

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MARK H. DEVER and DEPARTMENT OF THE INTERIOR,  
INDIANA DUNES NATIONAL LAKESHORE, Porter, IN

*Docket No. 02-2385; Submitted on the Record;  
Issued February 12, 2003*

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DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation benefits based on its determination that the selected position of Cashier II represented his wage-earning capacity.

This is the third appeal in this case.<sup>1</sup> On the first appeal, the Board reviewed an October 18, 1996 decision, by which an Office hearing representative found that the position of Cashier II fairly and reasonably represents appellant's wage-earning capacity beginning May 26, 1996. By decision dated January 27, 2000, the Board affirmed the Office's October 18, 1996 decision.<sup>2</sup>

Subsequent to the Board's January 27, 2000 decision, by letter dated March 7, 2000, the Office informed appellant that, as requested, his prior 1983 and 1987 claims for various right knee injuries had been combined under his claim number A9-358161, which already contained

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<sup>1</sup> Docket Nos. 98-396 & 98-522 (issued January 27, 2000); Docket No. 01-1453 (issued July 29, 2002).

<sup>2</sup> In its October 14, 1999 decision, the Board also affirmed decisions of the Office dated June 12, September 23, and October 28, 1997, on the separate issue of whether appellant met his burden of proof to establish that he was disabled for the period March 23, 1992 to July 12, 1993.

both his April 29, 1991 left elbow claim and July 29, 1991 right knee claim.<sup>3</sup> By letter dated October 30, 2000, appellant requested reconsideration of the Office's determination that he maintained the wage-earning capacity of a Cashier II, stating that the consideration of his right knee condition by the Office would cause the Office to modify its prior decision.

In a decision dated February 7, 2001, the Office denied merit review of appellant's claim on the grounds that the evidence submitted in support of the request for reconsideration was immaterial in nature. The Office specifically found that the issue of appellant's right knee condition had been fully addressed in the prior decisions, and noted that the Cashier II position was basically sedentary in nature. The Office concluded that, as appellant had submitted no new relevant evidence, and the arguments concerning his right knee condition had been previously considered, further review was not warranted.

On appeal for the second time, the Board reviewed the Office's February 7, 2001 decision and found that the Office improperly denied merit review of appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a). The Board specifically held that the consolidation, for the first time, of all of appellant's right knee claims and accompanying evidence, effectively constituted new and relevant evidence which was not considered by the Office in its prior decisions. In addition, the Board noted that the Office, in its decision denying reconsideration, incorrectly characterized the position of Cashier II as basically sedentary. The Department of Labor's *Dictionary of Occupational Titles* describes the position of Cashier II as "light," which contemplates walking or standing to a significant degree.<sup>4</sup> This is important as the record also contains medical evidence restricting appellant to three hours of intermittent walking or standing each day. By decision dated July 29, 2002, the Board reversed the Office's

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<sup>3</sup> On December 8, 1983 appellant filed a claim numbered A9-279213, alleging that he sustained torn cartilage in his right knee on November 29, 1983. In decisions dated February 13 and October 1, 1984, March 19 and October 25, 1985, the Office denied appellant's claim on the grounds that he failed to meet his burden to establish that his injury was causally related to his employment. On appeal, by decision dated March 31, 1986, the Board affirmed the Office's prior denials. Appellant requested reconsideration, and in a decision dated July 17, 1987, the Office declined to modify its prior decision. On appeal, by decision dated January 12, 1988, the Board affirmed the Office's July 17, 1987 decision. On May 26, 1987 appellant filed a claim number A9-311431 alleging that on April 24, 1987 he sustained a right knee injury in the performance of duty. The Office initially accepted appellant's claim for a right acute anterior cruciate ligament rupture, but later set its acceptance aside as premature. On October 8, 1987 appellant filed a claim numbered A9-315172 alleging that on October 5, 1987 he sustained additional right knee injuries in the performance of duty. The Office subsequently approved appellant's claim for a right knee strain on April 8, 1988. On June 21, 1991, under claim number A9-375612, the Office accepted that on May 2, 1991 appellant sustained injury to his left elbow and later expanded its acceptance on June 21, 1993 to include chronic tendinitis of the left elbow. On September 15, 1991 the Office accepted under claim number A9-358161 that appellant sustained a right knee sprain on July 29, 1991. All of these claims are now contained in the record currently before the Board. In addition to these claims, the record contains evidence that appellant has filed as many as sixteen additional claims for bee stings and head, neck, back, wrist and shoulder injuries.

<sup>4</sup> 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 or her 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. *Richard Alexander*, 48 ECAB 432 (1997).

February 7, 2001 decision and remanded the case for a full merit review and a new decision on the issue of whether the position of Cashier II represents appellant's wage-earning capacity. The complete facts of this case are set forth in the Board's January 27, 2000 and July 29, 2002 decisions and are herein incorporated by reference.

