

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MATTHEW KUCHARCZYK and DEPARTMENT OF THE NAVY,
PHILADELPHIA NAVAL SHIPYARD, Philadelphia, PA

*Docket No. 02-2265; Submitted on the Record;
Issued May 15, 2003*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly reduced appellant's compensation benefits effective August 15, 1999 based on its determination that the selected position of cashier II represented his wage-earning capacity; and (2) whether appellant met his burden of proof in establishing that he sustained a recurrence of disability on or after August 28, 2000 causally related to his March 15, 1982 accepted employment injury.

On March 16, 1982 appellant, then a 32-year-old molder, filed a notice of traumatic injury alleging that on March 15, 1982 he was hooking a chain into a gate when the chain slipped and caught his right hand between the gate and the chain. The Office accepted the claim for fracture of the fifth right metacarpal and authorized nerve entrapment surgery. Appellant began receiving compensation benefits for total disability in 1982.

In a report dated February 4, 1994, appellant's treating physician, Dr. Frank Mattei, a Board-certified orthopedic surgeon, indicated that appellant still had pain and numbness in his right hand and arm but opined that he was no longer totally disabled and could perform limited duties with his right hand.¹

The Office requested that appellant submit an updated medical report regarding his condition since the last report of record was from 1994. When the Office did not receive a report, appellant was referred to Dr. Steven J. Valentino on February 8, 1999 for a second opinion examination to determine the extent of his injury from 1982.

By report dated March 11, 1999, Dr. Valentino stated that appellant's hand injury had healed and diagnosed history of fracture right fifth metacarpal with residual mild rotatory

¹ Appellant received an 18 percent schedule award for his right arm impairment.

malunion. He examined appellant and opined that he had reached maximum medical improvement and could return to work eight hours a day with a maximum lifting of 30 pounds.²

On June 4, 1999 the Office issued a notice of proposed reduction of compensation, finding that appellant was only partially disabled and had the capacity to earn wages as a cashier II.³ Appellant's rehabilitation counselor determined that he was able to perform the position and the work was reasonably available within his commuting area. The position was described as: "A sedentary position (lifting up to 10 pounds); requires the ability to reach, handle and finger; must be able to see, talk and hear; requires 30 days of short demonstration."

By decision dated July 16, 1999, the Office reduced the rate of appellant's compensation benefits based on his wage-earning capacity as a cashier II, effective August 15, 1999.

Appellant disagreed with the Office's decision and requested an oral hearing, which was held on February 2, 2000. Appellant submitted progress notes from Dr. Joseph J. Thoder, a Board-certified orthopedic surgeon, dated May 3, June 21, July 26, September 1 and October 15, 1999 and January 27, 2000. Dr. Thoder indicated that appellant was working as a janitor and had developed right elbow pain.⁴

By decision dated March 24, 2000, the Office hearing representative affirmed the July 16, 1999 decision, reducing appellant's compensation benefits, finding that the position of cashier II properly represented his wage-earning capacity.

Appellant submitted progress notes from Dr. Thoder dated March 6, May 22, July 10 and 12 and October 18, 2000. He stated in a September 11, 2000 note that appellant had right lateral epicondylitis and could not work for six weeks. Dr. Thoder noted that appellant continued to have pain in the right upper extremity and right elbow and attributed this to his position as a janitor. He disallowed the position of cashier and janitor stating that the position aggravated appellant's elbow condition.

By letter dated February 12, 2001, appellant requested reconsideration and submitted a clinical note and work restrictions from Dr. Thoder, who stated that appellant could work eight hours per day with no twisting, no repetitive movements of the wrists and elbow and a maximum lifting of 10 to 20 pounds. Appellant alleged that the position of cashier II was not within his physical restrictions because it required frequent lifting up to 10 pounds. Dr. Thoder stated in a January 3, 2001 report, that any lifting should be nonrepetitive and defined nonrepetitive as an activity not occurring more than 4 times a minute and less than 200 times an hour.

On February 14, 2001 Dr. Thoder indicated in an attending physician's report, that appellant was totally disabled from September 11 through October 23, 2000.

² He also stated that appellant had a history of anxiety and depression but that it was not work related.

³ The Office first issued a notice of proposed suspension of compensation, which was later revoked. The Office also issued a notice of proposed termination of compensation, which was also revoked.

⁴ In the October 15, 1999 note, Dr. Thoder stated that appellant could not work as a cashier, but his opinion was based on a 50-pound lifting requirement when the lifting requirement was actually 10 pounds.

By decision dated October 29, 2001, the Office denied modification of the July 16, 1999 decision, finding that the weight of the medical evidence indicated that the position of cashier II was within appellant's medical restrictions and represented his wage-earning capacity.⁵

On January 9, 2002 appellant filed a claim for recurrence of disability. He stated that, on and after August 28, 2000, he experienced increased pain in his right hand and arm, which radiated up to his elbow. During that time appellant was working as a janitor and stopped work on August 28, 2000. In support of his claim, he submitted a November 28, 2001 report from Dr. Thoder, indicating that he had complained of elbow discomfort as far back as 1989.

