United States Department of Labor
Employees' Compensation Appeals Board

R.H., Appellant	)	
	)	
and	)	**Docket No. 10-995**
	)	**Issued: December 13, 2010**
DEPARTMENT OF THE ARMY, Stuttgart, Germany, 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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 1, 2010 appellant filed a timely appeal from a December 1, 2009 merit decision of the Office of Workers' Compensation Programs reducing his compensation benefits. 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 effective December 20, 2009 based on its finding that he had the capacity to earn wages as a receptionist.

FACTUAL HISTORY

On June 13, 2000 appellant, then a 36-year-old finance clerk, filed a claim alleging that on May 11, 2000 he sustained a left hand fracture in the performance of duty. He stopped work on May 15, 2000. The Office accepted the claim for a rupture of the left radiocarpal ligament, a closed fracture of the left carpal bone and a left wrist sprain. Appellant stopped work on May 15, 2000 and later returned to work on July 3, 2000. The employing establishment removed

him from employment on December 15, 2001 as he was unable to perform the duties of his position. The Office paid appellant monetary compensation for disability after that date.[1]

In a March 10, 2009 response to the Office's request for updated medical information, Dr. Charles H. Farr, Board-certified in family medicine, diagnosed bilateral midcarpal instability. He found that the condition was disabling and stated, "It is not know whether [appellant] can perform other types of work."

On March 20, 2009 the Office referred appellant to Dr. David Lotman, a Board-certified orthopedic surgeon, for a second opinion examination. On April 28, 2009 Dr. Lotman reviewed the history of injury and listed findings on examination. He diagnosed a resolved left radiocarpal sprain. Dr. Lotman found, however, that appellant also sustained an instability/ligamentous injury of the left wrist at the time of his employment injury that was not adequately treated. He opined that appellant "does have a disability resulting from his carpal instability. Because of the pain and popping, [appellant's] left wrist activities will be restricted, this includes activities which require repetitive motions, as well as activities which require stress." Dr. Lotman advised that appellant could perform light work that was not repetitive and activities that required finger rather than wrist work. In an accompanying work restriction evaluation, he listed limitations of repetitive wrist movements up to one hour per day, pushing up to 45 pounds for three hours per day, pulling up to 40 pounds for three hours per day and lifting up to 30 pounds for two hours per day. Dr. Lotman also opined that appellant should wear a wrist brace.

On May 19, 2009 the Office accepted appellant's claim for an articular cartilage disorder of the left hand. It also referred him for vocational rehabilitation.

On July 3, 2009 the rehabilitation counselor reviewed appellant's educational and work history. He discussed appellant's work in the military as an administrative clerk from 1984 until 1992 and his work for the employing establishment a financial operations postal clerk from 1993 to 2003. Based on appellant's education and work history, the rehabilitation counselor found that appellant could work in several jobs, including that of receptionist. He further found that he had no restrictions regarding finger dexterity and therefore most "sedentary clerical types of jobs involving typing and fingering activities" were within his work restrictions. The rehabilitation counselor asserted that job placement prospects were "only fair taking into consideration the present unemployment rate…."

On July 10, 2009 the rehabilitation specialist noted that appellant had little interest in vocational rehabilitation as he received disability benefits from the Social Security Administration and the Department of Veterans Affairs. He found that appellant had the vocational capability to work in several positions, including that of receptionist. The rehabilitation specialist found that the position of receptionist was reasonably available in the geographical area based on current labor market data with entry level wages of $9.00 per hour.

[1] In a report dated October 27, 2007, Dr. Steven J. Lancaster, a Board-certified orthopedic surgeon, diagnosed left carpal instability due to appellant's employment injury. In a March 2008 work restriction evaluation, he found that appellant could work with restrictions, including no repetitive wrist movements. On May 7, 2008 the Office referred appellant for vocational rehabilitation. In November 2008, it stopped vocational rehabilitation services to obtain clarification of his work restrictions.

On July 20, 2009 the Office informed appellant that he would receive job placement assistance for 90 days as part of the plan for him to return to work as a clerk, customer service representative or receptionist/information clerk. On August 2, 2009 appellant signed the job search but indicated that he did not "agree with any of this." From August through October 2009 the rehabilitation counselor forwarded job leads to appellant identifying various open positions.

