United States Department of Labor
Employees' Compensation Appeals Board

C.R., Appellant	)	
and	)	**Docket No. 10-1295**
	)	**Issued: March 10, 2011**
DEPARTMENT OF THE NAVY, BUSINESS CENTER, Philadelphia, PA, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 6, 2010 appellant, through his attorney, filed a timely appeal of a December 15, 2009 merit decision of the Office of Workers' Compensation Programs determining his wage-earning capacity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUE

The issue is whether the selected position of information clerk fairly and reasonably represents appellant's wage-earning capacity.

On appeal, counsel argues that appellant was not capable of performing the selected position of part time information clerk or chemical dependency counselor from either a vocational or physical standpoint.

FACTUAL HISTORY

This case was previously before the Board. On February 6, 1992 appellant, then a 36-year-old machinist, injured his right knee while moving a valve. The Office initially denied his

claim on April 30, 1992. The Branch of Hearings and Review affirmed the denial on December 14, 1992. By decision dated April 15, 1994,[1] the Board remanded the case for development of the medical evidence. The facts and circumstances of the case as set out in the Board's prior decision are adopted herein by reference.

The Office accepted appellant's claim for right knee strain as well as meniscal tear and authorized surgery. Appellant underwent right knee surgery on July 9, 1992. His surgeon, Dr. Mark Avart, an osteopath, found a complete medial meniscal tear with horizontal and vertical components as well as synovitis with some spurring of the anterior cruciate ligament, but no tearing.[2]

Appellant's federal employment terminated on September 15, 1995 as the employing establishment facility closed. He was unemployed from September 15, 1995 through January 11, 1999 when he began work as a residential rehabilitation specialist in the private sector. Appellant filed a claim on March 13, 1999 alleging on October 6, 1998 he sustained a recurrence of total disability. On July 9, 1999 the Office accepted this claim for medical treatment of his right knee. By decision dated December 9, 1999, the Branch of Hearings and Review denied appellant's claim for a recurrence of total disability beginning on October 6, 1998.

Appellant filed a claim for recurrence on July 27, 1999 alleging on July 22, 1999 he experienced a recurrence of total disability. The Office referred him for an impartial medical examination with Dr. E. Balasurbramanian, a Board-certified orthopedic surgeon, who found that there were no objective residuals from the 1991 employment injury and that the subjective complaints were not supported by objective findings. Dr. Balasurbramanian stated that appellant did not require additional surgery and could return to work without restrictions.

By decision dated February 21, 2001, the Office terminated appellant's wage-loss compensation benefits effective that date.

Appellant requested an oral hearing and by decision dated October 22, 2001, the Branch of Hearings and Review reversed the February 21, 2001 determination and remanded for additional development of the medical evidence. The Office again terminated appellant's compensation benefits by decision dated June 27, 2002. Appellant requested an oral hearing and on June 9, 2003, the Branch of Hearings and Review set aside this decision.

The Office referred appellant for an additional impartial medical examination on October 20, 2003. Dr. John F. Perry, a Board-certified orthopedic surgeon, found that appellant had a chronic impairment of his right knee due to his 1991 employment injury which resulted in a stretch injury to his anterior cruciate ligament and a complex tear of the posterior horn of the medial meniscus which developed into work-related arthritis. The Office accepted his claim for the right lateral meniscus tear and chondromalacia patella.

[1] Docket No. 93-1263 (issued April 15, 1994).

[2] On January 27, 1993 appellant filed a second claim alleging that he injured his right knee pushing a hand truck. The Office created a separate case File No. xxxxxx210 for this claim. It accepted this injury as right knee strain on February 10, 1993. The Office doubled appellant's knee claims on May 28, 1997.

The Office authorized rehabilitation services beginning August 2, 2004. Vocational testing noted that appellant received his associate degree in liberal arts with a major in education. Appellant also received a chemical dependency counselor certification, but not a license in chemical addiction counseling. Based on his aptitude test results, the suggested positions were information clerk, clerk aide, program aide, social-services aide and intake worker. Appellant signed an agreement to search for work as a program aide, intake worker or residence supervisor within 25 miles from his home.

On September 7, 2005 appellant underwent additional arthroscopic surgery on his right knee resulting in partial medial meniscectomy of the right knee, arthroscopic chondroplasty of the medial femoral and medial tibial condyles with partial synovectomy of the right knee.

