U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DONALD WILSON and U.S. POSTAL SERVICE,
POST OFFICE, Norman, OK

Docket No. 00-2747; Submitted on the Record;
Issued March 15, 2002

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether appellant has established that his April 17, 1995 loss of wage-earning capacity determination should be modified; and (2) whether the Office of Workers' Compensation Programs properly declined to reopen appellant's claim for consideration of the merits.

Appellant, a 35-year-old letter carrier, filed a claim alleging that on December 13, 1984 he injured his back and neck in an employment-related motor vehicle accident. The Office accepted appellant's claim for cervical strain, herniated disc L2-5, lumbar laminectomy and sciatica. By decision dated April 17, 1995, the Office reduced appellant's compensation benefits based on his capacity to earn wages as a cashier in reliance on the opinion of an impartial medical examiner. By letter received by the Office on April 24, 1995, appellant requested reconsideration. The Office denied modification on April 27, 1995. Appellant requested reconsideration on July 18 and September 28, 1995 and February 21, 1996 and by decisions dated September 26 and November 22, 1995 and March 14, 1996 respectively, the Office declined to reopen appellant's claim for consideration of the merits.

Appellant returned to a light-duty position at the employing establishment on October 13, 1998 and stopped work on October 19, 1998, alleging that he was totally disabled. By decision dated February 18, 2000, the Office denied modification of the April 17, 1995 decision. Appellant requested reconsideration on April 5, 2000 and by decision dated June 26, 2000, the Office declined to reopen appellant's claim for consideration of the merits.

The Board finds that appellant has not established that his April 17, 1995 loss of wage-earning capacity determination should be modified.

Section 8115 of the Federal Employees' Compensation Act[1] provides that wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and

[1] 5 U.S.C. §§ 8101-8193, 8115.

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 regard 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.

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*[2] will result in the percentage of the employee's loss of wage-earning capacity. The basic rate of compensation paid under the Act is 66 2/3 percent of the injured employee's monthly pay.[3]

In this case, appellant's attending physician, Dr. Tonya Washburn, a physician Board-certified in physical medicine and rehabilitation, completed reports on February 12 and 15 and May 5, 1993 listing appellant's restrictions as no lifting, as well as no prolonged sitting or standing. The Office referred appellant to a vocational rehabilitation counselor. In a report dated February 14, 1994, Dr. Washburn opined that appellant was totally disabled due to his employment-related injuries and stated that there had not been any significant worsening of his injury-related condition.

The Office referred appellant for a second opinion evaluation with Dr. Donald R. Chadwell, a physician Board-certified in physical medicine and rehabilitation. In a report dated April 25, 1994, he stated that appellant could work eight hours a day with restrictions on lifting, stooping, bending and twisting. Due to the conflict of medical opinion evidence between Drs. Chadwell and Washburn on the issue of disability, the Office referred appellant to Dr. D. Brent Tipton, a physician Board-certified in physical medicine and rehabilitation, for an impartial medical evaluation.

In a report dated September 21, 1994, Dr. Tipton noted appellant's history of injury and provided his findings on physical examination. He opined that appellant's current condition was more of a chronic pain syndrome rather than a specific ongoing injury and that appellant could perform sedentary work. Dr. Tipton indicated that appellant could work six to eight hours a day with limitations on kneeling, stooping, squatting, bending and lifting no more than 15 pounds. He stated that appellant should be allowed to alternate his sitting and standing position and should not use leg controls.

[2] 5 ECAB 376 (1953).

[3] *Karen L. Lonon-Jones,* 50 ECAB 293, 297 (1999).

In situations 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.[4] In this case, Dr. Tipton provided a detailed report expressing his opinion that appellant was not totally disabled and providing work restrictions. He relied on the history of injury and physical evaluation to reach his conclusions. The Board finds that this report constitutes the weight of the medical opinion evidence and establishes that appellant was capable of performing work within the restrictions provided by Dr. Tipton.

The Office referred Dr. Tipton's report to the rehabilitation counselor who determined that the position of cashier was within appellant's work restrictions, was reasonably available in appellant's commuting area and was appropriate based on appellant's prior work experiences. The Board finds that the Office properly considered the appropriate factors in determining that the position of cashier represented appellant's wage-earning capacity.

