United States Department of Labor
Employees' Compensation Appeals Board

DAVID L. SCOTT, Appellant	)	
and	)	**Docket No. 03-1822**
	)	**Issued: February 20, 2004**
DEPARTMENT OF THE AIR FORCE, WRIGHT-PATTERSON AIR FORCE BASE, Fairborn, OH, Employer	)	

Appearances:
David L. Scott, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On July 14, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated April 2, 2003, which reduced his compensation based on his capacity to earn wages as an office helper. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether the Office properly denied modification of its determination of appellant's wage-earning capacity.

FACTUAL HISTORY

On April 12, 1989 appellant, then a 34-year-old motor vehicle operator, sustained acute neck and low back strains, mild concussion and bulging discs at L3-4 and L4-5 when he was hit by a sheet of plexiglass at work on that date. He stopped work for about one month and then returned to his regular work. On December 3, 1991 appellant sustained a chronic acute

lumbosacral strain, associated with degenerative facet changes and mild diffuse bulging at L3-4 and L4-5.[1] He stopped work on December 4, 1991 and did not return.

Appellant received periodic treatment from Dr. Leroy B. Goodson, an attending Board-certified family practitioner. In various treatment notes, the physician indicated that appellant remained symptomatic in his low back and noted that he suffered stress from personal problems. Appellant began to participate in a vocational rehabilitation program and had regular meetings with a vocational rehabilitation counselor. The Office referred appellant to Dr. Arnold R. Penix, a Board-certified orthopedic surgeon. In a report dated December 5, 1994, Dr. Penix described appellant's factual and medical history and provided a detailed account of his examination on that date. He determined that appellant continued to have an acute lumbosacral strain with associated degenerative facet changes and disc bulging at L3-4 and L4-5. Dr. Penix noted that, although appellant continued to suffer residuals of his employment injuries, he exhibited limited objective findings on examination and his restrictions were based on subjective findings. He stated that appellant's degenerative changes and bulging discs were "not considered a pathologic entity." Dr. Penix indicated that appellant could occasionally lift up to 20 pounds and could sit, stand and walk intermittently as long as these actions were not required of him constantly throughout the day. He stated that appellant could not engage in significant bending, climbing or stooping and noted that he could "engage in a wide range of activities if motivated to do so." Dr. Penix stated that appellant's reported discomfort appeared to be out of proportion with the history of injury, physical findings and diagnostic test findings. In reports dated February 17 and April 10, 1995, Dr. Penix provided a similar description of appellant's work restrictions. He indicated that appellant could work eight hours per day.[2]

In a report dated March 10, 1995, Dr. Goodson indicated that appellant had been seen for generalized osteoarthritis involving multiple joints and noted that he was taking Prozac for "chronic pain of lumbar strain." In a report dated May 22, 1995, Dr. Goodson stated that Dr. Penix's evaluation of appellant's ability to work seemed "out of character" with the fact that he had previously been seen unfit to work by other physicians. He noted that appellant had "significant restriction of motion," and stated:

> "[Appellant] is totally unfit by reasons of injury, in particular moderate degenerative disc disease, severe facet joint disease, a moderate myofascial and mechanical low back pain, weakness and reduction in size of his right calf and dorsiflexion of his right foot as well as multiple traumas of failures at multiple facilities and treatment plus the complications of a difficult Vietnam, childhood and the last five years with failures in his low back treatment."

In a report dated April 8, 1996, Dr. Goodson again indicated that appellant had been found unfit for service by other physicians. He provided an account, though less detailed, of appellant's physical condition which was similar to that contained in his March 10, 1995 report.

[1] The files for these two injuries have been combined into the present case file.

[2] In a July 7, 1995 report, Dr. Penix again noted that appellant's symptoms were out of proportion to the physical findings.

Dr. Goodson noted appellant's emotional and medication problems and stated that he was totally disabled.

