United States Department of Labor
Employees' Compensation Appeals Board

W.S., Appellant	)	
and	)	**Docket No. 10-891**
	)	**Issued: March 2, 2011**
DEPARTMENT OF THE ARMY, RED RIVER ARMY DEPOT, Texarkana, TX, 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, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 18, 2010 appellant, through counsel, filed a timely appeal from a December 9, 2009 merit decision of the Office of Workers' Compensation Programs, affirming a March 27, 2009 decision reducing his wage-loss benefits based on his actual earnings. 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 the position of clerk represented appellant's wage-earning capacity as of February 2, 2009.

FACTUAL HISTORY

On September 14, 1988 appellant, then a 33-year-old heavy mobile equipment mechanic, filed a traumatic injury claim alleging that on August 25, 1998 he injured his lower back, left arm, groin area, back, neck and shoulder while pushing an engine on a buggy. He also filed a second traumatic claim that day alleging that on September 13, 1988 he injured his lower back, neck, left shoulder and arm, upper back and groin area also while pulling and pushing an engine

on a buggy. The Office accepted the August 25, 1988 claim for subluxations of T1, T2, T4, L3, L4 and L5, resolved as of January 15, 1992 and conversion disorder.[1] By letter dated November 12, 1991, it placed appellant on the periodic rolls for temporary total disability.

On September 30, 2008 Dr. Lori M. Guyton, a second opinion Board-certified neurologist, diagnosed cervical and lumbar spine disease, deconditioning due to decreased activity and disease and possible somatoform conversion. She concluded appellant was disabled from performing his date-of-injury position, but was capable of working a light-duty job allowing him to sit, stand and walk at will. Dr. Guyton provided work restrictions in an October 10, 2008 work capacity evaluation (Form OWCP-5c). Restrictions included: no working more than four hours to begin; up to four hours of intermittent sitting and walking; up to two hours of walking and repetitive wrist motion; 15 minutes of reaching and reaching above the shoulder; no pushing, pulling, lifting, squatting, kneeling, climbing twisting, bending or stooping and up to 1 hour of operating a motor vehicle and driving to and from work; and a 15-minute break every 2 hours.

On October 16, 2008 Dr. Howard S. Fishkoff, a second opinion Board-certified psychiatrist, diagnosed pain disorder and chronic pain. He concluded that appellant would be capable of performing clerical work part time. Dr. Fishkoff indicated that appellant would not be capable of performing any work requiring bending or any lifting.

On October 29, 2008 the employing establishment offered appellant a position as a clerk working four hours per day based on Dr. Guyton's October 10, 2008 work restrictions. The position required no pulling, pushing, lifting, kneeling, squatting or climbing. It did not require walking, sitting, standing, twisting, bending/stooping, reaching above the shoulder or operating a motor vehicle for more than 10-minute intervals. The employing establishment noted the salary as $16.55 per hour and that the hours were 12:30 pm to 3:30 pm. Appellant initially refused the position on November 4, 2008, but subsequently accepted the position and returned to work on January 26, 2009.

On February 3, 2009 the Office reduced appellant's wage-loss compensation effective January 26, 2009 based on his ability to earn wages as a clerk working 4 hours per day or 16 hours per week at a weekly pay rate of $264.80. It noted that his hours were increased to 5 hours per day or 20 hours per week at a weekly pay rate of $331.00.

In a March 27, 2009 decision, the Office determined that appellant's actual wages as a clerk fairly and reasonably represented his wage-earning capacity. It found that he had successfully worked in the position for more than 60 days. The Office noted that on January 26, 2009 appellant returned to work for four hours per day four days per week with a weekly salary of $264.80. On February 2, 2009 appellant's hours were increased to five hours per day four days per week with a weekly salary of $331.00. The Office noted that his pay rate when his disability began was $419.50, that the current pay rate for the job and step when injured was $821.60, that he had actual earnings of $331.00 per week, that dividing $331.00 by $821.60 resulted in a loss of wage-earning capacity of 40 percent and that when $419.50 was multiplied

[1] The employing establishment terminated appellant's employment due to his physical disqualification for performing the duties of his position effective June 9, 1990.

by 40 percent he had a wage-earning capacity of $167.84.[2] It then subtracted $167.84 from appellant's pay rate when disability began, $419.50 and determined that he had a loss of wage-earning capacity of $251.76. Multiplied by his compensation rate of 75 percent, this resulted in a new compensation amount of $188.82 per week. Using cost-of-living adjustments, the Office found that appellant's compensation amount was $326.00 per week. It reduced his entitlement to wage-loss compensation benefits; compensation payments were $1,268.60 every four weeks. Appellant continued to be entitled to medical benefits for treatment of the work-related injury.

