U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THOMAS E. STILLER and U.S. POSTAL SERVICE,
SOUTH STATION, Warren, MI

Docket No. 98-1621; Submitted on the Record;
Issued October 11, 2000

DECISION and ORDER

Before WILLIE T.C. THOMAS, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that the selected position of jewelry sorter represented appellant's wage-earning capacity; and (2) whether the Office abused its discretion in refusing to reopen appellant's case for a merit review under 5 U.S.C. § 8128(a).

On October 14, 1971 appellant, then a 46-year-old letter carrier, filed a claim for a traumatic injury or an occupational disease (Form CA-1 & 2) alleging that on October 13, 1971 he sustained contusions, a concussion, a bruised right arm and right knee, and back strain when he felt a sharp pain in his back and blacked out which caused his car to cross over into the southbound lane striking two other cars.

The Office accepted appellant's claim for chronic lumbosacral strain and a herniated disc at L4-5. The Office also authorized a laminectomy performed in 1972, a laminectomy and spinal fusion performed in 1975 and decompression of nerve root at S1 right performed in 1980.

In response to its September 7, 1995 letter advising him to submit a medical report regarding appellant's status at that time, treatment plan and prognosis, Dr. David C. Mitchell, a Board-certified orthopedic surgeon, submitted a September 12, 1995 medical report finding that appellant could work eight hours per day with certain physical restrictions.

In October 1995, the Office referred appellant to a vocational rehabilitation counselor based on Dr. Mitchell's findings.

By letter dated October 5, 1995, the Office advised appellant to submit medical evidence regarding his nonwork-related conditions. In response, the Office received a November 6, 1995 medical report from Dr. Robert K. Moore, a Board-certified internist whose primary specialty is in cardiology, finding that appellant was unsuitable for work due to his back and cardiac conditions.

In a November 27, 1995 report, a vocational rehabilitation counselor identified the positions of jewelry sorter and document preparer, microfilm as being within appellant's skills. In a January 9, 1996 report, the counselor indicated that the position of jewelry sorter was available in appellant's commuting area.[1]

In a notice of proposed reduction of compensation dated February 23, 1996, the Office found that the selected position of sorter represented appellant's wage-earning capacity. Specifically, the Office found that the selected position was within appellant's vocational preparation and within the work restrictions provided by Dr. Mitchell. The Office also found that the job was performed in sufficient numbers within appellant's local commuting area.

By decision dated April 11, 1996, the Office determined that appellant had the wage-earning capacity to perform the position of sorter and reduced appellant's wage-loss benefits accordingly. In an April 16, 1996 letter, appellant, through his representative, requested an oral hearing before an Office representative.

By decision dated March 3, 1997, the hearing representative affirmed the Office's decision. In an October 6, 1997 letter, appellant requested reconsideration of the Office's decision accompanied by factual and medical evidence.

In a decision dated November 5, 1997, the Office denied appellant's request for modification based on a merit review. By letter dated February 4, 1998, appellant requested reconsideration of the Office's decision.

By decision dated February 24, 1998, the Office denied appellant's request for reconsideration without a merit review on the grounds that it lacked probative value, and thus, it was insufficient to warrant review of the prior decision.[2]

The Board has duly reviewed the case record and finds that the Office properly determined that the selected position of jewelry sorter represented appellant's wage-earning capacity.

[1] In response to the Office's November 14, 1995 letter regarding appellant's physical limitations, Dr. Moore stated in a November 27, 1995 letter that appellant was not a good candidate for employment. In an undated memorandum, the Office advised the vocational rehabilitation counselor that appellant was disabled from work based on Dr. Moore's report. The Office, however, advised the counselor that it appeared appellant's disabling conditions were post injury. The Board has previously stated that physical ailments which preexisted the accepted condition must be taken into consideration when selecting a job for purposes of determining wage-earning capacity; physical ailments acquired subsequently to and unrelated to the accepted injury are, however, excluded from consideration. *John A. Zibutis*, 33 ECAB 1879 (1982). As such, appellant's heart condition is not a factor which needed to be taken into consideration of whether appellant could perform the duties of the jewelry sorter position that was used by the Office to determine his wage-earning capacity.

[2] The Board notes that, subsequent to the Office's February 24, 1998 decision, the Office received additional medical evidence. The Board, however, cannot consider evidence that was not before the Office at the time of the final decision. *See Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35 (1952); 20 C.F.R. § 501.2(c)(1).