In a report dated July 18, 1995, Dr. Tyrone Payne, an attending clinical psychologist, reported the findings of his mental status examination and testing of appellant. He diagnosed post-traumatic disorder (by history with some improvement) and dysthymic disorder. Dr. Payne indicated that appellant had the intellectual capabilities, basic achievement skills and mechanical reasoning skills to pursue a variety of occupations, including any available and appropriate sedentary occupations. Dr. Payne stated, "[t]he biggest problem seems to be [appellant's] overall attitude and lack of interest."

In late 1995, appellant's vocational rehabilitation counselor determined that he was capable of working in the constructed position of office helper. The position was found to be reasonably available within appellant's commuting area. The job was essentially clerical in nature, including duties such as sorting mail and delivering messages and required lifting up to 20 pounds and reaching and handling. By decision dated April 26, 1996, the Office adjusted appellant's compensation effective April 28, 1996 based on his capacity to work as an office helper. The Office based appellant's physical and emotional ability to perform the position on the opinions of Dr. Penix and Dr. Payne. The Office found that the opinion of Dr. Goodson regarding appellant's disability was not well rationalized.[3]

Appellant requested a hearing before an Office hearing representative which was held on December 5, 1996. He contended that the reports of his attending physicians showed that he was totally disabled. By decision dated and finalized June 6, 1997, the Office hearing representative affirmed the Office's April 26, 1996 wage-earning capacity decision.

Appellant continued to submit reports from Dr. Goodson and other attending physicians. A number of these reports detail appellant's medication regimen and his complaints of neck, back, hip and knee pain. In numerous notes dated between mid 1998 and late 2000, Dr. Goodson indicated that appellant's low back pain and severe disc degeneration remained unchanged. He made note of appellant's emotional condition, including his post-traumatic disorder and dysthymic disorder. Dr. Goodson also discussed other problems that appellant encountered such as difficulties with medication and throat, colon, knee and cardiac conditions.[4] Appellant also submit brief treatment notes from 1997 and 1998, including those of Dr. Edward Haraburda, a psychology resident, which discussed his emotional condition.

By letter dated January 3, 2001, appellant requested reconsideration of his claim. By decision dated January 24, 2001, the Office denied appellant's claim on the grounds that it was untimely filed and did not show clear evidence of error in the Office's prior decisions. The Office noted that the last merit decision regarding the adjustment of his compensation was dated

[3] Prior to its April 26, 1996 decision, the Office had provided appellant with an opportunity to submit evidence and argument if he believed his compensation should not be adjusted. He argued that the reports of his attending physicians showed that he was totally disabled.

[4] The record also contains numerous medical reports from other physicians concerning these throat, colon, knee and cardiac problems.

June 6, 1997. Appellant continued to submit numerous brief notes dated in 2001 and 2002 from Dr. Goodson who indicated that he continued to have a lumbosacral sprain and osteoarthritis of the low back. Dr. Goodson also discussed appellant's money worries, problems with his grandchildren and his emotional condition.

Appellant appealed his case to the Board.[5] By order remanding the case dated November 14, 2002, the Board set aside the Office's January 24, 2001 decision and remanded the case for further action to be followed by an appropriate decision. The Board noted that the Office improperly interpreted appellant's January 3, 2001 letter and the evidence submitted in connection with it to constitute a reconsideration request. The Board noted that appellant was actually seeking modification of the Office's determination that his wage-earning capacity was represented by the position of Office helper. It directed the Office to consider this request on remand.

Appellant submitted a January 7, 2003 report in which Dr. Vadak Ranganathan, an attending Board-certified neurologist, indicated that he had a "post-traumatic cervical lumbar strain." Diagnostic testing from November 2002 showed that appellant had a mild cervical radiculopathy. In a report dated February 5, 2003, Dr. Ranganathan indicated that appellant had a disc herniation at C5-6 and degenerative spondylosis between C3-4 and C6-7.

By decision dated April 2, 2003, the Office determined that appellant had not met his burden to establish that modification of the Office's determination of his wage-earning capacity was warranted.[6]

LEGAL PRECEDENT

Once a loss of wage-earning capacity is determined, a modification of such a 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.[7] The burden of proof is on the party attempting to show the award should be modified.[8]

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 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

[5] Docket No. 01-1330, issued November 14, 2002.

