United States Department of Labor
Employees' Compensation Appeals Board

C.R., Appellant	)	
and	)	**Docket No. 10-1631**
	)	**Issued: April 14, 2011**
DEPARTMENT OF THE NAVY, MARINE CORPS AIR STATION, Cherry Point, NC, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 14, 2010 appellant filed a timely appeal from merit decisions of the Office of Workers' Compensation Programs dated April 16, 2010. 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 appellant met his burden of proof to establish that wage-earning capacity decisions dated April 10, 2010 should be modified. On appeal he generally asserts that the Office erred.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

This case has previously been before the Board. By order dated March 28, 2002, the Board dismissed appellant's appeal on the grounds that the record did not contain a final decision of the Office issued within one year of the filing of the appeal on January 25, 2000.[2] In a July 7, 2006 decision, the Board found that he failed to establish that he had more than the 50 percent right lower extremity impairment as previously awarded. The Office properly refused to reopen appellant's case for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).[3] The facts of the claim as set forth in the prior appeals are incorporated herein by reference.

The record contains a position description of the emergency services clerk position, indicating that it was competitive and was described as clerical support. The physical demands of the position were described as sedentary and require the ability to move around and function in an office setting and carry light items. On April 16, 1993 Dr. Harold Vandersea, a Board-certified orthopedic surgeon, advised that appellant could perform the position. A notification of personnel action (Standard Form 50) advised that appellant was transferred from the position of pipefitter, with wages of $15.55 per hour, to the full-time emergency services clerk position, with an annual salary of $31,961.00, effective May 2, 1993.

By decision dated December 20, 1993, the Office noted that appellant had been reemployed as an emergency services clerk, effective May 2, 1993, and found that his actual earnings fairly and reasonably represented his wage-earning capacity with zero loss. Appellant voluntarily retired on November 25, 1994.

On November 25, 2008 appellant filed a Form CA-7, claim for compensation, commencing October 6, 2003. He advised that he received federal retirement benefits and social security benefits. By letter dated March 23, 2009, the Office asked appellant to describe his work activities and explain why he was incapable of working as of October 6, 2003. Appellant was asked to submit a narrative medical report in which a physician explained why he was unable to perform the duties of his job and whether the work stoppage was due to a worsening of his accepted condition.

In an April 2, 2009 response, appellant described his surgical history, stated that he had never been released to regular duty and asserted that he had been unable to work since retiring in 1994 and was therefore entitled to disability compensation.

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[2] Docket No. 01-618 (issued March 28, 2002).

[3] Docket No. 06-548 (issued July 7, 2006). On October 16, 1980 appellant, then a 45-year-old pipefitter, sustained an employment-related right knee injury, accepted for a right knee contusion and permanent aggravation of chondromalacia of the patella. By decision dated April 8, 1982, the Office reduced appellant's compensation based on his capacity to earn wages as a customer service clerk, and in decisions dated August 2, 1982 and March 19, 1986, denied modification of the April 8, 1982 decision. Appellant returned to his regular pipefitter duties on June 15, 1992. His physician placed further restrictions on his physical activity and, effective May 2, 1993, he began a modified position as an emergency services clerk. By decision dated December 20, 1993, the Office determined that appellant's actual wages as an emergency services clerk fairly and reasonably represented his wage-earning capacity with zero loss.

The medical evidence includes an August 4, 2003 report of Dr. Scott Q. Hannum, a Board-certified orthopedic surgeon, noted appellant's complaint of right knee grinding and popping with increased pain with walking and numbness and tingling in the right foot. Dr. Hannum reported that appellant had a history of prostate cancer, bad coronary artery disease and asthma, and that he did not have a limp and could ambulate under his own power, without a cane or walker. He advised that physical examination of the right lower extremity demonstrated minimal swelling and no redness or erythema. Dr. Hannum diagnosed right knee pain following revision. On October 6, 2003 he advised that there was no surgical solution that would eliminate appellant's pain and noted that appellant had a hard time getting up and walking. Dr. Hannum prescribed a motorized wheelchair and chairlift as ambulatory aids.