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 in such benefits.[3] Under section 8115(a) of the Federal Employees' Compensation Act,[4] 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 wage-earning capacity, or if the employee has no actual earnings, wage-earning capacity is determined with due regard to the nature of injury, degree of physical impairment, usual employment, age, qualifications for other employment, the availability of suitable employment, and other factors and circumstances which may affect the employee's wage-earning capacity in his or her disabled condition.[5]

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an Office specialist for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open market, that fits the 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 labor market should be made through contact with the state employment service or other applicable service.[6] Finally, by applying the principles set forth in *Albert C. Shadrick*, the employee's loss of wage-earning capacity can be ascertained.[7]

In this case, there is no indication that the selected position of jewelry sorter is outside the original restrictions set forth by Dr. Mitchell. The Office determined that appellant could perform the duties of a jewelry sorter, which included sorting jewelry articles for control and inventory purposes, counting and recording total items in each separate grouping, requesting additional articles from the production department when such items were needed to complete specified inventory levels, and maybe maintenance of inprocess record controls of patterns during casting and processing of gold jewelry. The physical requirements of the jewelry sorter position involved sedentary work, lifting no more than 10 pounds, reaching, handling, fingering and feeling. The work was categorized as unskilled, it was to be performed inside for 75 percent or more of the time and it required a 30-day vocational preparation period.

Dr. Mitchell's physical restrictions as set forth in his September 12, 1995 medical report included no climbing, squatting, lifting, carrying, and prolonged standing and walking for more than short distances. Dr. Mitchell also restricted appellant from bending and twisting. He indicated that appellant could perform work or activity at a desk wherein he had the option of standing, changing his position and moving about when he felt the need. The position of sorter, therefore, is within appellant's physical limitations.

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[3] *Garry Don Young*, 45 ECAB 621 (1994).

[4] 5 U.S.C. § 8115(a).

[5] *See Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); 5 U.S.C. § 8115(a).

[6] *See Dennis D. Owen*, 44 ECAB 475 (1993).

[7] 5 ECAB 376 (1953); *see* 20 C.F.R. § 10.303.

The July 24, 1994 medical notes of Dr. Mitchell indicating that appellant would not be able return to work predates Dr. Mitchell's September 7, 1995 medical report indicating that appellant could work eight hours per day with certain physical restrictions, the vocational rehabilitation counselor's identification of the sorter position based on Dr. Mitchell's findings and the Office's determination that this position represented appellant's wage-earning capacity.

Dr. Mitchell's March 6, 1996 medical report noted his review of objective test results and discussion with appellant regarding his previous finding that appellant could return to work and that a position had been found for appellant which resulted in the termination of his compensation benefits. Dr. Mitchell stated:

> "[Appellant] is over 70 years of age at this point. I think it is not practical that [appellant] now be sent back to work. I do feel quite strongly that this gentleman has extensive impairment for a variety of reasons. Although I had apparently indicated at an earlier time that I thought he could be back at some very sedentary work for eight hours at a time, perhaps that was overly ambitious on my part from the standpoint of duration of his performance. Although he has definite physical limitations on the basis of his back and lower extremity problems, he is not bedridden and obviously is capable of doing something. He probably could not sit for eight hours at a time, and it might be necessary if he were placed in some work situation that he be allowed to move about, change position, even lie down, at times if it seemed necessary. Other concerns would be could he park close to his work station so that getting to and from wherever it was that he had to be was not more than just perhaps a very short distance. A concern would be also in regard to weather as he would not be particularly trustworthy on a wet or slippery surface, or over uneven terrain as might be the case if there was snow or pavement irregularities. If such work were devised for him it seems to me that it ought to be considered a real job with the prospects of his being allowed to stay at for an extended period of time thereafter, that if his physical condition did not prove up to that that he return to his same prework status."

Dr. Mitchell's report failed to provide any medical rationale explaining why appellant was unable to perform the duties of a jewelry sorter. Further, Dr. Mitchell's report failed to establish total disability because he did not explain why he changed his opinion that appellant was totally disabled from his earlier opinion that appellant could work eight hours per day with restrictions. Dr. Mitchell's May 22, 1996 medical treatment notes and May 24, 1996 medical report revealed appellant's complaints regarding pain in his back and lower extremities, and appellant's medical treatment. Dr. Mitchell noted that he reviewed and placed a copy of a letter appellant received from the employing establishment indicating that he was not totally disabled and the employing establishment's concern that appellant's disability was based on problems that were not employment related. Dr. Mitchell did not address whether appellant could perform the duties of the selected position.

