

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DARRYL LEGGETT and DEPARTMENT OF DEFENSE,  
DEFENSE LOGISTICS AGENCY, Philadelphia, PA

*Docket No. 98-1531; Submitted on the Record;  
Issued April 4, 2000*

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DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation benefits effective March 30, 1997 based on its determination that the position of a part-time cashier represented his wage-earning capacity.

On December 21, 1994 appellant, then a 42-year-old motor vehicle operator, sustained an injury to his lower back while in the performance of duty. He sought medical care from Dr. Larry Finkelstein, an osteopath, on January 5, 1995. On March 10, 1995 the Office accepted appellant's claim for lumbar sprain/strain and paid appropriate compensation.<sup>1</sup>

On May 4, 1995 Dr. Finkelstein opined that appellant was unable to work since he could not lift, bend or stoop. By letter dated June 8, 1995, the Office referred appellant for a second opinion evaluation to Dr. Erwin R. Schmidt, a Board-certified orthopedic surgeon. On June 26, 1995 Dr. Schmidt concluded that appellant was disabled and could not work. He recommended continuing physical therapy. In a CA-20a form dated August 22, 1995, Dr. Finkelstein diagnosed lumbar strain and herniated disc and indicated that appellant's lumbar strain was due to the work-related injury. He indicated that appellant's disability would continue for 90 days or longer and that he could return to work on approximately January 1, 1996. Dr. Finkelstein recommended continuing physical therapy three times per week.

By report dated February 14, 1996, Dr. Finkelstein diagnosed chronic lumbar sprain and strain with history of herniated disc and recommended aquatic physical therapy. On March 4, 1996 Dr. Schmidt performed a new examination of appellant and determined that appellant could work four hours per day with physical restrictions. Restrictions were noted as: "lifting 20 [to] 30 pounds occasionally; standing -- 30 minutes (change position); bending occasionally; twisting/reaching -- ok."

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<sup>1</sup> The record indicates that appellant also had a low back injury in 1985 and 1991.

By letter dated June 7, 1996, the Office referred the case for vocational rehabilitation. On June 5, 1996 Dr. Schmidt completed a work restriction evaluation in which he noted appellant's work restrictions as follows: appellant should change his position approximately every 30 minutes; could lift 10 to 20 pounds occasionally; 10 pounds frequently, 20 pounds occasionally. He further indicated that appellant could perform repetitive motions of the wrist and elbow. Appellant was capable of working eight hours per day but should start working four hours for one month, six hours for one month and eight hours thereafter. Dr. Schmidt indicated that the work restrictions were indefinite. In a June 10, 1996 report, he noted no radiculopathy in either lower extremity, strength and sensation was normal, straight leg raising test was negative, standing position showed 60 percent of flexion and lateral bending of 20 percent. Dr. Schmidt further indicated that appellant could begin looking for a job that was sedentary light duty, limited lifting to 10 pounds frequently and occasionally 20 pounds. He advised appellant would need to change positions on a regular basis. Dr. Schmidt further indicated that maximum medical improvement would be achieved within three months.

On July 3, 1996 the rehabilitation counselor noted that the employing establishment did not have a limited-duty position for appellant. Dr. Finkelstein referred appellant to Dr. Joseph S. Lubeck, a Board-certified neurologist. On July 29, 1996 Dr. Lubeck examined appellant and noted that he was at a loss to explain appellant's ongoing symptoms on examination. Dr. Lubeck performed an electromyogram (EMG), which revealed no evidence of lumbosacral radiculopathy or nerve injury in the right leg.

Based on the results of the vocational and psychological testing, appellant's rehabilitation counselor assisted appellant in his job search by providing him with notice of several job openings. By report dated January 16, 1997, the rehabilitation counselor indicated that placement was unsuccessful and that she was closing the file. Accompanying her report was a job classification for the positions of cashier I and II. The physical demands of the cashier I job were described as sedentary with lifting of no more than 10 pounds. Cashier II was described as light work with lifting of no more than 20 pounds. The rehabilitation counselor further indicated that most of these positions would provide a sit/stand option. The job was primarily performed inside. Based on appellant's educational level and the results of his vocational testing, the rehabilitation specialist determined that appellant should be able to perform the duties of this position. She further determined that this job was reasonably available within a 35-mile commuting area in Philadelphia, Pennsylvania based on contact with the Pennsylvania Department of Labor and Industry. On January 27, 1997 the Office determined that rehabilitation efforts were unsuccessful and recommended that the case proceed with a loss of wage-earning capacity determination. The Office computed appellant's loss of wage-earning capacity based on 20, 30 and 40 hours of employment per week.

