United States Department of Labor
Employees' Compensation Appeals Board

R.S., Appellant	)	
and	)	**Docket No. 08-1038**
	)	**Issued: November 17, 2008**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, San Diego, CA, Employer	)	

Appearances:
Thomas S. Harkins, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 25, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' August 16, 2007 merit decision concerning the Office's wage-earning capacity determination and the Office's December 7, 2007 denying his request for further review of the merits of his claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly reduced appellant's compensation effective September 2, 2007 based on his capacity to earn wages as an optometric assistant; and (2) whether the Office properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

The Office accepted that on January 4, 2004 appellant, then a 41-year-old baggage screener, sustained a left shoulder strain, left rotator cuff tendinitis and precipitation of cervical degenerative disc disease due to lifting baggage. He stopped work and the Office paid him compensation for periods of disability.[1]

In December 2004, appellant was referred to vocational rehabilitation services and in October 2005 a direct placement plan was approved, which was designed to return him to work as an optometric assistant or dispensing optician.[2] The record indicates that from 1986 to 1987, he attended the American Business College in San Diego, CA and that he received a certificate as an optical technician. In 1988, appellant obtained an optician's license. He gained extensive work experience in this field for a variety of employers between 1986 and 2001. Appellant was not placed in a job under the October 2005 direct placement plan.

On September 30, 2005 Dr. Mark C. Nelson, an attending orthopedic surgeon, stated that appellant primarily reported pain and numbness in his neck, which radiated into his left arm and noted that he also reported low back pain. He diagnosed work-related left shoulder, cervical and trapezius strains and cervical spondylosis likely preexisting, but likely aggravated by the work-related cervical strain. Dr. Nelson opined that appellant was unlikely to successfully return to his previous employment as a baggage screener for the employing establishment. He recommended restrictions from lifting over 20 pounds, avoidance of overhead lifting, avoidance of repetitive flexion and extension of the neck and avoidance of work on a computer or telephone to prevent worsening of his cervical and shoulder symptoms.

Dr. Nelson referred appellant to Dr. Robert E. Scott, Jr., a Board-certified physical medicine and rehabilitation physician. On December 12, 2005 Dr. Scott diagnosed cervical spondylosis and degenerative disc disease (aggravated by the January 4, 2004 cervical strain, which caused chronic cervical and thoracic myofascial pain); left arm pain and numbness caused by cervical radiculitis, median neuropathy or myofascial pain; and left shoulder strain. He indicated that he agreed with other treating physicians that the majority of appellant's complaints were related to the cervical and thoracic regions.

In early 2006, appellant's vocational rehabilitation counselor learned that appellant's optician's license had expired in December 2004. Therefore, he was provided with a new direct placement plan in March 2006, which allowed for an additional 90 days to attempt to place him in a job as a security guard or an optometric assistant (a job which did not require an optician's license).[3] These efforts did not result in appellant being placed in a job. His rehabilitation

[1] There is some indication in the record that appellant sustained an employment injury on April 30, 2003, but the nature of this ostensible injury is not clear from the record.

[2] The record at that time contained medical reports showing that appellant was capable of light-duty work.

[3] Appellant's rehabilitation counselor determined that appellant was physically and vocationally capable of performing these positions and conducting a labor market survey in February 2006, which indicated that they were reasonably available in appellant's area.

counselor indicated that appellant felt that he could not work in any job and noted that he made no discernable effort to contact potential employers on his own.

