

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BARRY S. BLOCKER and U.S. POSTAL SERVICE,
POST OFFICE, Port Clinton, OH

*Docket No. 03-1354; Submitted on the Record;
Issued November 24, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly reduced appellant's compensation benefits based on his capacity to earn wages as a bank teller; and (2) whether appellant has met his burden of proof in establishing that he developed obesity, diabetes, stress, spinal stenosis, disc herniations and degenerative disc disease as a consequence of his accepted low back strain.

Appellant, a 43-year-old clerk, filed a claim for a traumatic injury to his lower back sustained on March 13, 1993 by lifting and dumping mail. The Office accepted his claim for a lumbar strain on April 1, 1993. Appellant accepted modified duty on March 26, 1993. He filed a notice of recurrence of disability on June 11, 1993 alleging that he sustained a recurrence of total disability on June 10, 1993. Appellant returned to light-duty work on June 29, 1993. By decision dated June 29, 1993, the Office accepted the recurrence of disability on June 10, 1993. On October 8, 1993 appellant filed a claim for a traumatic injury alleging that, on October 7, 1993, he injured his back and left shoulder blade in the performance of duty. He accepted a modified position on October 14, 1993. The employing establishment declined to reappoint appellant as a transitional clerk on November 16, 1993 on the basis that his work performance and conduct did not meet the employing establishment's standards. The Office resumed payment of compensation for temporary total disability.

The Office proposed to reduce appellant's compensation benefits, based on the position of bank teller, on February 16, 2000. By decision dated March 22, 2000, the Office adjusted his compensation benefits based on the constructed position of bank teller. Appellant requested an oral hearing on April 17, 2000. By decision dated December 4, 2000 and finalized January 2, 2001, the hearing representative affirmed the Office's March 22, 2000 wage-earning capacity determination.

Appellant requested reconsideration on January 30, 2001 and submitted additional medical evidence. By decision dated May 1, 2001, the Office denied modification of its prior

decisions. In a letter dated May 21, 2001, appellant requested reconsideration and, by decision dated January 30, 2002, the Office denied modification of its prior decisions.

Appellant filed a notice of recurrence of disability on July 27, 2001 alleging that he developed several conditions as a consequence of his accepted employment injury. He alleged that the additional conditions of spinal stenosis, disc herniations, degenerative disc disease, sleep apnea, obesity, diabetes and stress due to his constant back pain. By decision dated January 30, 2002, the Office found that appellant had not established a consequential injury as a result of his accepted employment injury.

Appellant requested a review of the Office's decisions by the Board. In an Order Remanding Case, dated September 4, 2002, the Board remanded the case for the Office to reassemble the record to include the medical evidence that it relied upon in reaching the March 22, 2000 wage-loss determination.¹ Following an attempt to reconstruct the record, the Office issued a decision on April 2, 2003 finding that appellant had not established a causal relationship between the claimed consequential injuries of obesity, diabetes, sleep apnea, spinal stenosis and degenerative disc disease and the accepted March 13, 1993 work injury; and that the position of bank teller represented appellant's wage-earning capacity.

The Board finds that the Office improperly reduced appellant's compensation benefits based on his capacity to earn wages as a bank teller.

Section 8115 of the Federal Employees' Compensation Act² provides that 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 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, *Dictionary of Occupational Titles* or otherwise available in the open market, that fits the 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*³ will result in the percentage

¹ Docket No. 02-833 (issued September 4, 2002).

² 5 U.S.C. §§ 8101-8193, 8115.

³ 5 ECAB 376 (1953).

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.⁴

In the present case, the Office found that the position of bank teller met the requirements of section 8115 for determination of wage-earning capacity and reduced appellant's compensation to reflect this in a March 22, 2000 decision. As indicated above, a position selected as representing wage-earning capacity must be made with due regard to the degree of physical impairment of the employee.

The Office found that the selected position was within appellant's physical limitations, based on the June 5, 1996 examination by Dr. J. Hugh Webb, a Board-certified neurosurgeon, and Office second opinion physician. A wage-earning capacity determination must be made on a reasonably current medical evaluation. The Board has held that examinations made within six months of the wage-earning capacity decision are "reasonably current."⁵ However, medical evaluations which are two years old are not sufficiently current.⁶ In this case, the Office relied upon a medical report which was nearly four years old at the time of the March 22, 2000 decision. Based on the Board's prior decisions, this medical evidence is clearly beyond the "reasonably current" standard and cannot be used to determine appellant's physical capacity for the purposes of determining his wage-earning capacity. In the present case, the Board finds that the Office determined appellant's loss of wage-earning capacity in a manner contrary to that set forth by the Board. The Office failed to ensure that the record contained a detailed current description of appellant's disabled condition and ability to perform work at the time of its March 22, 2000 decision. As the Office failed to rely upon reasonably current medical evidence in reaching its decision, it improperly determined appellant's wage-earning capacity based on the constructed position of bank teller.

