United States Department of Labor
Employees' Compensation Appeals Board

D.C., Appellant	)	
and	)	**Docket No. 07-1518**
	)	**Issued: August 21, 2008**
DEPARTMENT OF THE NAVY, PUGENT SOUND NAVAL SHIPYARD, Bremerton, WA, 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 May 15, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' hearing representative dated March 27, 2007, which affirmed the Office's September 29, 2006 wage-earning capacity determination. 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 met its burden of proof in reducing appellant's compensation based on its determination that the constructed position of a mechanical drafter represented his wage-earning capacity effective October 1, 2006.

FACTUAL HISTORY

On April 21, 1999 appellant, then a 47-year-old watch standard, filed an occupational disease claim for a left knee injury. He indicated that he was overcompensating for a right knee

injury.[1] Appellant did not initially stop work. The Office accepted his claim for left knee strain and torn medial meniscus of the left knee.[2]

On November 7, 2000 appellant's treating physician, Dr. Michael McManus, Board-certified in occupational medicine, opined that he had permanent work restrictions from "any driving or operation of heavy or dangerous machinery."

On April 11, 2001 appellant was placed on the periodic rolls in receipt of temporary total disability. The Office subsequently referred him to vocational rehabilitation on June 13, 2001. Appellant retired from the employing establishment on September 24, 2001. He underwent retraining at Olympic College from September 23, 2002 to December 11, 2004 in the field of drafting. By letter dated December 15, 2004, the Office advised appellant that, as he had completed training to be an engineering technician, he would receive 90 days of placement assistance in his job search. Appellant was advised that, upon completion of the 90 days, his compensation would be reduced as the evidence of record established that he was no longer totally disabled. He was found partially disabled with the capacity to earn wages as a mechanical engineering technician at the rate of $583.60 per week.

On April 1, 2005 the vocational rehabilitation counselor recommended closing appellant's file on the basis that he was unsuccessful in obtaining gainful employment after participating in the program for 90 days. The counselor determined that, based upon appellant's permanent restrictions, he was able to work as an engineering technician at the hourly rate of $564.40 per week or $14.11 per hour. On May 31, 2005 appellant's rehabilitation counselor noted that his file was closed effective that date. He noted that two positions, mechanical engineering technician and mechanical drafter, were reasonably available in appellant's labor market area.

By letters dated June 29 and July 12, 2005, the Office provided Dr. McManus with a labor market survey and functional job analysis for the position of mechanical engineering technician. It requested that he provide an opinion as to the suitability of the position. On July 19, 2005 the Office authorized appellant to be seen by Dr. McManus for a current physical examination and requested classification as to any driving restrictions. On August 11, 2005 Dr. McManus advised that appellant was completely restricted from any driving. He diagnosed severe secondary osteoarthritis involving the right knee and status post right total knee replacement. Dr. McManus also noted that appellant had severe secondary osteoarthritis involving the left knee with a degenerative tear of the medial meniscus, chronic bilateral knee pain and was on pain control, which included the use of methadone. He advised that appellant had been on these medications for a long time and was "habituated." Dr. McManus reiterated that appellant was "completely precluded from driving." He completed a work capacity evaluated and repeated his restrictions which included that they were permanent since October 16, 2001. Dr. McManus advised that appellant could work an eight-hour day with restrictions comprised of walking or standing for no more that two hours, restricted pushing,

[1] The record reflects that appellant had an accepted work related March 4, 1985 injury to the right knee, for which he received a schedule award of 51 percent to the right lower extremity.

[2] The record also indicates that appellant is morbidly obese.

pulling and lifting of no more than 50 pounds for one-half hour and no bending, stooping, squatting, kneeling, climbing or operating a motor vehicle.

In a letter dated August 20, 2005, the Office requested that Dr. McManus review a functional job analysis for the position of mechanical drafter and render an opinion as to its suitability for appellant's work restrictions. In a report dated October 6, 2005, Dr. McManus opined that the position of mechanical drafter would be appropriate for appellant. He did not find anything in the job classification to be beyond appellant's physical capacities. As the job classification did not include any weight bearing or driving requirements, he would need this information before giving final approval of the position.

By letter dated January 13, 2006, the vocational rehabilitation counselor provided Dr. McManus with a copy of the job analyses for mechanical drafter and mechanical engineering technician. He requested that an opinion regarding appellant's ability to perform these positions. On February 2, 2006 Dr. McManus opined that appellant was capable of performing the mechanical drafter position.