On July 30, 2006 Dr. Scott diagnosed cervical spondylosis and disc disease with the potential for significant foraminal stenosis at C4-5 and C5-6 and loss of cervical lordosis (aggravated by the January 4, 2004 injury and resulting in local cervical pain, radicular symptoms and cervical/thoracic myofascial pain); mild left shoulder acromioclavicular joint arthrosis and subscapularis tendinisis (contributing minimally to appellant's current complaints and objective finding); and history of low back pain due to a separate work injury of April 30, 2003. He indicated that appellant could perform full-time work but was restricted from overhead work, lifting over 25 pounds and repetitive or prolonged cervical motions or posturing. Dr. Scott noted that appellant needed to be able to change positions, *i.e.*, alternate between sitting and standing at will.[4] He stated that appellant's conditions associated with the January 4, 2004 work injury had reached maximum medical improvement. Dr. Scott stated, "[Appellant's] medical conditions have not changed appreciably for better or for worse since my first evaluation with him in December 2005. His presentation at that time is similar to his presentations noted in previous records dating back through the year 2004."

In January 8, February 21 and April 17, 2007 reports, Dr. Scott indicated that appellant's disability status had not changed since the time of his July 30, 2006 report. In an April 17, 2007 report, he indicated that appellant's cervical motion remained guarded in all directions with tenderness in the cervical paraspinal muscles and trapezius muscles (left greater than right) and 5/5 strength in his arms.

In May 2007, appellant's vocational rehabilitation counselor again determined that, based on his experience, education and medical restrictions and the findings of a labor market survey, appellant was employable as an optometric assistant. He conducted a labor market survey on May 7, 2007, which documented that the position of optometric assistant was reasonably available in appellant's commuting area and that the entry pay level for this position was $11.75 per hour or $470.00 per week.

The record contains an excerpt from the Department of Labor, *Dictionary of Occupational Titles* describing the duties of the position of optometric assistant. The duties, which are performed in support of an optometrist, include assisting in visual examinations of patients, utilizing ocular testing apparatus, working with patients in vision therapy, assisting patients in frame selection and instructing patients in the care and use of glasses or contact lenses. The job might also require adjusting and repairing glasses and modifying contact lenses, maintaining inventory of materials, assisting in fabrication of eye glasses or contact lenses, scheduling appointments and performing other clerical duties. The optometric assistant position is described as sedentary in the Department of Labor, *Dictionary of Occupational Titles* and

[4] Dr. Scott first provided similar restrictions in a March 2, 2006 report. In another portion of the July 30, 2006 report, Dr. Scott indicated that appellant should not engage in prolonged sitting or standing.

appellant's rehabilitation counselor indicated that the employers he contacted also characterized the position as sedentary in nature.[5]

In a June 12, 2007 report, Dr. Scott indicated that appellant's disability status had not changed since the time of his July 30, 2006 report. He indicated that appellant had some limitation of cervical motion with pain at extremes and indicated that motor strength was 5/5 in his arms.

In a July 11, 2007 notice, the Office advised appellant of its proposed adjustment of his compensation based on its determination that he had the capacity to earn wages as an optometric assistant. It indicated that it had been determined that he was vocationally and physically capable of working as an optometric assistant. The Office advised appellant that if he disagreed with this proposal he had 30 days from the date of the letter to submit evidence regarding his capacity to earn wages.[6]

In an August 1, 2007 letter, appellant's attorney argued that appellant could not physically perform the optometric assistant position. He indicated that Dr. Scott, in his July 30, 2006 report, had restricted appellant from "prolonged sitting" but that the position required "sitting most of the time."

In an August 16, 2007 decision, the Office reduced appellant's compensation effective September 2, 2007 based on its determination that he had the capacity to earn wages as an optometric assistant. It indicated that the duties of the optometric position were within the work restrictions recommended by Dr. Scott. The Office calculated appellant's new compensation rate based on a formula which used his rate of pay when injured and the pay rate of the constructed position of optometric assistant.

In October 2007, appellant requested reconsideration of his claim. In an October 22, 2007 memorandum, appellant's counsel again argued that he could not physically perform the optometric assistant position because Dr. Scott had restricted him from "prolonged sitting" but the position required "sitting most of the time." In an undated statement, appellant argued that the medical evidence of record showed that he could not perform the optometric assistant position. He claimed that, based on his experience, the optometric assistant position was not sedentary in nature but rather was "predominately a stand-up job." Appellant resubmitted a copy of Dr. Scott's July 30, 2006 report and new report dated August 7, 2007 in which Dr. Scott again indicated that his disability status had not changed.