On remand, by decision dated September 9, 2002, the Office found that a review of the case file showed that the issue of appellant's right knee condition had been fully addressed when selecting the Cashier II position. The Office further found that the Cashier II position was basically sedentary in nature, and that, therefore, the effect of any demands concerning appellant's knee was not an issue.

The Board finds that the Office did not meet its burden of proof in this case.

Once the Office accepts a claim, it has the burden of proof to establish that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.<sup>5</sup>

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 or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent the employee's wage-earning capacity, or if the employee has no actual wages, the wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, the employee's usual employment, age, qualifications for other employment, the availability of suitable employment, and other factors and circumstances which may affect his wage-earning capacity in his or her disabled condition.<sup>6</sup> In addition, the Board has previously held that in determining a loss of wage-earning capacity where the residuals of an injury prevent an employee from performing her regular duties, the impairments which preexisted the injury, in addition to the injury-related impairments, must be taken into consideration in the selection of a job within his work tolerance. It is only subsequently acquired impairments unrelated to the injury which are excluded from consideration in the determination of work capabilities.<sup>7</sup>

Contrary to the Office's assertions, while the Office previously addressed the issue of appellant's right knee injury and its potential effect on his ability to perform the duties of the selected position of Cashier II, at the time of the final October 18, 1996 Office decision on the issue of appellant's loss of wage-earning capacity, the only knee injury to have been doubled with appellant's left elbow claim was his July 29, 1991 knee injury claim, which could not be considered by the Office because it occurred subsequent to appellant's accepted April 29, 1991 left elbow injury.<sup>8</sup> As the record did not contain the complete medical evidence pertaining to appellant's 1983 and 1987 knee injuries, the Office could not possibly have fully considered these injuries in making its determination that the position of Cashier II is medically suitable for

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<sup>5</sup> *James Henderson, Jr.*, 51 ECAB 268 (2000); *Philip S. Deering*, 47 ECAB 692 (1996).

<sup>6</sup> 5 U.S.C. § 8115

<sup>7</sup> *James Henderson, Jr.*, *supra* note 5; *William Ray Fowler*, 31 ECAB 1817 (1980).

<sup>8</sup> *Pope D. Cox*, 39 ECAB 143 (1987).

appellant.<sup>9</sup> For this reason, the Board specifically instructed the Office to consider this additional evidence on remand. In addition, the Board notes that the Office, in its September 9, 2002 decision denying modification of its prior wage earning capacity decision, again incorrectly characterized the position of Cashier II as basically sedentary<sup>10</sup> and referenced a Form CA-66 contained in the record in support of its assertion. However, a review of the Form CA-66 reveals that it specifically lists the Cashier II position as “light,” not sedentary, and a “light” designation may include walking or standing to a significant degree.<sup>11</sup> As the record contains medical evidence restricting appellant to three hours of intermittent walking or standing each day, and as the Form CA-66 upon which the Office relied does not indicate the degree of walking or standing that may be involved in the Cashier II position, but clearly indicates that the position is designated “light,” which by definition may include walking or standing to a significant degree, the Office was incorrect in stating that “the effect of any demands concerning appellant’s knee was not an issue” in this case.<sup>12</sup> As the Office did not weigh the medical evidence relative to appellant’s accepted conditions and his preexisting knee conditions, and further mischaracterized the physical requirements of the selected Cashier II position, the Office did not meet its burden of proof to reduce appellant’s compensation benefits.

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<sup>9</sup> In determining loss of wage-earning capacity, physical impairments which preexisted the accepted condition must be taken into consideration when selecting a job for purposes of determining wage-earning capacity. *Pope D. Cox, supra* note 8.

<sup>10</sup> The *Dictionary of Occupational Titles* defines sedentary work as follows: Exerting up to 10 pounds of force occasionally (Occasionally: activity or condition exists up to 1/3 of the time) and/or a negligible amount of force frequently (Frequently: activity or condition exists from 1/3 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. Jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met.

<sup>11</sup> The *Dictionary of Occupational Titles* describes light work as follows: Exerting up to 20 pounds of force occasionally, and/or up to 10 pounds of force frequently, and/or a negligible amount of force constantly. (Constantly: activity or condition exists 2/3 or more of the time) to move objects. Physical demand requirements are in excess of those for sedentary work. Even though the weight lifted may be only a negligible amount, a job should be rated light work: (1) when it requires walking or standing to a significant degree; or (2) when it requires sitting most of the time but entails pushing and/or pulling of arm or leg controls; and/or (3) when the job requires working at a production rate pace entailing the constant pushing and/or pulling of materials even though the weight of those materials is negligible. NOTE: The constant stress and strain of maintaining a production rate pace, especially in an industrial setting, can be and is physically demanding of a worker even though the amount of force exerted is negligible.

<sup>12</sup> *Richard Alexander, supra* note 4.

The decision of the Office of Workers' Compensation Programs dated September 9, 2002 is hereby reversed.

Dated, Washington, DC  
February 12, 2003

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member