U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT CALEGARI and U.S. POSTAL SERVICE,
DETACHED MAIL UNIT, Jamaica, NY

Docket No. 97-2619; Submitted on the Record;
Issued August 17, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly found that appellant had a 86 percent loss of wage-earning capacity.

On April 29, 1985 appellant, then a 32-year-old postal clerk, was separating mail when he developed pain in the right side of his lower back while picking up a parcel. He stopped working on April 30, 1985 and returned to work, four hours a day, on June 3, 1985. The Office accepted appellant's claim for lumbosacral strain. He returned to full-time work on July 7, 1985 and received continuation of pay and compensation for the period he did not work. On August 6, 1986 appellant filed a claim for a recurrence of disability beginning May 30, 1986. He worked four hours on June 30, 1986, stopped working on July 1, 1986 and returned to work, four hours a day, beginning July 19, 1986. The Office accepted appellant's claim for a recurrence of disability and began payment of appropriate compensation. On May 23, 1987 appellant stopped working and began receiving temporary total disability compensation.

In a June 18, 1997 decision, the Office found that appellant could perform the duties of an inside sales/customer order clerk and, therefore, had a 86 percent loss of wage-earning capacity. The Office reduced appellant's compensation effective June 22, 1997.

The Board finds that the Office properly determined that appellant had an 86 percent loss of wage-earning capacity.

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 compensation benefits. Once the medical evidence suggests that a claimant is no longer totally disabled but rather is partially disabled, the issue of wage-earning capacity arises.[1] Wage-earning capacity is a measure of the employee's ability to earn wages in

[1] *Garry Don Young,* 45 ECAB 621 (1994).

the open labor market under normal employment conditions given the nature of the employee's injuries and the degree of physical impairment, his or her usual employment, the employee's age and vocational qualifications and the availability of suitable employment.[2] Accordingly, the evidence must establish that appellant can perform the duties of the job selected by the Office and that jobs in the position selected for determining wage-earning capacity are reasonably available in the general labor market in the commuting area in which the employee lives. In determining an employee's wage-earning capacity, the Office may not select a makeshift or odd lot position or one not reasonably available in the open labor market.[3]

In a June 12, 1985 report, Dr. Michael R. Labate, a general practitioner, diagnosed lumbosacral strain. In a November 23, 1986 report, Dr. Ayoob Khodadadi, a Board-certified radiologist, indicated that a computerized tomography (CT) scan of the lumbar spine showed bulging of the annulus fibrosis but no definite evidence of disc herniation. In a June 5, 1989 report, Dr. Michael Mechlin, a Board-certified radiologist, stated that a magnetic resonance imaging (MRI) scan of the lumbar spine showed degenerative disc disease at L5-S1 with a small bulge of the disc to the right with no compression of the dural sac. Appellant was referred to Dr. Leon Sultan, a Board-certified orthopedic surgeon, for an examination. In a September 18, 1989 report, Dr. Sultan stated that, based on appellant's clinical picture and the MRI and CT scans, appellant, at most, presented with a mild partial lower back disability. The doctor noted that appellant was neurologically intact on clinical examination and electrodiagnostic testing. He concluded that appellant could perform some type of sedentary work four to six hours a day. The Office subsequently referred appellant to Dr. Kenneth E. Seslowe, a Board-certified orthopedic surgeon, who concluded that appellant had a mild lumbosacral sprain with evidence of some degenerative disc disease at L5 and S1. He stated that appellant had no focal neurological impairment. Dr. Seslowe indicated appellant had a partial disability but could do sedentary work that did not require heavy lifting or prolonged bending. In a separate work restriction evaluation form, he reported that appellant could work six hours a day.

In a December 1, 1992 report, Dr. Elmo J. Lilli, a Board-certified family practitioner, indicated that appellant had pain and marked limitation of motion of the back. He concluded that appellant was totally incapacitated for work.