[6] Appellant submitted additional evidence after the Office's April 2, 2003 decision, but the Board cannot consider such evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

[7] *George W. Coleman*, 38 ECAB 782, 788 (1987); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

[8] *Jack E. Rohrabaugh*, 38 ECAB 186, 190 (1986).

wage-earning capacity in his disabled condition.[9] 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.[10]

ANALYSIS

In the present case, appellant did not submit evidence showing that the Office's original determination with regard to his wage-earning capacity was erroneous. The Office adjusted appellant's compensation effective April 28, 1996 on the grounds that he was capable of performing the constructed position of office helper. The Office received information from Dr. Penix, a Board-certified orthopedic surgeon who served as an Office referral physician, who found that appellant was not totally disabled for work and had a partial capacity to perform work for eight hours per day subject to specified work restrictions.[11]

Appellant's vocational rehabilitation counselor then determined that appellant was able to perform the position of office helper and that state employment services showed the position was available in sufficient numbers so as to make it reasonably available within appellant's commuting area. The Office properly relied on the opinion of the rehabilitation counselor that appellant was vocationally capable of performing the office helper position and a review of the evidence reveals that appellant was physically capable of performing the position. Appellant did not submit sufficient evidence or argument to show that he could not vocationally or physically perform the office helper position.

The Office properly relied on the opinion of Dr. Penix to determine that appellant was physically capable of performing the office helper position. In a report dated December 5, 1994, he provided an extensive discussion of appellant's factual and medical history and provided a detailed account of his examination on that date. He acknowledged that appellant continued to have an acute lumbosacral strain with associated degenerative facet changes and disc bulging at

[9] *See Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C § 8115(a). Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions. 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. *Albert L. Poe,* 37 ECAB 684, 690 (1986), *David Smith,* 34 ECAB 409, 411 (1982).

[10] *See 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). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8 (December 1993).

[11] The Office properly referred appellant to Dr. Penix after it determined that the brief reports of Dr. Goodson, an attending Board-certified family practitioner, provided an insufficient assessment of his ability to work.

L3-4 and L4-5, but noted that this condition did not prevent appellant from engaging in light work.[12] Dr. Penix explained the basis for this opinion by noting that appellant exhibited limited objective findings on examination and diagnostic testing and by indicating that his symptoms and complaints were out of proportion to the physical findings.[13] The physician concluded that appellant could work 8 hours per day, could occasionally lift up to 20 pounds and could sit, stand and walk intermittently as long as these actions were not required of him constantly throughout the day. Dr. Penix stated that appellant could not engage in significant bending, climbing or stooping and noted that he could "engage in a wide range of activities if motivated to do so."[14] The Board finds that these work restrictions are well within the requirements of the selected office helper position. The office helper position is essentially clerical in nature, including duties such as sorting mail and delivering messages and required lifting up to 20 pounds and reaching and handling.[15]

Appellant submitted March 10 and May 22, 1995 and April 8, 1996 reports in which Dr. Goodson indicated that appellant continued to have a lumbar strain and generalized osteoarthritis. In the May 22, 1995 report, Dr. Goodson stated that appellant was totally disabled due to various medical conditions such as degenerative disc disease, facet joint disease, mechanical low back pain, weakness and reduction in size of his right calf and limited dorsiflexion of the right foot. However, Dr. Goodson's reports are of limited probative value on the relevant issue of the present case in that they do not contain adequate medical rationale in support of the physician's opinion on causal relationship.[16] He did not provide an adequate discussion of the basis of his findings in that there is no report of record which contains a detailed description of any physical examination performed by Dr. Goodson. Nor did he describe appellant's employment injuries in any detail or explain how they could have been competent to cause total disability. Moreover, Dr. Goodson indicated that appellant's emotional condition and personal problems contributed to his inability to work. However, as a family practitioner, Dr. Goodson would not be competent to provide an opinion on appellant's emotional condition and its effect on his ability to work. He noted that prior physicians had found appellant "unfit" for duty, but these opinions of prior physicians did not assess appellant's ability to work around the time his compensation was adjusted.