[5] The employers contacted in a July 25, 2006 labor market survey specifically indicated that the position of optometric assistant would not require lifting more than 20 pounds, sitting or standing over 45 minutes without a break or repetitive reaching at the shoulder level or above. The Department of Labor, *Dictionary of Occupational Titles* describes a sedentary position as one that requires the exertion of up to 10 pounds of force occasionally (occasionally meaning up to 1/3 of the time) and exertion of a negligible amount of force frequently (frequently meaning up to 2/3 of the time) to lift, carry, push, pull or otherwise move objects, including the human body. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time.

[6] The Office calculated appellant's proposed new compensation rate based on a formula which used his rate of pay when injured and the pay rate of the constructed position of optometric assistant.

In a December 7, 2007 decision, the Office denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT -- ISSUE 1

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.[7] Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[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 wage-earning capacity in his disabled condition.[9] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[10] 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.[11] The fact that an employee has been unsuccessful in obtaining work in the selected position does not establish that the work is not reasonably available in his commuting area.[12]

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, *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.[13]

---

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

[8] *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

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

[10] *Albert L. Poe*, 37 ECAB 684, 690 (1986), *David Smith*, 34 ECAB 409, 411 (1982).

[11] *Id.*

[12] *See Leo A. Chartier*, 32 ECAB 652, 657 (1981).

[13] *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).

ANALYSIS -- ISSUE 1

The Office accepted that on January 4, 2004 appellant sustained a left shoulder strain, left rotator cuff tendinitis and precipitation of cervical degenerative disc disease due to lifting baggage. In an August 16, 2007 decision, it reduced appellant's compensation effective September 2, 2007 based on its determination that he had the capacity to earn wages as an optometric assistant.

The Board finds that the Office properly determined that appellant was physically and vocationally capable of performing the constructed position of optometric assistant.[14] The Office properly found that the medical reports of Dr. Scott, an attending physical medicine and rehabilitation physician, showed that appellant was able to perform the optometric assistant position around the time his compensation was adjusted in 2007.

On July 30, 2006 Dr. Scott discussed appellant's medical conditions which mostly involved the cervical and thoracic areas. He indicated that appellant could perform full-time work but was restricted from overhead work, lifting over 25 pounds and repetitive or prolonged cervical motions or posturing. Dr. Scott noted that appellant needed to be able to change positions, *i.e.*, alternate between sitting and standing at will.[15] In January 8, February 21 and April 17, 2007 reports, he indicated that appellant's disability status had not changed since the time of his July 30, 2006 report.

The Board finds that these work restrictions would allow appellant to perform the position of optometric assistant. The position involves performing duties in support of an optometrist such as helping to carry out visual examinations, assisting customers and performing various clerical duties. It is described as a sedentary position in the Department of Labor, *Dictionary of Occupational Titles.*[16] According to this description, an optometric assistant would not be required to lift more than 10 pounds and there is no indication that an optometric assistant would be required to work overhead or engage in repetitive or prolonged cervical motions or posturing. Appellant argued that he could not physically perform the optometric assistant position because Dr. Scott had restricted him from "prolonged sitting" but the position required "sitting most of the time." The Board notes that Dr. Scott's restriction from prolonged sitting is not meant to preclude appellant from sitting for a substantial portion of the workday but rather is

[14] Appellant did not have any actual wages on which to base his wage-earning capacity. The Office only based his wage-earning capacity on a constructed position after he failed to be placed in a position through participation in a vocational rehabilitation program. Appellant's rehabilitation counselor indicated that he did not make any discernable effort to contact potential employers on his own. *See supra* notes 9 through 12 and accompanying text regarding the bases for wage-earning capacity determinations.

[15] Dr. Scott first provided similar restrictions in a March 2, 2006 report. In another portion of the July 30, 2006 report, he indicated that appellant should not engage in prolonged sitting or standing.

