United States Department of Labor
Employees' Compensation Appeals Board

J.M., Appellant	)	
and	)	**Docket No. 13-581**
	)	**Issued: January 2, 2014**
DEPARTMENT OF THE ARMY, U.S. ARMY CORPS OF ENGINEERS, St. Louis, MO, Employer	)	

Appearances:
Appellant, pro se
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 January 15, 2013 appellant timely appealed the August 6, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) which affirmed the August 30, 2011 wage-earning capacity determination. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUE

The issue is whether appellant's actual earnings as a modified motor vehicle operator (administrative support) fairly and reasonably represented his wage-earning capacity as of May 2, 2011.

[1] 5 U.S.C. §§ 8101-8193.

[2] The record on appeal contains evidence received after OWCP issued its August 6, 2012 decision. The Board is precluded from considering evidence that was not in the case record at the time OWCP rendered its final decision. 20 C.F.R. § 501.2(c)(1).

FACTUAL HISTORY

Appellant, a 51-year-old temporary lock and dam operator, has an accepted occupational disease claim for permanent aggravation of bilateral hip osteoarthritis which arose on or about September 10, 2009.[3] He underwent a left total hip arthroplasty on July 15, 2010. OWCP authorized the surgery and subsequently paid wage-loss compensation for temporary total disability.

Effective May 2, 2011, appellant returned to work full time in a temporary modified motor vehicle operator (administrative support), with no loss in pay. He worked approximately four months in this position until the temporary appointment expired on August 26, 2011.[4]

By decision dated August 30, 2011, OWCP found that appellant's earnings as a motor vehicle operator (administrative support) fairly and reasonably represented his wage-earning capacity. It noted that at the time of his injury appellant held a 90-day temporary appointment. The employing establishment was obliged to offer him at least a 90-day temporary appointment and his four-month appointment met that obligation. OWCP further noted that appellant had demonstrated his ability to perform the assigned duties for at least two months, and therefore, the motor vehicle operator (administrative support) position was considered suitable to the limitations of his partial disability. Because appellant's actual weekly earnings ($847.64) met or exceeded the current wages of his date-of-injury position, OWCP determined that appellant had no loss of wage-earning capacity (LWEC).[5]

Appellant requested an oral hearing, which was held on April 12, 2012. In an August 6, 2012 decision, the hearing representative affirmed the August 30, 2011 decision.

LEGAL PRECEDENT

An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.[6] An employee's actual earnings generally best reflect his wage-earning capacity.[7] Absent evidence that actual earnings do not fairly and reasonably represent the employee's wage-earning capacity, such earnings must be accepted as representative of the individual's wage-earning

[3] Appellant's date-of-injury position was a temporary appointment which began on July 5, 2009. He continued to perform his regular duties as a lock and dam operator until his appointment expired on September 30, 2009.

[4] The initial May 2, 2011 appointment was not to exceed July 31, 2011. However, on August 1, 2011 appellant accepted an extension not to exceed August 27, 2011.

[5] Appellant's hourly pay rate at the time of injury was $20.75.

[6] 5 U.S.C. § 8115(a); 20 C.F.R. §§ 10.402, 10.403; *see Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

[7] *Hayden C. Ross*, 55 ECAB 455, 460 (2004).

capacity.[8] Compensation payments are based on the wage-earning capacity determination, and OWCP's finding remains undisturbed until properly modified.[9]

Factors to be considered in determining if a position fairly and reasonably represents the injured employee's wage-earning capacity include: (1) whether the kind of appointment and tour of duty are at least equivalent to those of the date-of-injury job; (2) whether the job is part-time (unless the claimant was a part-time worker at the time of injury) or sporadic in nature; (3) whether the job is seasonal in an area where year-round employment is available; and (4) whether the job is temporary where the claimant's previous job was permanent.[10] Additionally, a makeshift or odd-lot position designed to meet an injured employee's particular needs will not be considered representative of one's wage-earning capacity.[11]

Assuming the position is both vocationally and medically suitable and conforms to the above-noted criteria, the position will generally be deemed to represent the employee's wage-earning capacity after he has successfully performed the required duties for at least 60 days.[12] Modification of a wage-earning capacity determination is unwarranted 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 erroneous.[13] The burden of proof is on the party seeking modification of the wage-earning capacity determination.[14]

ANALYSIS

On April 26, 2011 the employing establishment offered appellant a temporary position as a modified motor vehicle operator (administrative support). The position description outlined various duties which included driving one or more types of passenger vehicles, operator maintenance and administrative duties. The job offer acknowledged that appellant had a 20-pound lifting restriction and was precluded from pushing/pulling greater than 20 pounds. His physical limitations also included no climbing, no kneeling, no squatting and no bending.[15]

[8] *Id.*

[9] *See Katherine T. Kreger*, 55 ECAB 633, 635 (2004).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7a (October 2009).