In a report dated March 14, 2008, Dr. Avart noted appellant's continued right knee pain and found right knee medial joint lined tenderness, pain with valgus stress and crepitus as well as weakness in the quadriceps and hamstrings with mild atrophy. He completed a work restriction evaluation on June 7, 2008 and indicated that appellant had no limitation on sitting or repetitive movements of the wrists or elbows. Dr. Avart found that appellant could work for two to four hours a day including walking, standing, bending, stooping and operating a motor vehicle at work for less than one hour each. He indicated that appellant should push, pull and lift less than 10 pounds and that he should squat and kneel for less than one hour. The Office referred appellant for additional rehabilitation services on July 1, 2008. Appellant agreed to seek employment as a residence supervisor or information clerk.

Dr. Avart examined appellant on November 10, 2008 and diagnosed intermittent right knee pain noting that appellant's disability and prognosis did not change. On January 12, 2009 he found that appellant's right knee pain had worsened with effusion, medial and patellofemoral pain with clicking, crepitus and restriction of motion. Appellant underwent a magnetic resonance imaging (MRI) scan on March 12, 2009 which demonstrated peripheral osteoarthritis of the medial femoral condyle and medial tibial plateau.

The vocational rehabilitation counselor reported that appellant had applied to 78 employers, but with no positive results. On March 31, 2009 appellant selected the position of information clerk as within his work abilities. The information clerk was required to work at a sedentary level with occasional lifting, carrying, pushing and pulling up to 10 pounds. The position was mostly sitting with standing or walking for brief periods of time. The position did not require climbing, balancing stooping, kneeling, crouching or crawling. The vocational rehabilitation counselor found that appellant's education and work experience met the specific vocational preparation and that the job was being performed in sufficient numbers to make it reasonable available to appellant within his commuting area. The position was available both full and part time with hourly earnings of $11.04 or $220.80 a week for a 20-hour week.

In a letter dated May 14, 2009, the Office proposed to reduce appellant's wage-loss benefits based on his capacity to earn wages as a part-time information clerk earning $11.04 an hour, 20 hours a week. It issued a final decision on June 19, 2009, reducing his compensation to reflect wage-earning capacity as an information clerk.

Appellant, through his attorney, requested an oral hearing. In a June 15, 2009 report, Dr. Avart reviewed appellant's June 17, 2008 work capacity evaluation and stated that appellant was not capable of working four hours a day. Dr. Avart stated:

> "The job description of informational clerk is possible for somewhere between two to four hours a day, but this is again depending upon how far he has to drive to travel to get to the place, how available standing and sitting, and the use for ice and elevation of his knee, which he will need to do as well if there are any stairs involved or things like this. The capabilities without having a place to work and to be able to accurately assess whether he could in fact work either two or four or none depending upon all of these factors, needs to be done before any determination about his work ability."

On September 1, 2009 Dr. Avart stated that appellant's disability and prognosis were unchanged.

Appellant testified at the oral hearing on October 22, 2009 and stated that he applied for jobs that were an hour's drive, beyond his physician's restrictions. He noted that he did not have any interview despite sending 69 resumes. Appellant stated that he would have to walk, sit and squat as an information clerk and that he had difficulty focusing due to his medications. Following the oral hearing he submitted an October 27, 2009 note from Dr. Avart, who advised that appellant could not work more than two hours a day either sitting or standing with position changes. Appellant could not drive more than 20 minutes at one time and had to elevate his knee three to four times a day as well as ice his knee for 10 to 15 minutes two to three times a day. Dr. Avart also found that appellant could not knell, squat, climb or crawl and should not lift over 10 pounds.

By decision dated December 15, 2009, an Office hearing representative affirmed the June 19, 2009 wage-earning capacity determination, finding that Dr. Avart did not provide sufficient physical findings or medical reasoning to support a change in appellant's work restrictions to two hours a day. The hearing representative further found that appellant was capable of performing the selected position as he had completed a two-year associate's degree program and had worked as a residential rehabilitation specialist for seven months.

LEGAL PRECEDENT

Section 8115 of the Federal Employees' Compensation Act[3] provides that 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 wage-earning capacity, or the employee has no actual earnings, his wage-earning capacity is determined with due regards to the nature of his injury, the degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment, and other factors or circumstances which may affect his wage-earning capacity in his disabled condition.[4]

[3] 5 U.S.C. §§ 8101-8193, 8115.