On October 23, 2009 the Office advised appellant of its proposed reduction of his compensation based on its finding that he had the physical and vocational ability to perform the position of receptionist. It provided him 30 days to submit additional evidence or argument. The Office reviewed the description of the position of receptionist from the Department of Labor, *Dictionary of Occupational Titles (DOT).* The position was sedentary but required frequent handling and fingering and also might require typing and other clerical duties.

On November 10, 2009 appellant questioned why the Office did not provide his attending physician with a work restriction evaluation for completion. He also challenged the weight accorded Dr. Lotman's opinion.

By decision dated December 1, 2009, the Office reduced appellant's compensation effective December 20, 2009 based on its determination that he had the capacity to work as a receptionist with wages of $360.00 per week. It calculated his new wage-earning capacity in accordance with the principles set forth in *Albert C. Shadrick*.[2]

On appeal, appellant contends that the Office failed to ask his attending physician, Dr. Farr, to complete a work restriction evaluation. He noted that the second opinion examiner found that he had disability. Appellant also asserted that Dr. Lotman had his medical license suspended in 1992 and had a restricted license granted on July 12, 2001.

LEGAL PRECEDENT

Once the Office 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.[3] 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.[4]

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an Office wage-earning capacity specialist for

[2] 5 ECAB 376 (1953); codified by regulation at 20 C.F.R. § 10.403.

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

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

selection of a position listed in the Department of Labor, *DOT* or 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.[5] 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*[6] will result in the percentage of the employee's loss of wage-earning capacity.

ANALYSIS

The Board finds that the Office did not properly reduce appellant's compensation based on his ability to earn wages as a receptionist. The medical evidence from Dr. Lotman established that appellant was no longer totally disabled; thus, the Office properly referred him for vocational rehabilitation. The rehabilitation counselor found that appellant had the physical and vocational capacity to perform the duties of a receptionist. On appeal, appellant contends that he is unable to work as a receptionist due to his employment injury.

The medical evidence is insufficient to support a finding that the position of receptionist was within appellant's physical limitations. The issue of whether an employee has the physical ability to perform a selected position is primarily a medical question that must be resolved by the medical evidence.[7] The Office referred appellant to Dr. Lotman for a second opinion examination. In a report dated April 28, 2009, Dr. Lotman diagnosed a resolved left radiocarpal sprain and an inadequately treated work-related instability/ligamentous injury of the wrist. He found that appellant had left wrist restrictions due to his carpal instability but could perform light duty with no repetitive wrist motions. Dr. Lotman opined that appellant could use his fingers to perform activities. In an accompanying work restriction evaluation, he advised that appellant could perform repetitive wrist movements for one hour per day, pushing up to 45 pounds for three hours per day, pulling up to 40 pounds for three hours per day and lifting up to 30 pounds for two hours per day.

The Office based its finding that appellant could perform the duties of a receptionist based on the opinion of Dr. Lotman. As noted, however, Dr. Lotman found that appellant could perform repetitive wrist movements only one hour per day. The DOT describes the duties of a receptionist as requiring frequent handling and duties such as typing and other clerical assignments. The rehabilitation counselor determined that appellant could perform typing and other clerical work, as he had no restrictions on repetitive finger work. He did not, however, explain why typing did not require repetitive wrist movements. Dr. Lotman found that appellant could work with his fingers but did not address whether he could perform duties such as typing. It is, consequently, unclear whether appellant has the capacity to work as a receptionist. The Office should have clarified the medical evidence by asking Dr. Lotman if appellant could perform the selected position of receptionist. As the medical evidence does not clearly and

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

[6] *Supra* note 2.

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

unequivocally establish that appellant could perform the duties of the selected position, the Office did not meet its burden of proof to reduce his compensation.[8]

CONCLUSION

The Board finds that the Office improperly reduced appellant's compensation effective December 20, 2009 based on its finding that he had the capacity to earn wages as a receptionist.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 1, 2009 is reversed.

Issued: December 13, 2010
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

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

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

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