By a notice of proposed reduction dated January 28, 1997, the Office advised appellant of its proposal to reduce his compensation on the basis that he was no longer totally disabled and that he was able to earn the wages of a part-time cashier.

In a letter received by the Office on March 3, 1997, appellant disagreed with the Office's determination that he could work as a cashier. Appellant challenged the validity of Dr. Schmidt's June 10, 1996 report arguing that an Office rehabilitation consultant had told the

physician what to say. Appellant further submitted a February 20, 1997 report from Dr. Finkelstein, who had treated appellant on February 7 and 20, 1997 following an exacerbation of his low back pain. Dr. Finkelstein indicated that appellant was “currently under disability” and recommended further aqua therapy.

By decision dated March 14, 1997, the Office finalized the loss of wage-earning capacity determination and adjusted appellant’s compensation effective March 30, 1997. The Office found that Dr. Finkelstein’s report did not reflect a thorough examination as it recited complaints of pain without providing any objective findings. The Office found that the reports of Dr. Schmidt represented the weight of the medical opinion evidence inasmuch as the physician had examined appellant on three occasions and provided opinions supported by objective evidence and medical reasoning. The Office further determined that the position of part-time cashier, with wages of \$105.26 per week, fairly and reasonably represented appellant’s wage-earning capacity. The Office found that appellant had an 18 percent wage-earning capacity and reduced his compensation accordingly.<sup>2</sup>

Appellant requested and received a hearing by an Office hearing representative on October 28, 1997.

Appellant submitted an April 23, 1997 medical report from Dr. Finkelstein requesting authorization for six months of aquatic therapy. Dr. Finkelstein stated that appellant’s “essential functional deficits are those of daily routine activities such as walking and standing, bending and stooping which are restricted due to the patient’s low back pain.” Dr. Finkelstein added that appellant also had degenerative changes of the lumbar spine. In a July 1, 1997 report, Dr. Finkelstein again requested that the Office authorize aquatic therapy.

By decision dated January 22, 1998, the Office hearing representative found that the position of part-time cashier fairly and reasonably represented appellant’s wage-earning capacity. The hearing representative found that the position conformed with Dr. Schmidt’s work restrictions and was reasonably available within appellant’s commuting area.

The Board finds that the position of part-time cashier fairly and reasonably represents appellant’s wage-earning capacity.

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction of benefits.<sup>3</sup> Wage-earning capacity is a measure of the employee’s ability to earn wages in the open labor market under normal employment conditions given the nature of the employee’s injuries and the degree of physical impairment, his or her usual employment, the employee’s age and vocational qualifications, and the availability of suitable employment.”<sup>4</sup>

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<sup>2</sup> On June 3, 1997 appellant retired from the employing establishment.

<sup>3</sup> *James B. Christenson*, 47 ECAB 775, 778 (1996).

<sup>4</sup> *Samuel J. Chavez*, 44 ECAB 431 (1993); *see* 5 U.S.C. § 8115(a); 2 A. Larson, *The Law of Workmen’s Compensation* § 57.22 (1989); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814 (December 1993).

Accordingly, the evidence must establish that jobs in the position selected for determining wage-earning capacity are reasonably available in the general labor market in the commuting area in which the employee lives. Generally, efforts to reemploy an injured worker are focused on reemployment possibilities with the employing establishment.<sup>5</sup> Where reemployment with the employing establishment is not possible, the vocational rehabilitation counselor assists in either additional job training or in job placement efforts. Where vocational rehabilitation efforts are unsuccessful, Office procedures instruct the vocational rehabilitation counselor to identify three positions from the Department of Labor's Directory of Occupational Titles and obtain information from the state employment service with respect to the availability and wage rate of the position.<sup>6</sup> The procedures provide for the claims examiner to select one of the positions in view of such factors as appellant's skills, aptitude, mental alertness, personality factors, etc. and to determine the medical suitability taking into consideration medical conditions due to the accepted work-related injury and any preexisting medical condition. Medical conditions arising subsequent to the work-related injury or disease are specifically excluded from consideration.<sup>7</sup> 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.<sup>8</sup>

In the present case, the Office contacted appellant's employing establishment to determine the feasibility of returning him to work in a limited-duty capacity. As appellant was not able to return to modified work at the employing establishment, the Office properly referred him for vocational services. Once rehabilitation efforts were found to be unsuccessful, the case was developed to determine appellant's wage-earning capacity.