[16] The Department of Labor, *Dictionary of Occupational Titles* describes a sedentary position as one that requires the exertion of up to 10 pounds of force occasionally (occasionally meaning up to 1/3 of the time) and exertion of a negligible amount of force frequently (frequently meaning up to 2/3 of the time) to lift, carry, push, pull, or otherwise move objects, including the human body. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. In addition, employers contacted in a May 7, 2007 labor market survey also characterized the optometric assistant position as sedentary in nature.

meant to convey that he should be able to change positions, *i.e.*, alternate between sitting and standing. Although the description of a sedentary position notes substantial sitting during the workday, the description also provides for alternating sitting with standing and walking.

Appellant's vocational rehabilitation counselor determined that appellant had the experience and skills to perform the position of optometric assistant and found that state employment services showed that the position was available in sufficient numbers so as to make it reasonably available within his commuting area.[17] The Office properly relied on the opinion of the rehabilitation counselor that appellant was vocationally capable of performing the optometric assistant position. Appellant did not submit any evidence or argument showing that he could not vocationally or physically perform the optometric assistant position.

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 position of optometric assistant represented his wage-earning capacity.[18] The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of optometric assistant and that such a position was reasonably available within the general labor market of his commuting area.[19] Therefore, the Office properly reduced appellant's compensation effective September 2, 2007 based on his capacity to earn wages as an optometric assistant.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[20] its regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[21] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his application for review within one year of the date of that decision.[22] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[23] The Board has held that the submission of evidence

[17] Appellant's vocational rehabilitation counselor conducted a labor market survey in May 2007, which confirmed that the optometric assistant position was reasonably available and that the entry pay level for the position was $11.75 per hour or $470.00 per week. The Board further notes that the record reveals that appellant gained extensive work experience in the optometry field for a variety of employers between 1986 and 2001.

[18] *See supra* note 9 and accompanying text.

[19] In addition, the Office properly applied the principles set forth in the *Shadrick* decision to calculate the reduction in appellant's compensation. *See supra* note 13 and accompanying text.

[20] Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[21] 20 C.F.R. § 10.606(b)(2).

[22] *Id*. at § 10.607(a).

[23] *Id*. at § 10.608(b).

or argument which repeats or duplicates evidence or argument already in the case record[24] and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.[25]

ANALYSIS -- ISSUE 2

In connection with his October 2007 reconsideration request, appellant, through his counselor, argued that he could not physically perform the optometric assistant position because Dr. Scott had restricted him from "prolonged sitting" but the position required "sitting most of the time." However, the submission of this argument would not require reopening of appellant's claim because he had already presented this argument and the Office had already considered and rejected it. As noted above, the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record does not constitute a basis for reopening a case.[26] Appellant argued that the medical evidence of record showed that he could not perform the optometric assistant position and that the optometric assistant position required more standing than indicated by the Office. This argument would not be relevant as he would not be competent to provide a medical opinion and he did not provide any support for his assertions regarding the nature of the optometric assistant position. The Board has held that submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.[27]

Appellant has not established that the Office improperly denied his request for further review of the merits of its August 16, 2007 decision under section 8128(a) of the Act, because the evidence and argument he submitted did not to show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or constitute relevant and pertinent new evidence not previously considered by the Office.

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation effective September 2, 2007 based on his capacity to earn wages as an optometric assistant. The Board further finds that the Office properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

[24] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

[25] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

[26] *See supra* note 24 and accompanying text.

[27] *See supra* note 25 and accompanying text. The Board has held that a nonphysician cannot render an opinion on a medical matter. *Arnold A. Alley*, 44 ECAB 912, 920-21 (1993). Appellant submitted a July 30, 2006 report of Dr. Scott but this report had already been in the record. He also submitted an August 7, 2007 report of Dr. Scott but this report was similar to other reports of Dr. Scott which were already in the record.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' December 7 and August 16, 2007 decisions are affirmed.

Issued: November 17, 2008
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board