United States Department of Labor
Employees' Compensation Appeals Board

S.H., Appellant	)	
and	)	
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Salt Lake City, UT, Employer	)	**Docket No. 11-180** **Issued: September 9, 2011**

Appearances:
John S. Evangelisti, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 29, 2010 appellant, through his attorney, filed a timely appeal from June 9 and August 12, 2010 merit decisions of the Office of Workers' Compensation Programs reducing his compensation based on his capacity to earn wages. Pursuant to the Federal Employees' Compensation Act[1] and 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 OWCP properly reduced appellant's compensation based on its findings that he had the capacity to earn wages as a fast food manager.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On July 1, 2004 appellant, then a 35-year-old lead security screener, filed a claim alleging that on June 26, 2004 he sustained an injury to his left rotator cuff in the performance of duty. OWCP accepted the claim for a left shoulder sprain, a tear of the left rotator cuff, brachial neuritis or radiculitis, cervical spinal stenosis and unilateral total paralysis of the vocal cords. On August 20, 2004 appellant underwent a subscapularis repair of the left shoulder and a biceps reconstruction of the sheath. He underwent a subacromial decompression on November 6, 2004, an open subscapularis lengthening on March 29, 2005 and a C6-7 fusion and discectomy on September 29, 2007.

On April 10, 2008 Dr. David J. Nathan, a neurosurgeon, diagnosed a C6-7 herniated disc, surgically treated.[2] He advised that appellant could "attend school for retraining" but noted that he did not treat appellant's shoulder injury.

OWCP referred appellant to Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon, for a second opinion examination. On August 15, 2008 Dr. Swartz reviewed the history of injury and the medical reports of record. She found that appellant had continuing residuals of his left shoulder condition. Dr. Swartz related that he had hoarseness due to a laryngeal nerve injury and opined that his C6-7 surgery was not related to his claim as he did not sustain an injury at C7. She found that appellant sustained a tear of the subscapularis and a C6 traction injury due to his June 28, 2004 employment injury. In a work restriction evaluation, Dr. Swartz found that he could not perform his usual employment but could work with left arm restrictions of reaching four hours a day, no overhead reaching, performing repetitive work with the left wrist and elbow four hours a day and lifting, pushing and pulling up to five pounds four hours a day. She further determined that appellant could lift up to 25 pounds with the right arm, squat, kneel and climb four hours a day and operate a motor vehicle for two hours a day.

On October 7, 2008 OWCP referred appellant for vocational rehabilitation.[3] In a report dated November 5, 2008, a rehabilitation counselor discussed his history of working as a bus driver, garbage truck driver, retail store security guard, bodyguard, security guard and fast food manager. He noted that appellant was a high school graduate. The rehabilitation counselor reviewed the results of vocational testing and found that he had the vocational ability to work as a food service, retail or hotel manager, security guard, sales clerk, cashier and customer service representative.

On March 12, 2009 OWCP approved 90 days of job placement assistance for appellant to search for work as a security guard or customer service representative.

[2] In a report dated August 6, 2008, Dr. Nathan related that he did not have any significant lessening of pain in his upper extremities following his C6-7 fusion. He noted that appellant had vocal cord palsy that had improved following a vocal cord injection.

[3] OWCP had previously referred appellant for vocational rehabilitation in 2006; however, services ceased as he required surgery.

On March 19, 2009 the rehabilitation counselor informed OWCP that appellant was having grand mal seizures and liver problems due to his diabetes medication. An OWCP rehabilitation specialist informed that rehabilitation counselor that appellant remained in 90-day job placement status pending information from a physician about his ability to work. On April 30, 2009 the rehabilitation counselor noted that appellant had not searched for a position due to his seizures and medications.

In a report dated March 18, 2009, Dr. Jahan Imani, a neurologist, discussed appellant's history of seizures and noted that a December 2008 electroencephalogram (EEG) showed epileptiform discharge. He noted that appellant had a frozen shoulder from a prior injury with some muscle atrophy. Dr. Imani diagnosed generalized tonic-clonic seizures.

In a report dated May 5, 2009, Dr. Imani diagnosed generalized tonic-clonic seizures based on an abnormal EEG and family history. He advised that appellant could not drive, climb or operate heavy machinery.

On June 22, 2009 OWCP's rehabilitation specialist questioned why the position of fast food manager was not included in the rehabilitation plan.[4] The rehabilitation counselor informed him that it was at appellant's request.

On June 20, 2009 the rehabilitation counselor completed a job classification form for the position of fast food services manager. The definition of the position, as set forth in the Department of Labor's *Dictionary of Occupational Titles*, (DOT) includes participating in the "preparation of and cooking, wrapping or packing types of food served or prepared by establishment, collecting of monies from in-house or take-out customers, or assembling food orders for wholesale customers." The strength level required is light and necessitates frequent, reaching, handing and fingering. The DOT classifies an activity as frequent when it is performed one-third to two-thirds of the time. The rehabilitation counselor found that appellant met the specific vocational preparation for the job through his high school education, aptitude test and past work as a fast food manager. He confirmed that the position was reasonably available through contacting the state employment services and noted that there were 180 openings a year statewide with a median weekly wage of $589.20.

On September 22, 2009 OWCP advised appellant of its proposed reduction of his compensation benefits based on its finding that he had the capacity to earn wages of $589.20 per week as a fast food manager.