The Office referred appellant, together with the statement of accepted facts and the case record, to Dr. Joseph R. Sgarlat, a Board-certified orthopedic surgeon, for an examination and second opinion. In a February 9, 1993 report, Dr. Sgarlat stated appellant had no weakness in the muscles to support any difficulty in walking. He noted appellant had a normal examination in motion of the knees, hips and ankles and in reflexes in the legs. Dr. Sgarlat related that appellant reported somewhat less sensation in the left leg as compared to the right but pointed out that the findings followed no dermatome pattern. He concluded that appellant had very little findings to support his longstanding complaints. Dr. Sgarlat commented that the MRI scan showed, at most, some degenerative changes at the lumbosacral level, which were not unusual and could even be found in people who had no complaints of back pain. He stated that the initial

[2] *See generally*, 5 U.S.C. § 8115(a); A. Larson *The Law of Workers' Compensation* § 57.22 (1989).

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

diagnosis appeared to have been a simple muscular strain of the low back, from which appellant should have recovered within a few days or at most a few weeks. Dr. Sgarlat indicated that the subsequent reinjuries were at most a superimposed back sprain, which again should have had a limited period of disability. He commented that appellant's long period of treatment was based on subjective symptoms without any truly abnormal objective findings. Dr. Sgarlat stated that appellant's current condition could not be attributed to his employment injury. He concluded that appellant was not disabled from any kind of physical activities. Dr. Sgarlat suggested that appellant avoid heavy manual labor.

In an August 24, 1994 report, Dr. James J. Kerrigan, a Board-certified neurologist, stated that a MRI scan, taken August 8, 1994, showed a large herniated disc at L5-S1 lateralized somewhat to the right with spondylytic changes at L5-S1. He also indicated that appellant had S1 radiculopathy. In a February 20, 1995 report, Dr. Lilli concluded from the findings of Dr. Kerrigan that appellant was unable to perform any gainful employment.

To resolve the conflict in the medical evidence between Drs. Lilli and Sgarlat, the Office referred appellant, together with the statement of accepted facts and the case record, to Dr. Peter A. Feinstein, a Board-certified orthopedic surgeon. In a May 17, 1995 report, Dr. Feinstein stated appellant had positive objective evidence of a herniated disc at L5-S1 on the MRI scan with confirmation of nerve irritation on nerve conduction tests and an electromyogram (EMG). He commented that appellant's current condition could not be attributed solely to the employment injury since Dr. Feinstein had no evidence of a herniated disc at that time but he added that it may have evolved from that time frame. In regard to appellant's ability to work, Dr. Feinstein stated:

> "I believe [appellant] is disabled from doing anything other than a sedentary job which would allow him to sit and stand at intervals of up to 15 minutes to 1 half hour and was primarily clerical in nature. I believe that he could probably work anywhere from part time four hours per day to six to eight hours per day, depending on the nature of the job and the ability to change positions."

The Office accepted that appellant had acceleration of a herniated L5-S1 nucleus pulposus as a result of the employment injury. After two years of development between appellant and a rehabilitation counselor, the Office selected the position of inside sales/customer order clerk[4] as within appellant's limitations. The position was described as sedentary, requiring the ability to lift up to 10 pounds and to reach, handle and finger. A representative from a state job center indicated that the job was being performed in sufficient numbers within appellant's commuting area so as to be reasonably available. He reported that the job was available 20 to 40 hours a week at a wage of $5.00 to $6.00 an hour. The Office, using the *Shadrick*[5] formula, determined that appellant had an 86 percent loss of wage-earning capacity, based on a calculation that he would work 20 hours a week at $5.00 an hour.

[4] Department of Labor, *Dictionary of Occupational Titles*, DOT No. 249-362.026 (4th ed., 1981).

[5] *Albert C. Shadrick*, 5 ECAB 378 (1953).

The position selected by the Office was within appellant's work limitations as set forth by Dr. Feinstein as it was a sedentary, part-time position. The Office confirmed that the position was reasonably available to appellant within his commuting area on a part-time basis. In situations where there exists opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[6] Dr. Lilli, in a June 27, 1997 report, stated that appellant was totally disabled for work but did not present any objective evidence in support of his finding. Dr. Feinstein's report is well rationalized and supported by an accurate history. His report, therefore, is entitled to special weight and in the circumstances of this case, constitutes the weight of the medical evidence establishing that appellant could perform a sedentary position such as that selected by the Office. The Office, therefore, has met its burden of proof in reducing appellant's compensation.

The decision of the Office of Workers' Compensation Programs, dated April 17, 1997, is hereby affirmed.

Dated, Washington, D.C.
August 17, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

[6] *James P. Roberts*, 31 ECAB 1010 (1980).