U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CLARENCE N. MELHINCH and U.S. POSTAL SERVICE,
POST OFFICE, Cleveland, OH

Docket No. 98-1928; Submitted on the Record;
Issued December 8, 2000

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
VALERIE D. EVANS-HARRELL

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's monetary compensation on the grounds that the selected position of sorter fairly and reasonably represents appellant's wage-earning capacity.

The Office accepted that on March 3, 1980 appellant, then a 39-year-old letter carrier, sustained low back strain while lifting sacks of mail.[1] Appellant's claim was later expanded to include a herniated disc at L5 and aggravation of spondylolisthesis. Appellant stopped work on the date of injury and did not return; he was placed on the periodic rolls for receipt of compensation effective September 3, 1980.

Appellant was initially treated for his March 3, 1980 back injury by Dr. Walter Wozniak, presently deceased, who diagnosed lumbosacral strain, a herniated disc at L5 and spondyloarthritis. Dr. Wozniak continued to treat appellant for his back conditions and continued to submit reports to the Office supporting total disability from work.

On February 19, 1985 appellant was examined by Dr. Ralph A. Reilly, a Board-certified orthopedic surgeon, for a second opinion. In an April 11, 1985 report, Dr. Reilly noted his findings upon examination, diagnosed cervical spondylosis and opined that appellant was deliberately trying to mislead him. Dr. Reilly opined that there were no objective findings to substantiate appellant's low back complaints and no evidence to support a diagnosis of a herniated lumbar disc or spondyloarthritis and he indicated that appellant was capable of returning to work with minor restrictions related to his cervical spine.

On February 20, 1985 Dr. Wozniak opined that appellant had reached maximum medical improvement and could return to sedentary work four hours per day with activity restrictions.

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[1] Appellant had experienced several prior work injuries which were accepted by the Office, including traumatic myositis on June 28, 1977, back and cervical strain on August 12, 1977 and lumbosacral strain on December 23, 1977.

Based upon Dr. Reilly's recommendation, appellant was referred, with a statement of accepted facts, to Dr. David P. Agle, a Board-certified psychiatrist, to determine whether appellant had any emotional condition. By decision dated January 9, 1986, Dr. Agle opined that, while psychogenic factors might have contributed to the onset of appellant's condition, he currently did not have a psychiatric condition. Dr. Agle recommended vocational rehabilitation, but noted that appellant's prognosis for success was guarded.

The Office thereafter referred appellant for vocational rehabilitation and a rehabilitation specialist (RS) was assigned. The RS met with appellant initially on August 21, 1996.[2] The RS also contacted the employing establishment for possible reemployment opportunities but was advised that appellant had been forced to resign because of suspicion of committing a felony. The employing establishment declined to reemploy appellant and the rehabilitation effort was placed in an interrupted status pending an investigation. Appellant rehabilitation file was closed on May 11, 1987.

The Office determined that a conflict in medical opinion evidence existed between Drs. Wozniak and Reilly, and in accordance with 5 U.S.C. § 8123, appellant was referred to an impartial specialist for resolution of the conflict.[3]

The Office thereafter referred appellant for evaluation to Dr. Donald L. Fisher, a Board-certified orthopedic surgeon, for another second opinion medical examination. By report dated November 11, 1994, Dr. Fisher diagnosed chronic cervical, thoracic and lumbar strain, noted that appellant had not had any medical treatment for five years and noted that he had no objective findings to support organic lesions or his subjective complaints. Dr. Fisher opined that, based upon his findings on examination, appellant was physically capable of returning to work eight-hours per day with restrictions on kneeling, standing, bending, twisting, reaching and lifting. A work restriction evaluation was completed to that effect on April 17, 1995.

On June 5, 1995 appellant's rehabilitation case was reopened based upon Dr. Fisher's second opinion report. The employing establishment again declined to reemploy appellant so that the rehabilitation effort was directed to placement with a new employer. After several failed attempts by the rehabilitation counselor (RC) to establish contact with appellant and after a finding of obstruction, the Office advised appellant by letter dated October 10, 1995 of the necessity of cooperating with the rehabilitation process. On August 13, 1996 appellant signed a placement plan targeting the positions of checker II, sorter and telemarketer and the RC continued to assist appellant in finding employment within his restrictions. The RC noted that appellant's long absence from the job market, his felony conviction and his limitation to sedentary employment were barriers to his securing employment. However, the RC advised that appellant had returned to work on January 23, 1997 as a telephone solicitor working five hours

[2] The record indicated that appellant was a high school graduate and had had previous jobs as a laborer, a boilerman with the U.S. Navy and an insurance salesman. He had worked as a letter carrier since 1966.

[3] The Office referred appellant to Dr. Shamsi Lashgari, a Board-certified orthopedic surgeon, whose report is not currently of record. However, a work restriction evaluation from Dr. Lashgari, dated December 3, 1989, indicated that appellant could work four to six hours per day with restrictions. As Dr. Lashgari's impartial medical examination report was evidently not submitted to the record, the Office determined that referral to another physician was warranted.

per day, earning $4.47 per hour. The Office determined that this was below appellant's wage-earning capacity and the rehabilitation effort continued. However, on April 10, 1997 the rehabilitation effort was closed and a constructed wage-earning capacity was recommended. The RC advised that two positions, checker II and sorter were suitable to appellant's physical limitations and were reasonably available within his commuting area. The RC noted that the position of sorter (clerical) "Sorts data, such as forms, correspondence, checks, receipts, bills and sales tickets, into specified sequence or grouping," and required 30 days to 3 months of vocational preparation. Other jobs identified as suitable for appellant included receptionist, which was marked as requiring three to six months vocational preparation, and checker II, data clerk, proofreader, report checker, which also was marked as requiring three to six months vocational preparation. The RC indicated that appellant's past work as a letter carrier at the Elyria employing establishment, which required sorting letters into letter cases, qualified him for the position. He further indicated that this job was being performed in sufficient numbers so as to make it reasonably available to appellant within his commuting area, citing the Ohio Labor Market Information from its State Employment Service.