By decision dated January 28, 2002, the Office denied appellant's claim for recurrence of disability on the grounds that the medical evidence did not demonstrate that he was totally disabled on or after August 28, 2000, causally related to the March 15, 1982 accepted work injury.

By letter dated April 17, 2002, appellant requested reconsideration of the Office's January 28, 2002 decision denying his claim for recurrence of disability. In support, he submitted a February 6, 2002 report from Dr. Thoder. In his report, Dr. Thoder addressed the issue of loss of wage-earning capacity and appellant's inability to perform the position of cashier and not the recurrence of disability claim. He stated that he disallowed any type of cashier job, whether it is the position described by the Department of Labor or any other position, since all cashiers' jobs fell outside his restrictions of no repetitive activities and no lifting in excess of 20 to 30 pounds. Dr. Thoder noted that appellant was qualified only for nonrepetitive sedentary work, with a maximum lifting of up to 20 pounds on a frequent basis and up to 30 pounds occasionally.

By decision dated June 10, 2002, the Office denied modification of the January 28, 2002 decision. The Office found that Dr. Thoder's report did not address appellant's claimed recurrence of disability beginning August 28, 2000 and the accepted work injury.

The Board finds that the Office properly reduced appellant's compensation benefits effective August 16, 1999, based on his capacity to earn wages as a cashier II.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.⁶ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁷

Under section 8115(a) of the Federal Employees' Compensation Act, 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

⁵ In an undated letter received on March 20, 2002, appellant requested reconsideration and submitted evidence, however, the Office did not issue a decision based on this request.

⁶ *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

⁷ *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

reasonably represent wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, his degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect his wage-earning capacity in his disabled condition.⁸ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.⁹ The job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives.¹⁰

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 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. Finally, application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.¹¹ In determining wage-earning capacity based on a constructed position, consideration is given to the residuals of the employment injury and the effects of conditions which preexisted the employment injury.¹²

In the present case, appellant's rehabilitation counselor determined that he was able to perform the position of cashier II based on his medical condition and that the work was reasonably available within his commuting area. Appellant's first treating physician, Dr. Mattei, stated on February 4, 1994 that appellant was no longer totally disabled and could work 8 hours a day, lift a maximum of 20 to 50 pounds and could not do simple grasping and fine manipulation with his right hand. Second opinion physician, Dr. Valentino, stated on March 11, 1999 that appellant could work 8 hours a day and could lift a maximum of 30 pounds with no other restrictions. On May 3, 1999 Dr. Thoder opined that appellant could work 8 hours a day with a maximum lifting of up to 20 pounds on a frequent basis.

Subsequent to the reduction of appellant's compensation benefits on August 15, 1999, the Office received reports from Dr. Thoder dated October 15, 1999, October 18, 2000, January 3, 2001 and February 6, 2002.

⁸ *Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

⁹ *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

¹⁰ *Id.*

¹¹ *Dennis D. Owen*, 44 ECAB 475, 479-80 (1993); *Wilson L. Clow, Jr.*, 44 ECAB 157, 171-75 (1992); *Albert C. Shadrick*, 5 ECAB 376 (1953).

¹² *Jess D. Todd*, 34 ECAB 798, 804 (1983).

The Board finds that at the time of the reduction of appellant's compensation benefits on August 15, 1999 the medical evidence of record indicated that appellant could perform the duties of cashier II. The *Dictionary of Occupational Titles* (DOT) describes the position of cashier II, (code 211.462-010) as follows:

"Receives cash from customer or employees in payment for goods or services and records amounts received. Makes change, cashes checks and issues receipts or tickets to customers."

The DOT describes the job requirements as follows: "Sedentary position (lifting up to 10 pounds); requires the ability to reach, handle and finger; must be able to see, talk and hear; requires 30 days of short demonstration."

At the time of the reduction of appellant's compensation benefits, the physical restrictions outlined by Drs. Mattei, Valentino and Thoder were all within the job description of cashier II. Dr. Mattei found on February 4, 1994 that appellant could work 8 hours a day, could lift up to 20 to 50 pounds and could not do simple grasping and fine manipulation with his right hand. Since the position of cashier II only required lifting up to 10 pounds and did not indicate grasping or fine manipulation, the Board finds that the cashier position was within Dr. Mattei's restrictions. Dr. Valentino stated on March 11, 1999 that appellant could work 8 hours a day with a maximum lifting of up to 30 pounds with no other restrictions. Since the position of cashier II only required lifting up to 10 pounds, the Board finds that the cashier position also fell within Dr. Valentino's restrictions. Finally, appellant's treating physician, Dr. Thoder, stated on May 3, 1999 that appellant could work 8 hours a day with lifting up to 20 pounds frequently. The position of cashier II only called for lifting up to 10 pounds. Appellant contended that the lifting involved in the position was repetitive, however, the position description does not indicate lifting of a repetitive nature. Dr. Thoder did not place any other restrictions on appellant at the time of the reduction of his compensation benefits. His restrictions were also in accord with the position.