[12] The Office accepted that on April 12, 1989 appellant sustained acute neck and low back strains, mild concussion and bulging discs at L3-4 and L4-5 and on December 3, 1991 he sustained a chronic acute lumbosacral strain, associated with degenerative facet changes and mild diffuse bulging at L3-4 and L4-5.

[13] He noted that the degenerative changes and bulging discs found on diagnostic testing were "not considered a pathologic entity."

[14] In reports dated February 17, April 10 and July 7, 1995, Dr. Penix provided a similar description of appellant's work restrictions. He indicated that appellant could work eight hours per day.

[15] There is no indication that the position required significant walking, standing, bending, climbing or stooping.

[16] *See George Randolph Taylor*, 6 ECAB 986, 988 (1954) (finding that a medical opinion not fortified by medical rationale is of little probative value).

The Office considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment, age and employment qualifications, in determining that the office helper position represented appellant's wage-earning capacity.[17] The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the office helper position and that such a position was reasonably available within the general labor market of appellant's commuting area. Therefore, the Office properly based appellant's wage-earning capacity effective April 28, 1996 on the office helper position. For these reasons, appellant has not shown that the Office's original determination with regard to his wage-earning capacity was erroneous.

In support of his argument that his wage-earning capacity should be modified, appellant also alleged that there was a material change in the nature and extent of his employment-related condition. However, the medical evidence submitted to support this contention does not contain a rationalized medical opinion explaining how his employment-related condition prevented appellant from performing the office helper position or otherwise establish that the Office improperly determined appellant's wage-earning capacity.

Appellant submitted numerous brief treatment notes, dated after the 1996 adjustment of his compensation, in which Dr. Goodson indicated that he continued to suffer from low back pain, low back strains and disc degeneration. In several reports, Dr. Goodson stated that appellant was totally disabled from work. However, these reports do not contain any detailed account of appellant's physical findings on examination to support an opinion on his ability to work. In fact, the reports of are such a brief nature, it remains unclear whether Dr. Goodson actually undertook any notable examination of appellant during this period. Many of the assessments of appellant's condition appear to be merely based on his complaints of pain. Dr. Goodson did not explain how appellant's work-related condition had worsened such that he was totally disabled from all work. Moreover, Dr. Goodson again suggested that appellant's disability was due in part to his emotional condition and personal problems, including his post-traumatic disorder and dysthymic disorder. As noted above, Dr. Goodson would not be competent to provide an opinion on appellant's emotional condition.[18] He also indicated that appellant's throat, colon, knee and cardiac problems contributed to his disability, but consideration of these nonwork-related conditions would not be appropriate.[19]

[17] *See Clayton Varner*, 37 ECAB 248, 256 (1985).

[18] Appellant also submitted treatment notes from 1997 and 1998, including those of Dr. Edward Haraburda, a psychology resident, which discussed his emotional condition. However, these notes did not provide any comprehensive assessment of appellant's emotional condition or his ability to work.

[19] The record also contains numerous medical reports from other physicians concerning these throat, colon, knee and cardiac problems. Appellant submitted a January 7 and February 5, 2003 reports in which Dr. Ranganathan, an attending Board-certified neurologist, indicated that he had a "post-traumatic cervical lumbar strain and a disc herniation at C5-6 and degenerative spondylosis between C3-4 and C6-7. However, it has not been accepted that appellant sustained herniated cervical discs due to employment factors and Dr. Ranganathan did not provide any opinion on appellant's ability to work.

For these reasons, appellant did not show that there was a material change in the nature and extent of his employment-related condition.[20]

CONCLUSION

For these reasons, appellant has not shown that it was improper for the Office to deny modification of its determination of his wage-earning capacity.

ORDER

IT IS HEREBY ORDERED THAT the April 2, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 20, 2004
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[20] *See Norman F. Bligh*, 41 ECAB 230, 237-38 (1989). Moreover, appellant has not been retrained or otherwise vocationally rehabilitated such that his work as an office helper would not be representative of his wage-earning capacity.