[4] *N.J.*, 59 ECAB 171 (2007).

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 for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open market, that fits that employee's capabilities with regard to his physical limitations, 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. Finally, application of the principles set forth in *Albert C. Shadrick*[5] will result in the percentage of the employee's loss of wage-earning capacity. The basis range of compensation paid under the Act is 66 2/3 percent of the injured employee's monthly pay.[6]

ANALYSIS

The evidence establishes that appellant has the capacity to earn wages. Dr. Avart, appellant's surgeon, reported in 2008 that appellant was no longer totally disabled for work. He released him to modified work and specified his work restrictions. An Office vocational rehabilitation counselor, who is a wage-earning capacity specialist, found that appellant was capable of earning wages as a part-time information clerk. He conducted a labor market survey to determine the wage and availability of the selected position. The vocational rehabilitation counselor also noted that appellant's education and work experience qualified him for the specific vocation requirements of the selected position.

The physical duties of an information clerk include occasional lifting, carrying, pushing and pulling up to 10 pounds. The position required mostly sitting with brief periods of standing or walking. An information clerk is not required to climb, balance, stoop, kneel, crouch or crawl. Appellant's attending physician, Dr. Avart, completed a work restriction evaluation on June 7, 2008 indicating that appellant could work from two to four hours a day. The work restrictions were commensurate with the duties of an information clerk with no limitation on sitting, but a less than one hour a day restriction on walking, standing, bending, stooping and operating a motor vehicle at work. Dr. Avart also found that appellant should push, pull and lift less than 10 pounds and that he should squat and kneel for less than one hour. Based on this information, the Office reduced appellant's compensation benefits based on his earning capacity as a part-time information clerk.

Dr. Avart completed a report on June 15, 2009 which stated that appellant was not capable of working four hours a day. However, he noted that appellant could possibly perform the duties of an information clerk up to four hours a day based on the specifics of the position. Dr. Avart indicated that appellant's work hours were dependent upon his commute, his ability to change positions between sitting and standing and whether he could elevate and ice his knee during the workday. The Board finds that he did not provide sufficient reasoning for altering appellant's work restrictions such that the selected position of part-time information clerk would not be appropriate. Dr. Avart did not have any objections to the stated duties of the selected position, but instead indicated that appellant might not be able to work four hours in some

[5] 5 ECAB 376 (1953).

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

information clerk positions which required a long commute or did not offer the ability to change positions. As there are no additional requirements for the selected position upon which the Office based its decision, Dr. Avart did not adequately explain his objections given the stated physical requirements. For these reasons, the Board finds that the Office has met its burden of proof to reduce appellant's wage-loss compensation benefits based on his wage-earning capacity in the selected position.

Appellant also pointed to his lack of success in obtaining placement with a new employer in the field. However, failure to obtain employment does not require the inference of impairment of wage-earning capacity.[7] The question is not whether appellant was able to secure employment. The question is whether he has the capacity to earn wages. The evidence from both the vocational rehabilitation counselor and appellant's physician establishes that he has the capacity to earn wages as a part-time information clerk.

On appeal, counsel argued that the selected position was not within appellant's physical or vocational abilities. As noted, the vocational rehabilitation counselor addressed the necessary preparation for the position and found that appellant's education and work experience were consistent with the information clerk position. Furthermore, Dr. Avart's initial work restrictions are within the job requirements and he failed to offer any medical reasoning for rejecting the stated physical requirements of the selected position. The Board finds that the Office met its burden of proof to reduce appellant's compensation for total disability. The Office gave due regards to relevant factors and followed standard procedures in determining appellant's wage-earning capacity as appears reasonable under the circumstances. The Board will therefore affirm the Office's decision.

CONCLUSION

The Board finds that the Office met its burden of proof to reduce appellant's wage-loss compensation benefits based on his ability to earn wages in the selected position of part-time information clerk.

[7] *W.B.*, 61 ECAB ___ (Docket No. 09-934, issued January 11, 2010); *Ruth Lahr*, 2 ECAB 86 (1948).

ORDER

IT IS HEREBY ORDERED THAT December 15, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 10, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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