The Office obtained a March 4, 1996 work restriction evaluation in which Dr. Schmidt stated that appellant could return to work, albeit with restrictions. Restrictions were noted as: "lifting 10 pounds frequently, lifting 20 pounds occasionally, change position approximately every 30 minutes." Dr. Schmidt concluded that appellant could perform repetitive motions of the wrist and elbows. Dr. Schmidt indicated that appellant should initially work four hours per day for one month, six hours per day for one month, and eight hours thereafter. The rehabilitation specialist reviewed appellant's prior work experience, vocational aptitude and, based on a labor market survey of the Philadelphia area, concluded that the position of part-time cashier was reasonably available. The physical demands and wage rates of the position were noted.

The Board finds that the Office met its burden of proof in reducing appellant's compensation. While appellant's treating physician, Dr. Finkelstein, indicated in a February 20,

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<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.8136(b)(December 1993).

<sup>6</sup> See *Carla Lechter*, 46 ECAB 452 (1995); *Harold D. Snyder*, 38 ECAB 763 (1987); see also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8 (December 1993).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(d) (December 1993).

<sup>8</sup> *Albert C. Shadrick*, 5 ECAB 376 (1953).

1997 report, that appellant had an exacerbation of low back pain and remained disabled, he did not provide any discussion for his conclusion nor did he list any examination or diagnostic test findings to support his conclusions. On the other hand, Dr. Schmidt provided a June 5, 1996 work restriction evaluation and a June 10, 1996 report noting restrictions consistent with the selected cashier position and noting findings that supported his conclusion that appellant could work within restrictions. Appellant's contention on appeal, that Dr. Schmidt's opinion was influenced by the rehabilitation consultant, is without merit as the record is devoid of evidence of any bias or influence.<sup>9</sup> Furthermore, Dr. Lubeck, in his July 29, 1996 report noted that he could not explain appellant's continuing symptoms and that an EMG was negative. Thus, the Office properly relied on the opinions of Dr. Schmidt, a Board-certified orthopedic surgeon, in finding that appellant was medically able to perform the selected position. Additionally, the record indicates that the selected position of part-time cashier was within appellant's physical limitations and vocational ability, and was reasonably available in the labor market.<sup>10</sup> Consequently, under 5 U.S.C. § 8115, the Office properly determined that appellant's wage-earning capacity was represented by the position of part-time cashier.<sup>11</sup>

Since the Office met its burden of proof in finding that appellant's wage-earning capacity was represented by the position of part-time cashier, the burden shifted to appellant to establish that he was unable to perform the selected position.<sup>12</sup> As appellant subsequently presented no rationalized medical evidence supporting his contention that he was unable to perform the job of a part-time cashier, the Office properly declined to modify its determination.

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<sup>9</sup> See *Anthony La-Grutta*, 37 ECAB 602 (1986). Appellant also argues that Dr. Schmidt erroneously referred to a motorcycle accident in his report. In the June 10, 1996 opinion, Dr. Schmidt referred to a May 30, 1996 motor vehicle accident, noting that an x-ray was taken at Graduate Hospital, which revealed neck strain only. A review of that report reveals that the motor vehicle accident had no impact on Dr. Schmidt's finding that appellant could return to work.

<sup>10</sup> Although appellant asserted that he was unable to secure employment, this does not establish that work was not available in appellant's commuting area. *Steve Costello*, 37 ECAB 251 (1985).

<sup>11</sup> The Board notes that subsequent to the Office's January 22, 1998 decision, the Office received medical evidence. The Board, however, cannot consider evidence on appeal that was not before the Office at the time of the final decision; see *Dennis E. Maddy*, 47 ECAB 259 (1995). 20 C.F.R. § 501.2(c).

<sup>12</sup> See *Wentworth M. Murray*, 7 ECAB 570 (1955).

The January 22, 1998 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, D.C.  
April 4, 2000

David S. Gerson  
Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member