In an April 9, 2009 letter, appellant's counsel requested a telephonic hearing with an Office hearing representative, which was held on August 13, 2009. Appellant testified at the hearing that he basically just sat in a cubicle basically doing nothing. Counsel contended at the hearing that the position was not suitable as the job did not exist.

In response to the hearing transcript, the employing establishment commented that the clerk position was an actual position and there was work appellant could do such as making copies, assembling binders and shredding of old documents.

In a December 9, 2009 decision, the Office hearing representative affirmed the Office's March 27, 2009 decision.[3]

LEGAL PRECEDENT

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 formula for determining loss of wage-earning capacity based on actual earnings, developed in the Board's decision in *Albert C. Shadrick*,[5] has been codified by regulations at 20 C.F.R. § 10.403. Office procedures provide that a determination regarding whether actual earnings fairly and reasonably represent wage-earning capacity should be made after an

[2] This appears to be a mathematical error as $419.50 multiplied by 40 percent results in $167.80, not $167.84.

[3] The record reveals that appellant filed a claim for a schedule award on March 4, 2009. The Office has not issued a final decision for any employment-related permanent impairment due to his accepted employment conditions. The Board lacks jurisdiction to address this issue on appeal. 20 C.F.R. § 501.2(c); *see E.L.*, 59 ECAB 405 (2008); *Linda Beale*, 57 ECAB 429 (2006) (the Board's jurisdiction extends only to the review of final decisions by the Office).

[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] 5 ECAB 376 (1953).

employee has been working in a given position for more than 60 days.[6] The amount of compensation paid is based on the wage-earning capacity determination and it remains undisturbed until properly modified.[7]

ANALYSIS

The Office accepted that appellant's claim for subluxations of T1, T2, T4, L3, L4 and L5, resolved as of January 15, 1992. It subsequently expanded the acceptance of the claim to include a conversion disorder. On October 29, 2008 the employing establishment offered appellant a position as a clerk working four hours per day based on the work restrictions provided by Dr. Guyton, a second opinion Board-certified neurologist. Initially, appellant rejected the October 29, 2008 job offer from the employing establishment, but subsequently accepted the job offer and started work on January 26, 2009.

By decision dated March 26, 2009, the Office reduced appellant's compensation after finding that his actual earnings as a clerk fairly and reasonably represented his wage-earning capacity. It found that he successfully performed the clerk position for more than 60 days. However, appellant accepted the position on January 26, 2009 which is 59 days before the Office's decision. As noted, Office procedures provide that a determination regarding whether actual earnings fairly and reasonably represent wage-earning capacity should be made after an employee has been working in a given position for more than 60 days.[8] Appellant started working for the employing establishment beginning January 26, 2009 performing clerical duties. The Office issued its decision finding the clerk position was suitable and reducing his wages on March 26, 2009. As of March 26, 2009 appellant had not worked in the clerk position for more than 60 days.[9] The Board, therefore, finds that the Office failed to meet its burden of proof.

CONCLUSION

The Board finds that the Office improperly determined appellant's wage-earning capacity based on his actual earnings as a clerk. The Office's decision must be reversed.

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (October 2009). *See also E.C.*, 59 ECAB 397 (2008); *Hayden C. Ross*, 55 ECAB 455 (2004).

[7] *See Sharon C. Clement*, 55 ECAB 552 (2004).

[8] Federal (FECA) Procedure Manual, *supra* note 6.

[9] *Id.*; *L.M.*, Docket No. 10-949 (issued December 1, 2010); *Amalia Stys*, Docket No. 96-521 (issued June 9, 1998).

ORDER

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

Issued: March 2, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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