

**United States Department of Labor
Employees' Compensation Appeals Board**

D.C., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Cleveland, OH, Employer**

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**Docket No. 08-670
Issued: January 23, 2009**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 9, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' February 21 and October 18, 2007 merit decisions, concerning his wage-earning capacity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly reduced appellant's compensation to zero effective February 21, 2007 based on his capacity to earn wages as a small parts assembler.

FACTUAL HISTORY

The Office accepted that on May 31, 1994 appellant, then a 27-year-old casual mail clerk, sustained a lumbar strain, herniated disc at L4-5 and disc desiccation at L4-5 due to trying to separate two mail hampers. Appellant stopped work on May 31, 1994 and his temporary employment status ended on June 24, 1994. The Office paid him compensation for periods of disability. On December 17, 2001 Dr. Susan Stephens, an attending Board-certified orthopedic

surgeon, performed bilateral laminectomies, foraminotomies and medial facetectomies at L4-5 and S1. These procedures were authorized by the Office.

In November 2004, the Office referred appellant to Dr. Manhal Ghanma, a Board-certified orthopedic surgeon, for a second opinion evaluation. On November 22, 2004 Dr. Ghanma stated that appellant no longer had a lumbar strain or herniated disc at L4-5 as the disc was surgically removed. He indicated that diagnostic testing did not show any evidence of nerve compression. Dr. Ghanma determined that appellant could perform the duties of his former job of casual mail clerk and noted that his only restriction was no lifting of over 100 pounds.

The Office sent a copy of Dr. Ghanma's report to Dr. Stephens and asked her whether she agreed with his conclusions with respect to appellant's ability to work. On March 14, 2005 Dr. Stephens disagreed with Dr. Ghanma's conclusions. She stated that appellant continued to have postoperative pain due to his December 2001 surgery and posited that he was totally unable to return to work due to significant pain and dysfunction and dependency on medication.

The Office determined that there was a conflict in the medical evidence between Dr. Ghanma and Dr. Stephens regarding appellant's ability to work. It referred him to Dr. Matthew Levy, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion on this matter. On November 15, 2005 Dr. Levy discussed appellant's medical history and reported findings on examination. He indicated that appellant's physical examination was marked by significant pain behaviors, poor effort at manual muscle testing and inconsistent answers through sensory testing. Dr. Levy stated that appellant's objective findings did not support any work-related residuals from his accepted employment injuries and opined that, due to the limited findings, he could perform his former occupation as a casual mail clerk. He stated that this determination was supported by the results of appellant's May 7, 2003 functional capacity evaluation, which showed him to be capable of performing medium duty work. Dr. Levy posited that appellant could return to medium duty work on a full-time basis.

On January 12, 2006 the Office requested that Dr. Levy provide a supplemental report indicating why appellant needed work restrictions if he had no remaining work-related residuals. On February 6, 2006 Dr. Levy stated that he erred when he posited that appellant no longer suffered from residuals of his work-related injury. He stated, "As a result of his allowed work conditions and the treatment thereof, [appellant] does continue to suffer from residuals of his work-related injury and as such he is able to return to medium[-]duty work as has been detailed in the functional capacity evaluation." In a February 6, 2006 work restrictions form, Dr. Levy stated that appellant could work for eight hours per day, lift up to 25 pounds, push or pull up to 50 pounds on wheels, engage in repetitive wrist and elbow motion for eight hours per day, walk or stand for two hours per day, sit for eight hours per day, reach above his shoulders for eight hours per day and twist for two hours per day.

In June 2006, appellant began to participate in a vocational rehabilitation plan. After he failed to find work through the program, appellant's vocational rehabilitation counselor determined in October 2006 that he was capable of performing the constructed position of small parts assembler at a median wage of \$550.00 per week. The position involved assembling small products and required standing and walking along with sitting. It required exerting up to

20 pounds of force and frequent use of the hands and arms. Appellant's counselor indicated that labor market sources showed that the position was available within appellant's commuting area. The Office began to question appellant's good faith in participating in the rehabilitation activities. Appellant submitted an October 23, 2006 note in which Dr. Stephens stated that he was under her care for a severe lumbar spine condition and noted that he was "unable to return to work at this time and it is unlikely that he will be able to return to work at all, considering his medical condition." In December 2006, the rehabilitation program was formally terminated.

In a January 9, 2007 letter, the Office advised appellant of its proposal to reduce his compensation based on his ability to work in the constructed position of small parts assembler.¹ It indicated that he was capable of working in the constructed position of small parts assembler for eight hours per day and could earn \$550.00 per week. The Office detailed calculations which showed that appellant's wage-earning capacity as a small parts assembler was far greater than the current salary of his date-of-injury job. It provided appellant with 30 days to submit evidence and argument if he disagreed with this proposed wage-earning capacity determination.

Appellant argued that he was not physically able to perform the small parts assembler position. He submitted a December 22, 2006 report in which Dr. Stephens stated that appellant continued to have chronic pain and indicated that he was unable to participate in rehabilitation program because "he really has a lot of pain and takes lots of medicine." Dr. Stephens indicated that physical examination of the lumbosacral spine revealed tenderness and decreased range of motion.

In February 21, 2007 decision, the Office reduced appellant's compensation to zero effective that date on the grounds that he was capable of working in the constructed position of small parts assembler for eight hours per day. It indicated that the opinion of Dr. Levy showed that he could perform the position and included calculations showing how his compensation would be reduced to zero based on its wage-earning capacity determination.