[11] *A.J.*, Docket No. 10-619 (issued June 29, 2010) (a makeshift/odd-lot position generally lacks a position description with specific duties, physical requirements and a work schedule).

[12] *Supra* note 10 at Chapter 2.814.7c(1).

[13] *Tamra McCauley*, 51 ECAB 375, 377 (2000).

[14] *Id.*

[15] The physical restrictions were provided by Dr. Daniel P. Holub, a Board-certified orthopedic surgeon, who performed the July 15, 2010 left total hip arthroplasty. On November 30, 2010 Dr. Holub released appellant to return to work with the above-noted physical restrictions. On January 10, 2011 he imposed a permanent restriction of no lifting greater than 45 pounds on an occasional basis.

Appellant was precluded from driving commercial vehicles while under the influence of his prescribed narcotic, Vicodin.[16] This latter restriction was based on the recommendation of appellant's primary care physician at the Milwaukee, WI, Veterans Affairs Medical Center (VAMC).[17] The April 26, 2011 job offer specifically stated: "Driving will be deferred until further notification from your current medical provider."

Appellant did not specifically challenge OWCP's finding that the April 26, 2011 job offer was suitable to his partially disabled condition. The assigned duties as a modified motor vehicle operator (administrative support) were consistent with appellant's documented physical limitations and the medication-related limitations associated with his prescribed use of Vicodin. Appellant successfully performed these duties for approximately four months (May 2 to August 26, 2011), which is further indication that the position fairly and reasonably represented his wage-earning capacity.

At his April 12, 2012 hearing, appellant argued that the offered position was makeshift because he was not a driver, but solely an administrative assistant. He testified that he was still on Vicodin, which prevented him from operating a commercial vehicle. However, appellant's ongoing narcotic pain medication did not prevent him from driving his personal vehicle. He argued that the modified motor vehicle operator position he accepted on April 26, 2011 had been tailored to his specific needs, and he could not expect to go elsewhere and earn $21.12 per hour as an administrative assistant.

While the employing establishment's April 26, 2011 job offer sought to accommodate appellant's injury-related limitations, it was not a makeshift position. The employing establishment found an existing job with a formal position description. The job offer included details regarding which duties appellant was expected to perform and which ones would be waived and/or deferred as a result of his injury-related limitations. The written offer also included specific details regarding pay rate, tour of duty, location and start date. The Board finds that the April 26, 2011 offer is inconsistent with a makeshift/odd-lot position.[18]

Appellant also argued that the position was makeshift because he never drove. First, the April 26, 2011 job offer did not remove driving as part of appellant's required duties, but merely deferred that particular duty until further notification from his current medical provider. Second, according to the formal position description, actual driving only represented 30 percent of the overall duties, with administrative duties representing 40 percent. While appellant ultimately

[16] The above-noted restrictions were provided by Dr. Daniel P. Holub, a Board-certified orthopedic surgeon, who performed the July 15, 2010 left total hip arthroplasty.

[17] In a February 10, 2011 letter, Dr. John Hayes advised that appellant should not drive a commercial vehicle while using narcotics. This restriction was to remain in effect for two months until appellant was reevaluated. On March 29, 2011 Dr. Hayes advised that appellant would be off Vicodin as of April 22, 2011 and that he had no future plans of prescribing appellant any narcotics for pain. When appellant subsequently relocated to the St. Louis, MO area, his local VAMC internist continued to prescribe narcotics for pain management and similarly advised against appellant operating commercial vehicles. This restriction remained in effect at least through June 24, 2011.

[18] *See A.J.*, *supra* note 11.

spent most of his time performing administrative duties, this does not retroactively undermine an otherwise suitable job offer.

The temporary nature of the April 26, 2011 job offer was consistent with appellant's date-of-injury job. He successfully performed the modified motor vehicle operator (administrative support) position for at least 60 days, and the wages appellant earned beginning May 2, 2011 met or exceeded the current wages of his date-of-injury job. Accordingly, OWCP properly determined that appellant had no LWEC.

CONCLUSION

The Board finds that appellant's actual earnings as a modified motor vehicle operator (administrative support) fairly and reasonably represented his wage-earning capacity. Based on his actual weekly earnings ($847.64), there was no loss in wage-earning capacity effective May 2, 2011.

ORDER

IT IS HEREBY ORDERED THAT the August 6, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 2, 2014
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