position ended. The Office paid him compensation for total disability beginning October 14, 2007.

On May 12, 2008 Dr. Steve J. Wisniewski, an attending Board-certified internist, found that appellant could work four hours a day with no lifting over 40 pounds and no repetitive bending, twisting or stooping. On June 17, 2008 Dr. William V. Watson, a Board-certified orthopedic surgeon and Office referral physician, listed work restrictions including no lifting over 15 pounds and walking and standing up to one hour.

The Office determined that a conflict in medical opinion arose regarding the extent of appellant's work restrictions and referred him to Dr. Allan R. Wilson, a Board-certified orthopedic surgeon, for an impartial medical examination. Dr. Wilson diagnosed progressive multilevel degenerative disc disease aggravated by the August 24, 2007 employment injury. In a work-restriction evaluation, he provided limitations of lifting up to 20 pounds for four hours a day and pushing or pulling up to 50 pounds for one hour a day.

On November 7, 2008 the Office accepted permanent aggravation of lumbar degenerative disc disease. It referred appellant for vocational rehabilitation. The rehabilitation counselor searched for a position for him with the employing establishment.

On June 3, 2009 the employing establishment offered appellant the position of temporary, seasonal visitor use assistant with the employing establishment. The position required lifting under 20 pounds for four hours and pushing and pulling less than 50 pounds for one hour a day. Appellant accepted the job offer and returned to work on June 22, 2009.

By decision dated August 27, 2009, the Office reduced appellant's compensation based on its finding that his actual earning as a temporary, seasonal visitor use assistant effective June 22, 2009 fairly and reasonably represented his wage-earning capacity. It determined his loss of wage-earning capacity by applying the formula developed in the *Albert C. Shadrick* decision.[2]

On appeal, appellant noted that Dr. Wilson did not address his ability to stand and bend. He tried to contact Dr. Wilson about the lack of restrictions in his report and found out that he had died. The Office informed appellant that it would terminate his compensation if he refused the position. Appellant asserted that he would not have enough money to support himself and his family after the reduction. He had to take Neurontin while working which caused side effects, including suicidal thoughts. Appellant was depressed due to his condition. Prior to his employment injury, appellant worked as a carpenter off season to add to his income.

[2] *Albert C. Shadrick*, 5 ECAB 376 (1953) codified at 20 C.F.R. § 10.403.

LEGAL PRECEDENT

Section 8115(a) of the Federal Employees' Compensation Act[3] 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 her wage-earning capacity.[4] Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such a measure.[5] The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision,[6] has been codified at 20 C.F.R. § 10.403. The Office calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the current pay rate for the date-of-injury job.[7]

The Office's procedure manual provides guidelines for determining wage-earning capacity based on actual earnings:

> "a. Factors considered. To determine whether the claimant's work fairly and reasonably represented his or her WEC [wage-earning capacity] the CE [claims examiner] should consider whether the kind of appointment and tour of duty (see FECA PM 2.900.3) are at least equivalent to those of the job held on the date of injury. Unless they are, the CE may not consider the work suitable.
>
> "For instance, reemployment of a temporary or casual worker in another temporary or casual (USPS) position is proper, as long as it will last at least 90 days and reemployment of a term or transitional (USPS) worker in another term or transitional (USPS) worker is likewise acceptable. However, the reemployment may not be considered suitable when:
>
> > (1) The job is part-time (unless the claimant was a part-time worker at the time of injury or sporadic in nature;
> >
> > (2) The job is seasonal in an area where year-round employment is available;
> >
> > (3) The job is temporary where the claimant's previous job was permanent."[8]

[3] 5 U.S.C. §§ 8101-8193.

[4] *Id*. at § 8115(a); *J.S.*, 58 ECAB 280 (2007); *Loni J. Cleveland*, 52 ECAB 171 (2000).

[5] *Lottie M. Williams*, 56 ECAB 198 (2005).

[6] *Albert C. Shadrick*, *supra* note 2.

[7] 20 C.F.R. § 10.403(c).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (July 1997).

ANALYSIS

The Office accepted that appellant sustained lumbar sprain and a permanent aggravation of degenerative disc disease due to an August 24, 2007 employment injury. It determined that a conflict arose between Dr. Wisniewsky, his attending physician and Dr. Watson, who provided a second opinion examination, on the extent of his work restrictions. The Office referred appellant to Dr. Wilson for resolution of the conflict. On October 14, 2008 Dr. Wilson diagnosed progressive multilevel degenerative disc disease aggravated by the August 24, 2007 employment injury. He found that appellant could lift up to 20 pounds for four hours a day and pushing or pulling up to 50 pounds for one hour a day.

The employing establishment offered appellant the position of temporary, seasonal visitor use assistant within the restrictions found by Dr. Wilson. He accepted the position and returned to work on June 22, 2009. As appellant was in a temporary position at the time of his injury, the Office may use actual wages in a temporary position to determine his wage-earning capacity.[9] However, the position must be available for at least 90 days in order to be appropriate.[10] There is no evidence of record to establish the duration of appellant's temporary, seasonal position. Consequently, the Office erred in finding that his wages in his position of temporary, seasonal visitor use assistant fairly and reasonably represent his wage-earning capacity.[11]

CONCLUSION

The Board finds that the Office improperly reduced appellant's compensation based on its determination that his actual earnings as a visitor use assistant fairly and reasonably represented his wage-earning capacity.

[9] *Id.*; *see also A.P.*, 58 ECAB 198 (2006).

[10] *Id*.

[11] In view of the Board's disposition of the merits, it will not address appellant's arguments on appeal.

ORDER

IT IS HEREBY ORDERED THAT the August 27, 2009 decision of the Office of Workers' Compensation Programs is reversed.

Issued: January 6, 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