

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHARLES A. SMITH and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Pittsburgh, PA

*Docket No. 00-2431; Submitted on the Record;
Issued April 8, 2002*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation to reflect his wage-earning capacity in the position of distribution clerk.

The Office accepted appellant's claim for a thoracic and lumbar strain and herniated nucleus pulposus at C7-T1. Appellant underwent a left C7-T1 posterior foraminotomy and discectomy with intraoperative evoked potential monitoring. He returned to work from February 1 through March 9, 1993 but was unable to work in a cold environment for a nonwork-related reason and stopped working. Appellant remained out of work as of March 9, 1993 because the employing establishment could not accommodate him. He began receiving temporary total disability benefits.

In a report dated November 30, 1993, a referral physician, Dr. Francis X. Plunkett, a Board-certified orthopedic surgeon, considered appellant's history of injury, performed a physical examination and reviewed x-rays. He diagnosed chronic radiculopathy and opined that appellant could perform sedentary work which did not require lifting over 20 pounds nor any overhead work. Dr. Plunkett stated that appellant could work eight hours a day.

In a work restriction evaluation dated January 12, 1994, appellant's treating physician, Dr. Alan J. Barnett, a Board-certified internist, indicated that appellant could lift 0 to 10 pounds, could not perform repetitive grasping and could work 6 hours. In a report dated April 20, 1994, Dr. Barnett considered that appellant first came to his office on May 30, 1990 complaining of left-sided neck pain and numbness in the left hand, with pain in the left upper extremity. He considered appellant's medical treatment, performed a physical examination and diagnosed residuals of left C8 radiculopathy secondary to a herniated disc of the cervical spine. Dr. Barnett stated that appellant could perform sedentary work, with no lifting, carrying, pushing or pulling weights over 10 pounds and appellant would require breaks after working a 3-hour period.

To resolve the conflict between Drs. Plunkett and Barnett's opinions, the Office referred appellant to an impartial medical specialist, Dr. Leland S. Blough, a Board-certified orthopedic surgeon. In his June 8, 1995 report, Dr. Blough diagnosed dorsolumbar back strain and herniated nucleus pulposus of the left neural foraminal with extruded fragments of C7-T1 with left neck and shoulder brachialgia, and left C7-8 radiculopathy residuals. He stated that appellant was capable of performing light to sedentary work six hours a day but could progress to eight hours a day after two or three months. Dr. Blough stated that appellant could perform left-hand fine motor movements or lift more than a few pounds with the left hand. He stated that appellant could lift up to 20 pounds with the right upper extremity and should not have sustained left upper extremity work above upper chest level and should not have constant or long sustained neck flexion posture as in bending over a desk when writing.

In a report dated January 24, 1996, Dr. Barnett referred to a letter of medical history he enclosed, summarized appellant's symptoms of pain in the left side of his neck and his left shoulder blade, noted that he last examined appellant on January 12, 1996 and diagnosed left cervical sensory radiculopathy consequent to a herniated cervical disc status post decompression laminectomy in October 1992. He stated that appellant could work part time with interspersed sitting, standing or walking and no lifting, bending, squatting, climbing, kneeling or twisting.

Subsequently, after efforts were made to return appellant to work at the employing establishment, the Office sought to obtain an update of appellant's restrictions from Dr. Blough. Because Dr. Blough had retired, however, the Office referred appellant to another impartial medical specialist, Dr. W. Scott Nettrour, a Board-certified orthopedic surgeon. In a report dated July 23, 1997, Dr. Nettrour considered appellant's history of injury, performed a physical examination and reviewed x-rays. He stated that the neurologic examination of the left upper extremity revealed decreased triceps and wrist extensor strength, mild weakness of thenar and hypothenar intrinsics of the left hand with the absence of the triceps reflex and hypesthesia along a C8 dermatome of the left hand. Dr. Nettrour diagnosed persistent mechanical neck pain and referred left shoulder pain with sequela of a left C7-8 radiculopathy in the left upper extremity. He stated that appellant could return to sedentary duties with lifting below shoulder height of up to 20 pounds and no overhead lifting with his upper extremities. Dr. Nettrour stated that appellant could work eight hours. He stated that appellant had a significant mechanical cervical spine problem at the site of his previous C7-T1 posterior laminectomy and discectomy with possible persistent entrapment of the left C7-8 nerve root sleeves.

On September 30, 1997 a rehabilitation counselor identified the job of radio dispatcher which was reasonably available, within appellant's physical restrictions and required three to six months' training. The job duties included receiving complaints from the public concerning crimes and police emergencies, broadcasting orders to police radio patrol units in the vicinity and recording calls broadcast and complaints received. The job had a maximum lifting requirement of 10 pounds and required reaching, handling, fingering and feeling.