On April 13, 2006 the vocational rehabilitation services counselor forwarded the mechanical drafter job description to determine appellant's wage-earning capacity. The position was listed in the Department of Labor, *Dictionary of Occupational Titles*, DOT No. 007.281-010. The rehabilitation counselor provided information concerning the availability of the position within appellant's commuting area and pay ranges within the geographical area, as confirmed by state officials. He determined that the job conformed to appellant's medical restrictions and that he was vocationally qualified for the job based on his completion of a two-year training program in the field of technical design at Olympic College. The job description for the position included making detailed drawings of machinery and mechanical devices, reviewing rough sketches and engineering specifications received from the engineer or architect, calculating and laying out dimensions, angles, curvature of parts, materials to be used, mathematics and knowledge of building materials and manufacturing technology. The physical requirements were determined to be sedentary, with lifting or carrying a maximum of 10 pounds occasionally as well as frequent reaching, handling or fingering and use of sight.

By letter dated August 28, 2006, the Office notified appellant that it proposed to reduce his wage-loss compensation as the medical and factual evidence established that he was partially disabled and had the capacity to earn wages as a mechanical drafter at the rate of $640.80 per week. Appellant was advised that his physician had reviewed the job description for a mechanical drafter and found that he could perform the physical activities as described in the job analysis. He was also advised that the vocational rehabilitation counselor had found that appellant's experience, education, medical restrictions and labor market survey documented his employability as a mechanical drafter. The Office informed appellant that the counselor documented that mechanical drafter positions were reasonably available in his commuting area at the entry pay level of $640.80 per week. Appellant was advised that the physical requirements of the position were consistent with his work restrictions and included sedentary work and occasional lifting or carrying of a maximum of 10 pounds. The position was comprised of frequent reaching, handling and fingering, as well as use of his sight. The Office further indicated that appellant's weekly rate of pay on the date of the injury was $654.60 and was effective August 22, 2000. It determined that the current rate of pay for his date-of-injury

position was equal $682.29 per week and that the adjusted wage-earning capacity for appellant per week equated to a loss in earning capacity of $39.28 per week, adjusted by a 75 percent compensation rate of $29.46 per week, which when increased by the cost of living resulted in $33.00 per week. The Office informed appellant that his monthly compensation checks would equate to $132.00 per month. It allotted appellant 30 days to submit additional evidence or argument regarding his capacity to earn wages.

On September 7, 2006 appellant submitted a response that was addressed to Dr. McManus. He requested that the physician provide the Office with an opinion regarding his work capacity, which included that he could not drive due to the medications that he was prescribed. No response was received from Dr. McManus.

By decision dated September 29, 2006, the Office reduced appellant's compensation to $132.00 every four weeks effective October 1, 2006, based on his ability to work as a mechanical drafter, which was found to be medically and vocationally suitable and represented his wage-earning capacity.

The Office subsequently received a September 21, 2006 report from Dr. McManus who opined that appellant had reached maximum medical improvement and that his restrictions were permanent. Dr. McManus advised that appellant required the use of long acting narcotics analgesics for pain control. As a result, appellant was completely restricted from any driving or operating heavy or dangerous machinery.

In a September 30, 2006 statement, appellant reiterated that his physician had advised that he was unable to drive due to his medications. He also reiterated that he had two separate claims and that he was being evaluated one knee at a time, as opposed to having all of his conditions considered.

On October 12, 2006 appellant requested a telephonic hearing, which was held on February 5, 2007. During the hearing, he noted working for the employing establishment until he retired in 2003. Appellant indicated that he started taking methadone while participating in vocational rehabilitation and could not drive due to his medication. He alleged that public transportation was not readily available and that the bus station was seven to eight miles away from his home. Appellant alleged that, even if he could get to work, he was uncertain that he would be hired or that he would be able to work due to his medication, which made him sleepy.

By decision dated March 27, 2007, the Office hearing representative affirmed the September 29, 2006 decision. He noted that appellant had not established that he was unable to commute to a place of employment using a form of public transportation other than his motor vehicle.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[3]

[3] *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

Section 8115(a) of the Federal Employees' Compensation Act,[4] provides 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. Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.[5] If the actual earnings do not fairly and reasonably represent wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, his degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect her wage-earning capacity in his disabled condition.[6] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[7] The job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives.[8] In determining an employee's wage-earning capacity, the Office may not select a makeshift or odd lot position or one not reasonably available on the open labor market.[9]

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by the Office or to an Office wage-earning capacity specialist for selection of a position, listed in the Department of Labor, *Dictionary of Occupational Titles* or otherwise available in the open labor market, that fits that employee's capabilities with regard to his physical limitation, education, age and prior experience. 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.[10] Finally, application of the principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.[11]

ANALYSIS

The medical evidence includes several reports from appellant's treating physician, Dr. McManus, who noted that appellant was restricted from any kind of driving. However, he found that appellant could work eight hours daily with permanent restrictions comprised of

[4] 5 U.S.C. § 8115.

[5] *Hubert F. Myatt*, 32 ECAB 1994 (1981); *Lee R. Sires*, 23 ECAB 12 (1971).