In an August 21, 1996 medical report, Dr. Mitchell noted appellant's complaints regarding pain in his lower extremities. Dr. Mitchell opined that it was most likely that the major portion of the lower extremity symptoms was secondary to appellant's diabetic peripheral

neuropathy rather than lumbar radiculopathy. He noted that appellant was referred to a neurologist for further examination. Dr. Mitchell's report failed to address appellant's capacity to perform the duties of the selected position and attributed appellant's pain in his lower extremities to a condition that has not been accepted by the Office as employment related.

In a November 26, 1996 medical report, Dr. Mitchell noted that appellant had lumbar radiculopathy which was complicated at that point by the presence of diabetes mellitus and heart disease. He opined:

> "[Appellant] is not at this time to be considered available for any sort of work. I had indicated at one time in the past that I thought he could do some sedentary work, but I think now even that is no longer a reasonable consideration. He feels that he is unable to drive as he cannot handle his legs well enough experiencing a good deal of leg discomfort. It has now been over 20 years, he tells me, since he has driven. His ability to get around is very limited. He cannot sit or stand for more than brief periods of time.
>
> "I feel myself that there is nothing that can be done medically or surgically to improve his situation."

As in his March 6, 1996 medical report, Dr. Mitchell did not explain why he changed his opinion that appellant was totally disabled from his earlier opinion in his September 12, 1995 report that appellant could work eight hours per day with restrictions.

Dr. Mitchell's June 6, 1997 medical report revealed that appellant was unable to lift 75 pounds as required by the sorter position. This medical report is not based on an accurate factual background inasmuch as the position of jewelry sorter did not require appellant to lift 75 pounds; rather, it required appellant to lift no more than 10 pounds.[8]

Dr. Mitchell's July 18, 1997 medical report revealed that appellant's back condition had become worse, but that surgery was not recommended because it was not obvious that it would benefit appellant. Dr. Mitchell failed to address whether appellant could perform the duties of the selected position. In sum, the additional reports from Dr. Mitchell are insufficient to warrant modification of appellant's work restrictions because Dr. Mitchell's revised assessment is not based on any specific objective findings indicating a worsening of appellant's condition that is due to the accepted conditions.

Dr. Moore's November 27, 1995 medical report revealed appellant's continued chest pains and his findings on objective examination. He diagnosed peripheral and autonomic neuropathy in the past, macular degeneration to the eyes, hypercholesterolemia and noninsulin-dependent diabetes mellitus. He opined:

> "I do not feel [appellant] is capable of engaging in activities involving any strenuous exertion. He could lift very light weight objects multiple times daily

[8] Dr. Mitchell submitted a letter dated August 1, 1997 indicating that he had made a mistake in finding that the selected position required appellant to lift 75 pounds.

from a cardiac standpoint. I am not sure his other conditions would permit this. I would not recommend the work activity involving climbing two or three flights of steps, running, lifting, or carrying heavy weights. Any lifting should be less than five pounds. In spite of the orthopedist's opinion, or in addition to it, I will tell you that from my knowledge of [appellant] any work involving bending would be impossible. In addition, with his peripheral neuropathy I do not feel any degree of significant walking or other such leg activities would be tolerable. On the other hand [appellant's] mental capacity seems quite intact."

Regarding the Office's November 14, 1995 letter, Dr. Moore stated that activities such as bending, kneeling, squatting or standing would be difficult for appellant with his orthopedic condition and there was no relevancy from a cardiac standpoint. Further, he stated that temperature extremes and exposure to pollutants could have adverse effects and should be avoided. He also stated that appellant could not work in stressful situations such as high volume work, meeting deadlines, or shifting priorities because his chest discomforts seemed to be worse when he was under stress even from his orthopedic symptoms such as back and neck pains. In addition, he stated that appellant experienced dizziness at times and he felt this would be aggravated by any rapid repetitive activity. Dr. Moore's report attributes appellant's disability to conditions that have not been accepted by the Office as employment related and he did not provide any medical rationale to support his physical restrictions.