In a July 30, 2004 report, Dr. C. Steven Powell, Board-certified in vascular surgery, advised that appellant had bilateral lower extremity claudication which, together with his right, limited his ability to walk and precluded a walking program and made him a poor surgical candidate. On October 6, 2004 Dr. Hannum noted that he had seen appellant on three occasions between August and October 2003 and reiterated that he was not a good candidate for revision surgery in light of multiple medical problems. In a November 15, 2004 report, Dr. Joseph R. Overby, a family practitioner, advised that, while appellant's vascular consultant recommended a walking program, he was unable to do this due to his chronic right knee problems. He opined that appellant's heart and lung problems, in addition to his knee problem, rendered him permanently totally disabled.[4] In a February 4, 2005 report, Dr. Powell diagnosed atherosclerotic arterial occlusive disease of the lower extremities and advised that this was not injury related, noting that appellant's arteriogram demonstrated aortoiliac and femoral occlusive disease which was the cause of his claudication symptoms in his lower extremities. He stated that he had recommended a progressive walking program which was precluded because Dr. Hannum advised that he could not walk.

In September 2008, appellant was hospitalized due to prostate cancer. In a May 12, 2009 report, Dr. George J. Miller, Board-certified in orthopedic surgery, noted appellant's complaint of right knee pain for which he used a cane for ambulation and stability due to a 1980 injury. He discussed appellant's medical and surgical history and provided physical examination findings. Dr. Miller noted that appellant walked with a limp, that alignment was neutral, flexibility and skin were normal, with no swelling, effusion, ecchymosis or atrophy and no crepitation. McMurray's, Lachman's, posterior drawer, valgus and varus stress tests were negative. Strength examination was normal and right knee flexion was reduced. Right knee x-ray demonstrated good position and alignment of the prosthesis with no sign of loosening. Dr. Miller diagnosed joint pain and advised that appellant should return as needed.

On December 17, 2009 the Office advised appellant that the medical record did not support that he was totally disabled from work beginning October 3, 2003 and asked that he submit additional documentation. In a January 13, 2010 report, Dr. Miller provided examination findings and diagnosed pain in joint, lower leg.

[4] Appellant also submitted an October 11, 2004 report in which Dr. Gordon H. Downie, Board-certified in internal medicine and pulmonary disease, noted a history of asbestos exposure and diagnosed obstructive lung disease.

By decision dated January 29, 2010, the Office denied appellant's claim for monetary compensation beginning October 3, 2003.

On February 19, 2010 appellant requested reconsideration, asserting that his condition was an exacerbation of his employment injury. He submitted a January 13, 2010 letter in which Dr. Miller advised that he was seen in May and October 2009 and on January 13, 2010. Dr. Miller noted that in 2003 his former partner, Dr. Hannum ordered a motorized wheelchair and electric chair lift due to appellant's severe problems with the right knee.[5] He advised that appellant walked painfully with a cane for short distances but, in general, used a motorized scooter, and that he saw him in October 2009 for left leg problems, not the right. Dr. Miller noted that on January 13, 2010 appellant presented walking with his cane in a painful, limping fashion and reported right knee and leg pain that had been present since his revision surgery. Examination findings included moderated restricted range of motion with a well-healed incision. Dr. Miller advised that May 2009 x-rays demonstrated a total knee in place and no sign of loosening and opined that appellant was totally disabled from gainful employment due to right knee and leg pain, stating that, from reading Dr. Hannum's notes, he would assume that appellant was totally disabled at least in 2003 when Dr. Hannum ordered the motorized chair and electric lift because "these are things he would do for a patient who was disabled because of lower extremity impairment."

By decision dated April 16, 2010, the Office vacated the January 29, 2010 decision and modified the December 20, 1993 wage-earning capacity decision to that appellant had sustained a loss in wage-earning capacity. It noted that his wages in the emergency services clerk position were less than those as a pipefitter, and thus he incurred a wage loss due to being placed in the clerk position. The December 20, 1993 decision was modified to show that appellant would be entitled to a loss of wage-earning capacity for the period May 2, 1993, when he was transferred to the emergency services clerk position, to November 24, 1994, when he retired. A second decision issued that day advised that his wages as an emergency services clerk fairly and reasonably represented his wage-earning capacity. The Office applied the *Shadrick* formula and determined that appellant had a loss in wage-earning capacity of $8.20 per week, increased by applicable cost-of-living adjustments to $15.25 weekly, for a new compensation rate each four weeks of $61.00, effective May 2, 1993.