The Board further finds that appellant has failed to meet his burden of proof in establishing that he developed spinal stenosis, disc herniations, degenerative disc disease, sleep apnea, obesity, diabetes and stress as a consequence of his accepted employment-related lumbar strain.

It is an accepted principle of workers' compensation law that, when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause which is attributable to the employee's own intentional conduct. As is noted by *Larson* in his treatise on workers' compensation, once the work-connected character of any injury has been established, the subsequent progression of that condition remains compensable so long as the worsening is not shown to have been produced by an independent nonindustrial cause and so long as it is clear that the real operative factor is the

⁴ *Karen L. Lonon-Jones*, 50 ECAB 293, 297 (1999).

⁵ *Carl C. Green, Jr.*, 47 ECAB 737, 746 (1996).

⁶ See *Anthony Pestana*, 39 ECAB 980, 986-987 (1988); *Ellen G. Trimmer*, 32 ECAB 1878, 1882 (1981) (medical reports submitted two years prior to the wage-earning capacity determination were not sufficient to establish appellant's current work capacity).

progression of the compensable injury, associated with an exertion that in itself would not be unreasonable under the circumstances.⁷

In this case, appellant alleged that he developed spinal stenosis, disc herniations, degenerative disc disease, sleep apnea, obesity, diabetes and stress as a consequence of his accepted employment-related lumbar strain.⁸ In support of his claims, appellant submitted a series of reports from Dr. Michael J. Major, a Board-certified internist. On March 9, 2000 Dr. Major stated that appellant was in considerable discomfort due to his back injury and that his chronic low back pain had led to obesity, with consequential sleep apnea and diabetes. In a report dated June 9, 2000, Dr. Major asserted that appellant did not have a diagnosis of diabetes prior to his work injury, that appellant had not undergone a sleep study to diagnose apnea and that appellant's gain of 33 pounds since his employment injury was due to his inability to exercise secondary to back pain.

Appellant underwent a magnetic resonance imaging (MRI) scan on July 20, 2001. This scan demonstrated degenerative disc disease at L4-5 and L1-2 with a broad central disc herniation at L4-5 causing a moderate degree of lumbar spine stenosis. Appellant also had a small focal central disc herniation at L1-2 and narrowing of the neural foramina at L4-5 bilaterally. Dr. Major reviewed this report on August 3, 2001 and stated that these findings were the expected progression of appellant's disc injury. He stated that appellant's back pain had limited his physical activity resulting in weight gain. Dr. Major stated that, "[appellant] now suffers from noninsulin dependant diabetes mellitus. This is a problem of insulin resistance, primarily related to obesity." He also stated that appellant experienced obstruction of the oropharyngeal airway during sleep. Dr. Major attributed this condition to the fact that the tongue gained weight along with the rest of the body leading to worsening apnea. He concluded, "I believe these problems are directly connected to [appellant's] low back injury of March 1993."

The district medical adviser, Dr. David I. Krohn, a Board-certified internist, completed a report on August 31, 2001 and found that appellant's chronic back strain did not contribute to any of the additional medical conditions alleged. He noted that appellant weighed 250 pounds at the time of his injury and that appellant's obesity long preceded the claimed work-related injury to his back. Dr. Krohn disagreed that appellant's findings on the MRI scan were due to his accepted employment injury and stated that a diagnosis of diabetes had not been established by the record before him. He also noted that appellant had not undergone the necessary study to establish sleep apnea. Dr. Krohn concluded that it was speculative to claim that sleep apnea was due to appellant's back injury as obesity was not a precondition for sleep apnea. He stated, "I have indicated above no necessary correlation between [appellant's] complaint of back pain and his obesity."

Dr. Major responded to Dr. Krohn's report on October 2, 2001. He again asserted that appellant gained more than 30 pounds following his work injury. Dr. Major further stated that

⁷ *Clement Jay After Buffalo*, 45 ECAB 707, 715 (1994).

⁸ Appellant did not submit any medical evidence regarding his claimed condition of stress and the Office did not address this aspect of appellant's claim. Therefore, the Board will not address any claim for an emotional condition on appeal. 20 C.F.R. § 501.29(c).

appellant's recent MRI scan demonstrated a progression of appellant's work-related injury of March 12, 1993. He stated, "This MRI [scan] revealed disc herniation at L4-5; his most recent MRI [scan] now shows disc herniation at L4-5 with a moderate degree of spinal stenosis. This[,] I believe[,] represents clear progression of his disease." Dr. Major asserted that appellant's diagnosis of diabetes was established and concluded, "[m]ost physicians will quickly agree that weight loss and exercise are very important in the control and prevention of diabetes. These issues are clearly exacerbate[d] by [appellant's] work-related injury." Dr. Major stated:

"It is my opinion again that the medical record clearly demonstrates progression of [appellant's] back injury as most obviously seen in the progression of L4-5 disc herniation with spinal stenosis on his most recent MRI [scan]. His back pain makes any reasonable plans for significant exercise difficult at best. This has contributed to [appellant's] weight gain, which in turn contributes to his diabetes and quite probably sleep apnea."