On May 12, 1997 the Office issued a notice of proposed reduction of compensation advising appellant that his compensation would be reduced based upon his ability to earn wages in the position of sorter. The Office noted that the second opinion report from Dr. Fisher established that he could work eight-hours per day with certain physical restrictions and that the position of sorter was the most medically suitable to appellant's partially disabled condition. It further noted that such a position was reasonably available to appellant on a full-time basis within his commuting area, according to the Labor Market Survey from the State Employment Service, and that it was commensurate with appellant's education and transferable skills. Appellant was allowed 30 days within which to object of provide comment.

Appellant responded by letter dated May 15, 1997, advising that he disagreed with the Office's proposed action stating that Dr. Fisher did not give him a fair evaluation, that the position selected required the frequent use of his arm and the turning of his head which he felt he was unable to do and that he was unaware that his current position of telephone solicitor was not acceptable.

In support of these allegations, appellant submitted a report from Dr. Darshan Mahajan, a Board-certified psychiatrist and neurologist, which noted that since appellant fell at work appellant had experienced pain in his neck and upper extremities. Dr. Mahajan diagnosed recurrent cervical strain with a history of neck and back recurrent injuries with chronic pain syndrome. He noted that appellant had significant psychological overlay and did not give very good effort during testing. Appellant's work capacity was not addressed.

On June 13, 1997 the Office finalized its proposed reduction of compensation finding that Dr. Mahajan's report did not alter the Office's decision that the position of sorter fairly and reasonably represented appellant's wage-earning capacity and it reduced his compensation effective June 22, 1997.

Appellant disagreed with this decision and he requested a hearing, which was held on February 26, 1998. At the hearing appellant's representative argued that the position selected by the Office did not exist in appellant's commuting area, that his position as telemarketer represented his wage-earning capacity, that the Office did not appropriately develop appellant's

psychiatric condition and that appellant was not appropriately advised that the position of sorter was medically suitable to his partially disabled condition. Appellant testified that he believed a sorter would perform duties sorting mail such as he had in the employing establishment, but he claimed that he was unable to find such a job as the employing establishment would not rehire him due to his felony conviction. Appellant argued, however, that he could not lift packages due to his weight lifting restriction. Appellant claimed that the position he was performing as telemarketer was acceptable, that he had sustained another back injury on May 9, 1998 and that he had not received any treatment for his back since 1988 or 1989 when Dr. Wozniak died until his recent injury.

Also submitted at the hearing was a March 24, 1998 letter to the Office from the employing establishment which noted that appellant was not rehired due to two felony convictions, but noting that the position of sorter was most vocationally suitable for appellant as its duties were within appellant's restrictions and it included appellant's "transferrable skills and past work experience."

By decision dated April 30, 1998, the hearing representative affirmed the June 13, 1997 Office decision finding that the position of sorter fairly and reasonably represented appellant's wage-earning capacity.

The Board finds that the Office did not meet its burden of proof to modify appellant's compensation benefits.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[4] After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[5] This burden includes cases in which the Office terminates compensation under section 8106(c) of the Federal Employees' Compensation Act for refusing to accept suitable work or neglecting to perform suitable work.[6] In these cases the Office must first establish that the work offered is suitable.[7] To establish the suitability of an offered position, the Office must first establish that the employee has the physical ability to perform such a position and that is a medical question which can only be established by the medical evidence.[8] The Office must establish this through the weight of the medical evidence of record. The Office has not met this burden by relying on the additional second opinion medical examination of Dr. Fisher.

The Board has frequently explained that, when there exist opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for

[4] *Harold S. McGough*, 36 ECAB 332 (1984).

[5] *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

[6] *See Henry P. Gilmore*, 46 ECAB 709 (1995).

[7] *David P. Camacho*, 40 ECAB 267 (1988); *Harry B. Topping, Jr.*, 33 ECAB 341 (1981).

[8] *H. Adrian Osborne*, 48 ECAB 556 (1997); *Robert Dickerson*, 46 ECAB 1002 (1995).

the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual and medical background, must be given special weight.[9] In this case, however, Dr. Lashgari, the impartial medical examiner, failed to submit a medical narrative addressing the issues in question to the record. The Office, instead of referring appellant for another impartial medical examination to resolve the existing conflict in medical opinion evidence, referred appellant for a second opinion examination with Dr. Fisher. Dr. Fisher's status, therefore, is a second opinion evaluating physician and not an impartial medical specialist. Dr. Fisher's report concluded that appellant could perform an eight-hour per day sedentary job with lifting limits and found no organic lesions which would explain appellant's continued subjective complaints. As this report constitutes no more than another second opinion, it does not outweigh the other medical evidence of record, nor does it resolve the conflict that the Office had determined existed, *i.e.*, the opinion of Dr. Wozniak, which continued to support continuing disability and the opinion of Dr. Reilly, which did not. The Office, therefore, has not established by the weight of the medical opinion evidence that appellant was partially disabled and had the capacity to perform some type of work activity for eight hours per day and consequently did not meet its burden of proof to modify appellant's monetary compensation through a suitable work/wage-earning capacity determination.

Accordingly, the decision of the Office of Workers' Compensation Programs dated April 30, 1998 is hereby reversed.

Dated, Washington, DC
December 8, 2000

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

Valerie D. Evans-Harrell
Alternate Member

[9] *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).