The Board finds that the Office properly considered appellant's physical limitations in determining that the position of cashier II represented appellant's wage-earning capacity. The weight of the medical evidence at the time of the reduction of compensation established that appellant had the requisite ability, skill and experience to perform the position of cashier II and that such a position was reasonably available within the general labor market of appellant's commuting area.

The Board notes that, at the time of the reduction of appellant's compensation benefits on August 15, 1999, the record did not include Dr. Thoder's February 6, 2002 report.¹³ Even though appellant submitted the report in support of his request for reconsideration of the recurrence of disability claim, the report addressed the issue of loss of wage-earning capacity. Dr. Thoder stated that he disallowed all cashier jobs, whether it is a position with the Department of Labor or any other position, since all cashier jobs fell outside appellant's work restrictions. Although Dr. Thoder's report addressed the issue of appellant's inability to perform the job of

¹³ As mentioned earlier, Dr. Thoder in his October 10, 1999 note, said appellant could not work as a cashier, but this was based on a 50-pound lifting requirement.

cashier, it was not in the record at the time of the Office's October 29, 2001 final decision and therefore it was not considered. At the time of the reduction of appellant's compensation benefits, the weight of the medical evidence demonstrated that the chosen position was within appellant's medical restrictions and represented his wage-earning capacity.

The Board further finds that appellant did not meet his burden of proof in establishing that he sustained a recurrence of disability on or after August 28, 2000 causally related to his March 15, 1982 accepted employment injury.

An individual who claims a recurrence of disability resulting from an accepted employment injury has the burden of establishing that the disability is related to the accepted injury. This burden requires furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and, who supports that conclusion with sound medical reasoning.¹⁴

In this case, appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence, a causal relationship between his claimed total disability for work beginning August 28, 2000 and his accepted right hand condition.¹⁵ The Board has held that the mere belief that a condition was caused or aggravated by employment factors or incidents is insufficient to establish a causal relationship between the two.¹⁶ As applied to this case, appellant's assertion that his disability for work beginning August 28, 2000 was causally related to the accepted condition must be supported by rationalized medical evidence establishing that relationship. Without supporting medical rationale from a physician, appellant's right elbow condition and his personal belief that he was totally disabled for work beginning August 28, 2000 due to work factors, are insufficient to establish his claim.

Appellant claimed that shortly after he returned to work as a janitor he had increased pain in his right hand up to the elbow. He worked as a janitor from August 23, 1999 until August 28, 2000, when he stopped work. In support of his claim for recurrence of disability, appellant submitted a disability certificate from Dr. Thoder dated September 11, 2000 indicating that he was disabled for the next six weeks, however, Dr. Thoder did not support his note with a rationalized medical opinion. Without further explanation of why and how appellant was disabled for the stated period, this note has little probative value. Dr. Thoder also checked "yes" in an attending physician's report dated February 7, 2001, that appellant's condition was related to his employment. In the same form, he indicated that appellant was totally disabled from September 11 through October 23, 2000, but did not provide a supporting rationalized medical opinion relating the alleged period of disability to the accepted work injury. The Board has found in previous cases, such as in *Barbara J. Williams*, that an attending physician's report in which the physician marked the box "yes" that his or her diagnosis was causally related to the

¹⁴ *Louise G. Malloy*, 45 ECAB 613 (1994).

¹⁵ *Dominic M. DeScala*, 37 ECAB 369, 372 (1986).

¹⁶ *Lillian M. Jones*, 34 ECAB 379, 381 (1982).

employment injury is of severely diminished probative value.¹⁷ In *Williams*, appellant's physician designated on his attending physician's report, by marking the "yes" box, that his diagnosis was causally related to the accepted employment injury. The Board found in *Williams* that the report was "of severely diminished probative value, as reports of this type without any explanation or rationale, are insufficient to establish causal relation."¹⁸ In this case, the Board also finds that Dr. Thoder's attending physician's report marking the box "yes" that appellant's condition was related to an employment activity is insufficient to establish causal relation. Appellant did not submit any other evidence addressing his alleged total disability in support of his recurrence of disability claim.

On the contrary, the reports from Dr. Thoder indicated that appellant could work eight hours a day with certain lifting limitations and no repetitive activities. Dr. Thoder did acknowledge that appellant had a right elbow condition, but he did not provide the necessary medical rationale to relate appellant's condition to the period of disability and the accepted employment injury. Appellant did not submitted the requisite rationalized medical opinion evidence to establish that his alleged period of total disability and elbow condition were causally related to the accepted injury on March 15, 1982.

Because appellant has failed to submit rationalized medical evidence establishing that his current condition was causally related to the accepted employment injury, the Board finds that he has not satisfied his burden of proof in this case.

The decisions of the Office of Workers' Compensation Programs dated June 10 and January 28, 2002 and October 29, 2001 are hereby affirmed.

Dated, Washington, DC
May 15, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁷ *Barbara J. Williams*, 40 ECAB 649 (1989).

¹⁸ *Id.*