In this case, the Office properly found that there was a conflict of medical opinion evidence between appellant's attending physician, Dr. Major, a Board-certified internist, and the District medical adviser, Dr. Krohn, a Board-certified internist. Dr. Major opined that appellant's accepted employment injury made it difficult for him to exercise and, thus, contributed to his current conditions of obesity, diabetes and sleep apnea as well as his current spinal conditions. Dr. Krohn reviewed the medical evidence, included in the record, and found that appellant was overweight, at the time of his injury and that his employment injury did not result in a progression of his degenerative disc disease and did not contribute to his alleged conditions of diabetes or sleep apnea. Section 8123(a) of the Act,⁹ provides, "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." The Office properly referred appellant to Dr. William Rix, a Board-certified orthopedic surgeon, to resolve the existing conflict of medical opinion evidence.

In a report dated December 4, 2001, Dr. Rix noted appellant's history of injury and medical history. He performed a physical examination and noted that appellant was overweight. Dr. Rix stated that appellant had pain on the extremes of his range of motion but that appellant's sensory examination was normal. He noted that appellant exhibited some inappropriate pain behavior.

Dr. Rix stated that appellant's March 12, 1993 lumbosacral strain aggravated a preexisting but asymptomatic degenerative disc disease of his lumbar spine. He stated that appellant's strain had resolved but left appellant with symptomatic degenerative disc disease at L4-5 and L5-S1. Dr. Rix found that appellant's MRI scans demonstrated the picture of degenerative disc disease with its natural progression with age. He stated that the work injury did not cause the degenerative disc disease nor the findings on the latest MRI scan, but was responsible for appellant's present low back symptoms. Dr. Rix concluded, "The March 12, 1993 accident did not cause the degenerative disc disease but without a prior history, rendered it

⁹ 5 U.S.C. §§ 8101-8193, 8123(a).

symptomatic. [Appellant] does have a light[-]duty capacity to work but he cannot return to his former job in the mailroom with all its lifting.”

In regard to the alleged consequential injuries, Dr. Rix opined that appellant’s medical problems were not causally related to his March 12, 1993 injury. He explained that appellant was obese when he was injured and he only gained 10 to 20 pounds since his injury. He noted that appellant’s diabetes mellitus began one to two years ago as did his sleep apnea. Dr. Rix noted that appellant’s diabetes began years after his low back strain and that the cause of this condition was multifactorial including body type, dietary practices, family history and genetic make-up. He stated that appellant’s bulging disc at L4-5, disc herniations at L1-2 and L4-5 and L4-5 spinal stenosis were not related to his employment injury, as there was no consistent examination implicating the L5 nerve root neurologically and there were degenerative discs at other levels which were not impacted by appellant’s employment injury. In regard to appellant’s spinal stenosis, Dr. Rix stated that this was a slowly occurring degenerative disc and not related to a single traumatic event. In regard to appellant’s alleged sleep apnea, Dr. Rix stated, “This occurred many years after the March 12, 1993 injury and it is not logical to conclude that a low back strain could result in tongue obstruction of [appellant’s] airway during sleep.” He concluded, “It is not a logical consequence that these three conditions stem from a low back strain that occurred many years before.”

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.¹⁰ In this case, Dr. Rix provided a detailed report and explained why he did not believe that appellant’s current conditions were not a consequence of his accepted employment injury. Specifically, he noted that appellant had a weight problem prior to his employment injury. Dr. Rix also noted appellant’s proportionally minimal weight gain following the employment injury and indicated that appellant’s sleep apnea was not due to the employment injury. He opined that diabetes was caused by a multitude of factors and that there was no temporal relationship between appellant’s alleged change of lifestyle after his employment injury and onset of the disease. In regard to appellant’s disc bulges, herniations, spinal stenosis and degenerative disc disease, Dr. Rix explained that he did not believe that these conditions were caused or aggravated by appellant’s employment injury, a one time event, as these conditions were not clearly established at the time of the injury, in the case of the disc bulge at L4-5 and as the remainder of the spinal conditions were degenerative in nature, by very definition worsening over a period of time rather than affected by a single traumatic injury.

As Dr. Rix’s report is entitled to the weight of the medical opinion evidence and, as appellant did not submit any additional medical evidence addressing the causal relationship between his current alleged consequential injuries and his accepted lumbar strain, appellant has not met his burden of proof in establishing that he developed additional injuries as a consequence of his accepted March 12, 1993 lumbar strain and the Office properly denied his claim for consequential injuries.

¹⁰ *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

The April 2, 2003 decision of the Office of Workers' Compensation Programs is hereby reversed regarding the loss of wage-earning capacity determination and affirmed regarding the denial of any consequential injury.

Dated, Washington, DC
November 24, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member