In a report dated December 5, 1997, Dr. Barnett diagnosed left cervical radiculopathy originally caused by a herniated disc at the cervical spine. He described appellant's symptoms of pain in the left side of his neck, numbness and weakness in his left hand. Dr. Barnett opined that appellant would not be able to perform the job of radio dispatcher because it required prolonged

sitting, typing and either holding a telephone or “wearing phone,” all of which would exacerbate his left shoulder.

By letter dated February 5, 1998, Dr. Nettrour stated that he believed that appellant could perform the job of a radio dispatcher. He opined that Dr. Barnett’s objections stated in his December 5, 1997 report were not valid.

By decision dated July 7, 1998, the Office reduced appellant’s compensation based on his wage-earning capacity as a radio dispatcher. Appellant requested an oral hearing before an Office hearing representative which was held on February 10, 1999. In a report dated February 9, 1999, Dr. Barnett considered appellant’s history of injury and stated that, despite appellant’s surgery in October 1992, appellant “continued to suffer the aftereffects of his nerve injury, with demonstrable mild weakness in the left shoulder and moderate weakness of the left hand.” He reiterated appellant’s symptoms of pain in the left side of his neck and numbness in his left hand. Dr. Barnett opined that appellant was unable to satisfy the job requirements of a radio dispatcher requiring him to handle and finger feel.

By decision dated March 25, 1999, the Office hearing representative reversed the Office’s July 7, 1998 decision, stating that the job of radio dispatcher was an invalid position for appellant because the job was a civil service position at which appellant was not actually employed and the Office was not allowed to select a position of that kind. The Office hearing representative remanded the case for the Office to select another position.

On June 10, 1999 a rehabilitation counselor identified the job of distribution clerk as being within appellant’s physical restrictions, reasonably available and one appellant had the professional qualifications to perform. The physical requirements were frequent reaching, handling and fingering. No lifting was required. The job duties included assembling forms, manuals or circulars, wrapping, tying or placing material in envelopes, boxes or other containers, and writing addresses and other related tasks to forward the mail to other sites.

By letter dated June 30, 1999, appellant’s attorney stated that Dr. Barnett orally opined that appellant was not capable of performing the position of distribution clerk.

By decision dated August 31, 1999, the Office reduced appellant’s compensation based on his wage-earning capacity in the position of a distribution clerk. The Office found that Dr. Nettrour’s opinion that appellant could perform the job of radio dispatcher established that appellant could perform the job of distribution clerk because the physical requirements of the jobs were the same. The Office found that Dr. Nettrour’s report was well reasoned and entitled to special weight because Dr. Nettrour was an impartial medical specialist.

Appellant requested an oral hearing before an Office hearing representative which was held on March 22, 2000. At the hearing, his representative stated that appellant’s condition had worsened since Dr. Nettrour’s last examination on July 23, 1997. Appellant testified that his left arm had worsened in that the weather affected him a lot more, his hands cramped up “a lot quicker than they used to,” and the strength in his hand was “little or none.” He testified that when he used his left arm for repetitive-type functions, his started cramping up, he had muscle spasms in his back and shoulder, and he hurt a lot, particularly the next day. Appellant stated

that he could work for a day as a distribution clerk but not more than a day. He stated that he tried to work three or four times after his injury but the employing establishment “kept sending [him] back home.”

Appellant’s representative stated that the Department of Labor’s *Dictionary of Occupational Titles* stated that the position of distribution clerk was light duty, and Dr. Nettrour stated that appellant could only perform sedentary, so that even according to Dr. Nettrour’s report, appellant could not perform the job of distribution clerk.

Appellant submitted medical reports from Dr. Barnett, one dated February 9, 1999, which had previously been submitted and another dated October 27, 1999. In his October 27, 1999 report, Dr. Barnett stated that since appellant’s surgery in October 1992 appellant continued to have “aftereffects of the nerve injury with mild weakness in the left hand,” pains in the left shoulder and neck, and “some numbness of the left hand causing difficulty with manipulation.” He stated that at the time and currently, he believed appellant was unable to satisfy his job requirement pertaining to fine coordination, handling and finger feel.