LEGAL PRECEDENT

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.[6] Office procedures provide that it can make a retroactive wage-earning capacity determination if the claimant worked in the position for at

[5] Dr. Miller also references a May 2003 report from his assistant, stating that it was quoted in the December 17, 2009 Office letter. The record does not contain a May 2003 medical report, and the report referenced in the December 17, 2009 letter is Dr. Miller's May 12, 2009 report in which the physician advised that appellant's examination was normal with normal x-rays.

[6] *Katherine T. Kreger*, 55 ECAB 633 (2004).

least 60 days, the position fairly and reasonably represented his or her wage-earning capacity and the work stoppage did not occur because of any change in his injury-related condition affecting the ability to work.[7]

The procedures further provide that, "[i]f a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss. In this instance the [claims examiner] will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity."[8] Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.[9] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[10]

In addition, Chapter 2.814.11 of the procedure manual contains provisions regarding the modification of a formal loss of wage-earning capacity. The relevant part provides that a formal loss of wage-earning capacity will be modified when: (1) the original rating was in error; (2) the claimant's medical condition has changed; or (3) the claimant has been vocationally rehabilitated. Office procedures further provide that the party seeking modification of a formal loss of wage-earning capacity decision has the burden to prove that one of these criteria has been met. If the Office is seeking modification, it must establish that the original rating was in error, that the injury-related condition has improved or that the claimant has been vocationally rehabilitated.[11]

Office procedures direct that a wage-earning capacity determination based on actual wages be made following 60 days of employment. The procedures provide for a retroactive determination where an employee has worked for at least 60 days, the employment fairly and reasonably represents the claimant's wage-earning capacity and work stoppage did not occur due to any change in the claimant's injury-related condition.[12] The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick*, 5 ECAB 376 (1953) decision, 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.[13] Office procedures provide that a

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (July 1997); *Selden H. Swartz*, 55 ECAB 272 (2004).

[8] Federal (FECA) Procedure Manual, *id*. at section 2.814.9(a) (December 1995).

[9] *Stanley B. Plotkin*, 51 ECAB 700 (2000).

[10] *Id.*

[11] Federal (FECA) Procedure Manual, *supra* note 7 at section 2.814.11 (October 2009).

[12] *K.S.*, Docket No. 08-2105 (issued February 11, 2009); Federal (FECA) Procedure Manual, *id*. at sections 2.814.7(c) and 2.814.7(e) (October 2009).

[13] 20 C.F.R. § 10.403(c).

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.[14]

Once a formal wage-earning capacity decision is in place, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.[15] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[16]

ANALYSIS

The Board finds that the Office modified the 1993 wage-earning capacity to reflect appellant's entitlement to compensation from May 2, 1993 to November 24, 1994 when he retired. The Office did not otherwise change the 1993 decision. Appellant did not submit sufficient evidence to show that the December 20, 1993 wage-earning capacity was erroneous.[17] The Office accepted that on October 16, 1980 appellant sustained a right knee contusion and permanent aggravation of chondromalacia patella. Appellant has not asserted that he was retrained or otherwise rehabilitated, and there is no evidence of record to establish that appellant's position as an emergency services clerk was temporary, part time or makeshift. The record contains a position description noting that the position was competitive, and also contains a notice of personnel action showing that appellant was permanently transferred to a full-time position as an emergency services clerk effective May 2, 1993. In the April 16, 2010 decisions, the Office found that appellant had in fact sustained a period of wage loss and paid compensation from May 2, 1995 to November 24, 1994. It noted that appellant's wages in the emergency services clerk position were less than those as a pipefitter, and he incurred a wage loss due to being placed in the clerk position. The Office properly applied the *Shadrick* formula to determine appellant's loss of wage-earning capacity.[18] The record does not support that the determination of wage-earning capacity was erroneous.