In a September 29, 2009 response, appellant related that he telephoned several managers at fast food restaurants and was told each time that he was not qualified for any position. He related that starting salaries were much lower than $589.20. Appellant asserted that he gained weight after his work injury and developed diabetes. He was undergoing surgery for his seizures in a few weeks and could no longer drive.

[4] In a June 22, 2009 telephone call, appellant requested an extension of his job placement services as his diabetes and seizures prevented his participation in the program. OWCP's claims examiner explained that he must provide medical evidence from his physician explaining why he could not perform a job search.

By decision dated November 30, 2009, OWCP reduced appellant's compensation based on its finding that he had the physical and vocational capability of earning wages as a fast food manager. It calculated his wage-earning capacity in accordance with the principles set forth in *Albert C. Shadrick*.[5]

On December 23, 2009 appellant requested a hearing that was held on March 18, 2010. His attorney argued that he could not physically perform the position of fast food manager based on the restrictions of Dr. Schwartz. Appellant's attorney asserted that as Dr. Schwartz found that he could not reach over his shoulder, reach over four hours or lift, push or pull over 5 pounds with his left arm, he could not perform the duties of a fast food manager which required lifting up to 20 pounds and frequently reaching, fingering and handling. Counsel further argued that the wages used in the reduction of compensation were median rather than local.

On April 21, 2010 appellant's attorney reiterated that he was physically unable to perform the reaching and lifting required by the position, that the medical evidence was unexplained and that the rehabilitation counselor did not properly analyze the wage information and the job availability.

By decision dated June 9, 2010, a hearing representative affirmed the November 10, 2009 decision. On June 24, 2010 appellant, through his attorney, requested reconsideration. He submitted employment projections for the position of food service manager. By decision dated August 12, 2010, OWCP denied modification of its June 9, 2010 decision.

On appeal, appellant's attorney argues that he could not work as a manager, that the work was not reasonably available and could not earn the wages found by OWCP.

LEGAL PRECEDENT

Once OWCP 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 of benefits.[6] Under section 8115(a), wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent his or her wage-earning capacity, or if the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, his or her usual employment, age, qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect wage-earning capacity in his or her disabled condition.[7]

When OWCP makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an OWCP wage-earning capacity specialist for selection of a position listed in the Department of Labor's *Dictionary of Occupational Titles* or

[5] 5 ECAB 376 (1953); codified by regulation at 20 C.F.R. § 10.403.

[6] *T.O.*, 58 ECAB 377 (2007).

[7] *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

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.[8] Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service. Finally, application of the principles set forth in *Albert C. Shadrick*[9] will result in the percentage of the employee's loss of wage-earning capacity.

ANALYSIS

OWCP determined that the selected position of fast food manager was medically and vocationally suitable and represented appellant's wage-earning capacity. The issue of whether an employee has the physical ability to perform a modified position is a medical question that must be resolved by probative medical evidence.[10] The Board finds that the medical evidence does not support a finding that the selected position of fast food manager is within appellant's physical limitations.

OWCP referred appellant to Dr. Swartz for a second opinion examination. On August 15, 2008 Dr. Swartz diagnosed a C6 traction injury and a tear of the subscapularis of the left shoulder. She determined that residuals of appellant's work injury prevented him from returning to his regular employment. Dr. Swartz found that he could work eight hours a day with left arm restrictions of no reaching over four hours, no reaching overhead, no lifting, pushing or pulling over five pounds and no repetitive work with the left wrist and elbow for more than four hours a day. She opined that appellant could lift up to 25 pounds with the right arm and could squat, kneel and climb up to four hours a day. The rehabilitation counselor submitted job descriptions for the position of fast food manager as listed in the DOT. Although the position was classified as light, it required frequent reaching, handling and fingering. The DOT provides that an activity is frequent if it is performed from one-third to two-thirds of the time. Dr. Swartz restricted appellant from reaching or performing repetitive movements over four hours a day with his left arm. She further found that he could lift only 5 pounds with his left arm while the position of fast food managers necessitated occasional lifting of up to 20 pounds. The duties of the position, such as preparing, cooking, wrapping and packing food, would require appellant to use his left arm in addition to his right. The evidence does not establish that appellant had the capacity to work as a fast food manager. OWCP's procedures state that, unless the medical evidence is clear and unequivocal that the selected position is medically suitable, it should send a job description to an appropriate physician for an opinion regarding whether the claimant can perform the position.[11] As the medical evidence does not clearly and unequivocally establish that appellant could perform the duties of the selected position, OWCP did not meet its burden of proof to reduce his compensation.

[8] *Mary E. Marshall*, 56 ECAB 420 (2005); *James A. Birt*, 51 ECAB 291 (2000).

[9] 5 ECAB 376 (1953); codified by regulation at 20 C.F.R. § 10.403.

[10] *See Maruissa Mack*, 50 ECAB 498 (1999); *Robert Dickinson*, 46 ECAB 1002 (1995).

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(d) (December 1995); *see also William H. Woods*, 51 ECAB 619 (2000).

CONCLUSION

The Board finds that OWCP improperly reduced appellant's compensation based on its finding that he had the capacity to earn wages as a fast food manager.

ORDER

IT IS HEREBY ORDERED THAT the August 12 and June 9, 2010 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: September 9, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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