Dr. Barnett considered that the position of a distribution clerk required assembly and routing of various types of print material including forms, manuals and circulars, wrapping, tying and placing materials in envelopes, boxes and other containers, and handling the packages to further distribution sites and record keeping. He stated that the job required the ability to not only reach but also handle and finger bimanually. Dr. Barnett stated that appellant’s persistent symptoms in the left upper extremity including numbness would prevent from full-time work “in such capacity on a[n] eight-hour a day, five days a week schedule.”

By decision dated June 15, 2000, the Office hearing representative affirmed the Office decision dated September 31, 1999.

The Board finds that the Office improperly determined appellant’s 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 in such benefits.¹

Under section 8115(a) of Federal Employees’ Compensation Act, if the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, his or her usual employment, age, qualifications for other employment, the availability of suitable employment, and other factors and circumstances which may affect wage-earning capacity in his or her disabled condition.² 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

¹ *Francesco Bermudez*, 51 ECAB _____ (Docket No. 98-1395, issued May 11, 2000).

² *See Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); *petition for recon. denied*, (Docket No. 92-118, issued February 11, 1993); *see also* 5 U.S.C. § 8115(a).

or to an Office wage-earning capacity specialist for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open labor 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.³ Finally, application of the principles set forth in *Albert C. Shardrick* will result in the percentage of the employee's loss of wage-earning capacity.⁴ The basic rate of compensation paid under the Act is 66 2/3 percent of the injured employee's monthly pay.

It is well established that where there are opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.⁵ In this case, to resolve the conflict between Dr. Barnett's opinion that appellant could only perform sedentary work six hours and Dr. Plunkett's opinion that appellant could perform sedentary work eight hours, the Office referred appellant to the impartial medical specialist, Dr. Nettrour. In his July 23, 1997 report, based on a history of injury, a physical examination and x-rays, Dr. Nettrour opined that appellant could perform sedentary work for 8 hours with lifting up to 20 pounds below the shoulder and no overhead lifting with the upper extremities. By letter dated February 5, 1998, Dr. Nettrour opined that appellant could perform the job of radio dispatcher. He also opined that Dr. Barnett's December 5, 1997 opinion that appellant could not perform the job because it required prolonged sitting, typing and holding or wearing a telephone was not valid. Relying on Dr. Nettrour's opinion, in its August 31, 1999 decision, the Office adjusted appellant's compensation to reflect his wage-earning capacity in the position of the distribution clerk.

At the hearing, appellant submitted an additional report from Dr. Barnett dated October 27, 1999 in which he reiterated his prior findings of appellant's neck and left arm condition, and opined that appellant could not work as a distribution clerk because he could not perform the job requirements involving fine coordination, handling and finger feel.

The Office relied on Dr. Nettrour's February 5, 1998 opinion that appellant could perform the job of radio dispatcher in determining that appellant could perform the job of distribution clerk because the physical requirements of the radio dispatcher and distribution clerks were the same and Dr. Nettrour's opinion was entitled to special weight because Dr. Nettrour was an impartial medical specialist. The Board has held that an impartial medical specialist is not entitled to special weight if it is based upon an incomplete and inaccurate factual background.⁶ Although the physical requirements of the radio dispatcher and distribution clerk are similar, *i.e.*, the distribution clerk position had no lifting requirement and the radio dispatcher job required lifting up to 10 pounds, and the reaching, handling and fingering for the distribution

³ *Raymond Alexander*, 48 ECAB 432 (1997); *Dorothy Lams*, 47 ECAB 584 (1996).

⁴ *Dorothy Lams*, *supra* note 3; *Albert C. Shardrick*, 5 ECAB 376 (1953). *See also*, 20 C.F.R. § 10.303.

⁵ *Kathryn Haggerty*, 45 ECAB 383, 389 (1994); *Jane B. Roanhaus*, 42 ECAB 288 (1990).

⁶ *Gwendolyn Merriweather*, 50 ECAB 410, 415-16 (1999); *James R. Driscoll*, 50 ECAB 146, 154-55 (1998).

clerk was frequent, the work requirements for the distribution clerk position required repetitive motion in that they consisted of assembling documents and tying or placing materials in envelopes, boxes or other containers. Since the specific requirements of the distribution clerk position are different from those of a radio dispatcher, Dr. Nettrour's opinion that appellant could perform the work of a radio dispatcher does not establish that appellant could perform the work of a distribution clerk. Therefore, Dr. Nettrour's opinion does not resolve the conflict in the medical evidence as to whether appellant can perform the work of a distribution clerk. The Office therefore has failed to meet its burden that appellant's wage-earning capacity has changed.

The July 26, 2000 and August 31, 1999 decisions of the Office of Workers' Compensation Programs are hereby reversed.

Dated, Washington, DC
April 8, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member