Appellant requested a hearing before an Office hearing representative. At the July 24, 2007 hearing, he repeated his assertions that he was not physically able to perform the small parts assembler position. Appellant contended that he had preexisting conditions, including emotional problems and a human immunodeficiency virus condition, which prevented him from performing the work. He claimed that he could not perform the sitting required by the position. After the hearing, appellant submitted a June 27, 2007 medical report indicating that he had lumbar facet blocks in his low back. In an October 18, 2007 decision, the Office hearing representative affirmed the February 21, 2007 decision.

LEGAL PRECEDENT

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.² Its

¹ Appellant had been unsuccessful in the job search he conducted with the help of his vocational rehabilitation counselor.

² *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.³

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.⁴ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.⁵ 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.⁶

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.⁷

Section 8123(a) of the Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."⁸ When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.⁹ In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the

³ See *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁴ See *Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

⁵ *Albert L. Poe*, 37 ECAB 684, 690 (1986), *David Smith*, 34 ECAB 409, 411 (1982).

⁶ *Id.*

⁷ 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).

⁸ 5 U.S.C. § 8123(a).

⁹ *William C. Bush*, 40 ECAB 1064, 1975 (1989).

conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹⁰

ANALYSIS

The Office accepted that on May 31, 1994 appellant sustained a lumbar strain, herniated disc at L4-5 and disc desiccation at L4-5 due to trying to separate two mail hampers. On December 17, 2001 appellant underwent bilateral laminectomies, foraminotomies and medial facetectomies at L4-5 and S1. The Office paid him compensation for periods of disability.

After the Office received information 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, appellant's vocational rehabilitation counselor determined that he was able to perform the position of small parts assembler. The position involved assembling small products and required standing and walking along with sitting. It required exerting up to 20 pounds of force and frequent use of the hands and arms. Labor market sources showed the position was available in sufficient numbers so as to make it reasonably available within appellant's commuting area and that the median wage for the position was \$550.00 per week. The Office properly relied on the opinion of the rehabilitation counselor that appellant was vocationally capable of performing the small parts assembler position.

A review of the evidence reveals that appellant was physically capable of performing the small parts assembler position. The Office properly based its determination that he could perform the position on the opinion of Dr. Levy, a Board-certified orthopedic surgeon, who served as an impartial medical specialist. It properly referred appellant to Dr. Levy after it determined that there was a conflict in the medical opinion between Dr. Ghanma, a Board-certified orthopedic surgeon, who served as an Office referral physician, and Dr. Stephens, an attending Board-certified orthopedic surgeon.¹¹

In his November 15, 2005 and February 6, 2006 reports, Dr. Levy determined that appellant's medical findings showed that he was capable of performing medium-duty work. In a February 6, 2006 work restrictions form, he stated that appellant could work for eight hours per day, lift up to 25 pounds, push or pull up to 50 pounds on wheels, engage in repetitive wrist and elbow motion for eight hours per day, walk or stand for two hours per day, sit for eight hours per day, reach above his shoulders for eight hours per day and twist for two hours per day. Dr. Levy provided rationale for his opinion on appellant's ability to work by explaining that appellant had limited findings on examination and diagnostic testing. He noted that appellant's physical examination was marked by significant pain behaviors, poor effort at manual muscle testing and inconsistent answers through sensory testing. The Board finds that Dr. Levy's well-rationalized opinion constitutes the weight of the medical evidence with respect to appellant's ability to

¹⁰ *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

¹¹ *See supra* notes 8 and 9 and accompanying text. In a November 22, 2004 report, Dr. Ghanma determined that appellant could perform the duties of his former job of casual mail clerk and noted that his only restriction was no lifting of over 100 pounds. In contrast Dr. Stephens indicated on March 14, 2005 that appellant was totally disabled.

work.¹² The Board further finds that these work restrictions would not prevent appellant from performing the small parts assembler position.

Appellant submitted several medical reports produced after Dr. Levy's opinion, including reports of Dr. Stephens. These reports, however, are of limited probative value on the relevant issue of the present case in that these physicians did not provide a rationalized medical opinion that appellant could not perform the small parts assembler position.¹³ Appellant asserted that he had preexisting conditions, including emotional problems and a human immunodeficiency virus condition, which prevented him from performing the work. However, he did not submit medical evidence supporting this assertion.

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 small parts assembler represented his wage-earning capacity.¹⁴ The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of small parts assembler and that such a position was reasonably available within the general labor market of his commuting area. The Office properly calculated appellant's wage-earning capacity based on his ability to perform the small parts assembler position. Therefore, it properly reduced appellant's compensation to zero effective February 21, 2007 based on his capacity to earn wages as a small parts assembler.

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation to zero effective February 21, 2007 based on his capacity to earn wages as a small parts assembler.

¹² See *supra* note 10 and accompanying text.

¹³ See *Leon Harris Ford*, 31 ECAB 514, 518 (1980) (finding that a medical report is of limited probative value on a given medical matter if it contains a conclusion which is unsupported by medical rationale).

¹⁴ See *Clayton Varner*, 37 ECAB 248, 256 (1985).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' October 18 and February 21, 2007 decisions are affirmed.

Issued: January 23, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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