Once loss of wage-earning capacity 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. The burden of proof is on the party attempting to show the award should be modified.[5]

In this case, appellant submitted a series of reports from Dr. Washburn in support of his claim for a modification of his wage-earning capacity determination. On March 23, 1995 she stated that appellant could not stand for more than 20 minutes and that he was unable to lift, bend or twist. Dr. Washburn stated that the primary limitation preventing appellant from being a cashier was the standing. In a report dated May 5, 1995, she again stated that appellant was not capable of standing six to eight hours as a cashier. On January 22, 1996 Dr. Washburn stated that appellant required vocational retraining to do a job that requires no particular bending, lifting, twisting or prolonged standing and sitting. He repeated these conclusions on March 6, 1998. There is no evidence in the record that appellant would be required to stand continuously six to eight hours to comply with the requirements of a clerical cashier as defined in the Department of Labor's *Dictionary of Occupational Titles.*[6] Furthermore, Dr. Washburn has not established a change in appellant's condition, which would require additional limitations beyond those provided by Dr. Tipton, the impartial medical examiner.

In a report dated February 1, 1996, Dr. Washburn stated that appellant "actually looks much worse than I have ever seen him." She noted that appellant's magnetic resonance imaging (MRI) scan revealed a large right-sided disc protrusion at L5-S1. Dr. Washburn noted that she had not reviewed appellant's old film, but opined that this protrusion was somewhat new and enlarged. She stated that appellant was totally disabled. This report is not sufficient to establish

---

[4] *Nathan L. Harrell,* 41 ECAB 401, 407 (1990).

[5] *Stanley B. Plotkin*, 51 ECAB ___ (Docket No. 99-1838, issued September 28, 2000).

[6] (Fourth Edition – revised 1991).

a material change in the nature and extent of appellant's condition as Dr. Washburn stated that she had not reviewed appellant's earlier diagnostic studies in reaching the conclusion that he had a new and enlarged protrusion. Without a proper factual and medical background, this report lacks probative value.

Due to the deficiencies mentioned above, the reports from Dr. Washburn are not sufficient to overcome the weight accorded Dr. Tipton as the impartial medical examiner nor to create a conflict with his well-rationalized report.[7]

Following appellant's return to light-duty work at the employing establishment, Dr. Washburn completed a report on December 4, 1998 stating that appellant had severe increase in symptoms. She concluded that appellant could not perform work, which required any standing and that he needed a sedentary position allowing occasional changes in position. Dr. Washburn suggested that appellant begin working for two hours and gradually increase. In a January 21, 1999 report, Dr. Washburn stated that appellant's disability was due to his employment-related injury and stated, "there has been no change in his overall exam[ination] in the last several years." She opined that appellant could not work in the light-duty position offered by the employing establishment and that he was not capable of long-term standing. On February 24, 1999 Dr. Washburn stated that there was no change in appellant's neurological examination, but that she felt that he was not capable of returning to work. On May 13, 1999 she reported that appellant was temporarily totally disabled and unable to work as a cashier as he could not stand for any length of time.

These reports are not sufficient to meet appellant's burden of proof in establishing a material change in his injury-related condition. Dr. Washburn stated that appellant's neurological findings had not changed. As her reports fail to support a change in appellant's injury-related condition, the Office properly declined to modify appellant's wage-earning capacity determination based on these reports.

Appellant also submitted a report dated October 18, 1999 from Dr. Michael J. Carl, who stated that appellant was capable of working at the sedentary level. He stated that appellant had objective evidence of residual effects of the lumbar disc displacement and lumbar discectomy. Dr. Carl listed these as lumbar mechanical dysfunction and persistent, chronic lumbosacral radiculopathy in the S1 distribution. He concluded that appellant had reached maximum medical improvement in 1994.

In this report, Dr. Carl's finding of maximum medical improvement in 1994 does not support appellant's claim for a change in the nature and extent of his injury-related condition, such that appellant has met his burden of proof to require a modification of his wage-earning capacity determination.

The Board further finds that the Office properly declined to reopen appellant's claim for consideration of the merits on June 26, 2000.

---

[7] *Dorothy Sidwell,* 41 ECAB 857, 874 (1990).

The Office's regulations provide that a timely request for reconsideration in writing may be reviewed on its merits if the employee has submitted evidence or argument which shows that the Office erroneously applied or interpreted a specific point of law, advances a relevant legal argument not previously considered by the Office, or constitutes relevant and pertinent new evidence not previously considered by the Office.[8]

In this case, appellant submitted a report dated March 20, 2000 from Dr. Washburn. In this report she repeated her work restrictions. The report did not provide any additional new evidence not previously considered by the Office as Dr. Washburn had included work restrictions in several reports. As this report was repetitive and did not address the issue of a material change in the nature and extent of appellant's condition it is not sufficient to require the Office to reopen appellant's claim for consideration of the merits.

The June 26 and February 18, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
March 15, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

[8] 20 C.F.R. §§ 10.608.