Furthermore, the medical evidence relevant to appellant's injury-related right knee condition on or after October 3, 2006 does not establish that there was a material change such that he could not perform the sedentary duties of the emergency services clerk position. Dr. Powell advised that appellant had bilateral lower extremity claudication which, together with

[14] Federal (FECA) Procedure Manual, *supra* note 7 at section 2.814.7(c) (October 2009); *see J.K.*, Docket No. 08-1148 (issued March 13, 2009).

[15] *Stanley B. Plotkin*, *supra* note 9.

[16] *Id.*

[17] *Katherine T. Kreger*, *supra* note 6, *Sharon C. Clement*, 55 ECAB 552 (2004); Federal (FECA) Procedure Manual, *supra* note 8.

[18] 20 C.F.R. § 10.403(c).

his right TKR, limited his ability to walk but not comment on appellant's restrictions or work capabilities. As he did not address appellant's physical capacity for work or, in particular, any inability to perform the duties of the sedentary emergency services clerk position, his reports are of little probative value on the issue of whether appellant's injury-related right knee condition materially changed such that the wage-earning capacity determination should be modified.[19]

Dr. Overby advised in November 2004 that appellant was totally disabled due to heart and lung problems, along with his knee problem. Appellant's heart disease and lung problems were not accepted as employment related, and the physician did not provide any rationale to support his opinion or explain how appellant's disability was due to a material change in the injury-related right knee condition.[20]

Dr. Miller advised in a January 13, 2010 that appellant was totally disabled due to right knee and leg pain, and advised that, based on Dr. Hannum's reports, he assumed that appellant was totally disabled in 2003 when Dr. Hannum ordered the motorized wheelchair. The Board, however, finds his reliance on Dr. Hannum's October 2003 report flawed. Dr. Hannum prescribed a motorized wheelchair and chair lift for appellant on October 6, 2003. However, two months previously, in an August 4, 2003 report, he noted a medical history of prostate cancer, bad coronary artery disease and asthma. Dr. Hannum advised that appellant did not have a limp and could ambulate without the use of a cane, provided right knee findings of minimal swelling and no redness or erythema and diagnosed right knee pain following TKR revision. He explained why, in a two-month period, appellant's injury-related condition had materially changed from walking without a limp to needing a motorized wheelchair or did not opine that appellant was totally disabled. Furthermore, in an October 6, 2004 report, Dr. Hannum noted that appellant was not a good candidate for surgery in light of his multiple medical problems. Subsequently acquired conditions are not considered in determining wage-earning capacity.[21] Likewise, while Dr. Miller advised on January 13, 2010 that appellant walked in a painful, limping fashion and had right leg pain and restricted range of motion and advised that appellant was totally disabled from gainful employment due to right knee and leg pain. He did not discuss appellant's significant medical problems that are not employment related, including the bilateral lower extremity claudication condition diagnosed by Dr. Powell, or exhibit any knowledge of the sedentary duties of the emergency services clerk position. The Board therefore finds Dr. Miller's opinion of diminished probative value and insufficient to establish that there was a material worsening of appellant's employment-related right knee condition affecting his ability to work.[22]

As the medical evidence submitted by appellant does not adequately explain that he had a material worsening of his injury-related right knee condition, it is insufficient to establish that he

[19] Rationalized medical opinion evidence is medical evidence based on a complete factual and medical background of reasonable medical certainty and supported by medical rationale explaining the opinion offered. *A.P.*, Docket No. 08-1822 (issued August 5, 2009).

[20] *Id.*

[21] *See John D. Jackson*, 55 ECAB 465 (2004).

[22] *Supra* note 7.

was unable to perform the duties of the emergency services clerk position that provided the basis for the December 20, 1993 wage-earning capacity decision, as modified on April 16, 2010.[23]

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that an April 16, 2010 wage-earning capacity decision should be modified.

ORDER

IT IS HEREBY ORDERED THAT the April 16, 2010 decisions of the Office of Workers' Compensation Programs be affirmed.

Issued: April 14, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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

[23] *P.C.*, 58 ECAB 504 (2007).