[6] *See Pope D. Cox*, 39 ECAB 143, 148 (1988); *see supra* note 4.

[7] *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

[8] *Id.*

[9] *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

[10] *Karen L. Lonon-Jones*, 50 ECAB 293, 297 (1999).

[11] *Id. See Albert C. Shadrick*, 5 ECAB 376 (1953).

walking or standing for no more that two hours, restricted pushing, pulling and lifting of no more than 50 pounds for half an hour and no bending, stooping, squatting, kneeling, climbing or operating a motor vehicle. In setting forth appellant's restrictions, the physician referenced the conditions to both of appellant's knees.

The Office referred appellant for vocational rehabilitation counseling on June 13, 2001 and he underwent retraining at Olympic College from September 23, 2002 to December 11, 2004 in the field of drafting. On April 1, 2005 the vocational rehabilitation counselor determined that appellant was capable of working. On May 31, 2005 the Office noted that the positions of mechanical engineering technician and mechanical drafter were reasonably available in appellant's labor market. On June 29, July 12 and August 20, 2005 it requested that Dr. McManus provide his opinion as to whether the position of mechanical drafters was suitable. In reports dated October 6, 2005 and February 2, 2006, Dr. McManus advised that the position of mechanical drafter would be appropriate and that appellant was capable of performing the position.

On August 28, 2006 the Office proposed to reduce appellant's compensation, noting that he was only partially disabled and had the capacity to earn wages as a mechanical drafter at the rate of $640.80 per week. Because appellant was unable to secure employment, the vocational rehabilitation counselor noted that the mechanical drafter position fit appellant's work capabilities. The Office determined that appellant had the capacity to earn wages as a mechanical drafter, based on the August 11, 2005 work capacity evaluation provided by Dr. McManus and in follow-up reports.

The Board finds that the medical evidence establishes that appellant was capable of performing the duties required for the selected position of mechanical drafter. In the August 11, 2005 work capacity evaluation, Dr. McManus advised that appellant could return to a full day of light-duty work with the above noted restrictions comprised of walking or standing for no more that two hours, restricted pushing, pulling and lifting of no more than 50 pounds for half an hour and no bending, stooping, squatting, kneeling, climbing or operating a motor vehicle. Although Dr. McManus opined that appellant was restricted from driving, he opined that appellant could perform the duties of the selected mechanical drafter position.

The Office vocational rehabilitation counselor determined that appellant was able to perform the position of a mechanical drafter and provided a job classification statement and a job description for the position, which noted that the position was sedentary with requirements that included drafting and making drawings of machinery and mechanical devices, reviewing rough sketches and engineering specifications from engineers and architects, calculating and laying out dimensions, angles, curvature of parts, mathematics, knowledge of building materials and manufacturing technology. The position was also deemed sedentary and the physical requirements were carrying a maximum of 10 pounds occasionally, frequent reaching, handling, or fingering and use of sight. As noted above, appellant's physician determined that the position was within his medical restrictions. The Office vocational rehabilitation counselor noted that the position was available in sufficient numbers so as to make it reasonably available within appellant's commuting area and that the wage of the position was $640.80 per week.

The Board finds that the Office considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment and age and employment qualifications, in determining that the position of mechanical drafter represented his wage-earning capacity.[12] The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of mechanical drafter and that such a position was reasonably available within the general labor market of his commuting area. The Office therefore properly determined that the position of mechanical drafter reflected appellant's wage-earning capacity and using the *Shadrick* formula,[13] reduced his compensation effective October 1, 2006.

Appellant contends that he would have difficulty finding a job but offered no evidence to support that mechanical drafter positions were not reasonably available in his commuting area. The Board has held that a claimant's perception that he would not be hired for a selected position is not a basis for finding that a selected position is not reasonably available.[14] Although the record supports that appellant cannot drive, the selected position does not require him to drive. Appellant submitted no evidence to support his assertion that public transportation was not available for commuting to work. He did not provide any evidence that there were no other reasonable alternatives for commuting to work. Appellant also asserted that the Office did not consider all of his conditions before reducing his compensation; however, the record indicates that Dr. McManus considered both of appellant's knee conditions in setting forth his work restrictions.

Consequently, the Office properly found that the constructed position of a mechanical drafter represented appellant's wage-earning capacity.

CONCLUSION

The Board finds that the Office met its burden of proof in reducing appellant's compensation based on its determination that the constructed position of a mechanical drafter represented his wage-earning capacity effective October 1, 2006.

[12] *James M. Frasher*, 53 ECAB 794 (2002).

[13] *See Shadrick*, *supra* note 11; *see also* 20 C.F.R. § 10.403.

[14] *See Kenneth Tappen*, 49 ECAB 334 (1998).

ORDER

IT IS HEREBY ORDERED THAT the March 27, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 21, 2008
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