In a July 30, 1996 medical report, Dr. Thomas J. O'Neil, an osteopath, opined:

"[F]or a wide variety of reasons [appellant] is disabled from work and that he is unable to perform any activities including driving. The reasons for these restrictions are as follows: (1) Chronic lumbar radiculopathy secondary to multiple injuries to the low back and surgery occurring in the 1970s and 1980s; (2) Significant diabetic peripheral neuropathy; (3) Atherosclerotic heart disease; [and] (4) Diabetes mellitus."

In an addendum, Dr. O'Neil stated:

"[I]t is my opinion that, due to the patient's chronic lumbar radiculopathy, he is unable to perform the work required of a mild sorter which I understand does require the ability to lift. I believe that, in addition to the other medical problems listed above, [appellant's] chronic lumbar radiculopathy prohibits him from any physical work that involves lifting or prolonged sitting or standing."

Dr. O'Neil did not provide any medical rationale explaining how appellant's condition prevented him from performing the selected position.

In his September 18, 1997 medical report concerning appellant's disability due to his chronic back pain and lumbar radiculopathy, Dr. O'Neil stated that appellant had a very long and complex history of back injuries, surgery and chronic lumbar radiculopathy. He further stated that appellant continued to be bothered by chronic lumbar pain. He noted that an April 1997 magnetic resonance imaging (MRI) of the lumbar spine indicated evidence of L5-S1 disc protrusion at the left lateral recess, and lumbar spinal stenosis and granulation of scar tissue

noted prominently at L3-4. He concluded that he did not believe work, which involved any lifting, sitting, or standing was feasible for appellant. Dr. O'Neil's opinion is based on all of appellant's medical problems, and he failed to provide any medical rationale explaining how or why appellant was unable to perform the duties of a jewelry sorter.

The treatment notes of appellant's physical therapist, Jodi Pilarski, are of no probative value inasmuch as a physical therapist is not a physician under the Act and therefore is not competent to give a medical opinion.[9]

A March 31, 1997 x-ray report from Dr. Richard Hayes, a Board-certified radiologist, regarding appellant's lumbosacral spine indicated that appellant had degenerative changes between the levels of L3 and S1. Dr. Hayes stated that he did not see evidence of any acute bony fracture. Dr. Hayes failed to address whether appellant could perform the selected position.

Similarly, in an April 9, 1997 report, Dr. David P. Zadvinskis, a radiologist, failed to address whether appellant could perform the selected position. He noted his MRI results which indicated surgical changes at L3-4, L4-5 and L5-S1, broad-based protrusion of L5-S1 into the left lateral recess-left neural foramen, allowing for foci of enhancing granulation tissue from the prior surgery, but no additional focal protrusion or herniation was present, and mild canal stenosis at every level from L2-3 inferiorly.

A May 29, 1997 medical report of Dr. Eric N. Backos, a Board-certified physiatrist, indicated pain in appellant's back and lower extremities, and his findings on objective examination. Dr. Backos stated that appellant was unable to seek gainful employment. He stated that appellant's previous restrictions, which included no climbing, squatting, kneeling, lifting more than five pounds, carrying, prolonged walking or standing only for short distances, bending, twisting and driving, and lying down when necessary and weather and pavement irregularities would still hold. Dr. Backos opined that "[b]ased on objective criteria and objective evidence of the MRI scan, [appellant] is totally and permanently disabled from seeking gainful employment due to his back pain, the limited mobility of his back and inability to sit, stand or walk for a significant period of time." Dr. Backos did not provide any medical rationale explaining how or why appellant was unable to perform the duties of a jewelry sorter.

As noted above, the selected position must not only be medically suitable but also be available in appellant's commuting area. The vocational rehabilitation counselor stated in his January 9, 1996 report that the position of jewelry sorter was reasonably available within appellant's commuting area and that the position paid $9.78 per hour in the open market. Appellant's compensation was accordingly reduced to reflect such wage-earning capacity under the principles set forth in *Shadrick*.[10] Appellant's representative argued before the Office that the selected position was not available in appellant's area. The Board, however, notes the fact

[9] 5 U.S.C. § 8101(2); *see also Jerre R. Rinehart*, 45 ECAB 518 (1994); *Barbara J. Williams*, 40 ECAB 649 (1989); *Jane A. White*, 34 ECAB 515 (1983).

[10] 5 ECAB 376 (1953).

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.[11]

Inasmuch as the evidence of record established that appellant could perform light work with restrictions, and as the Office followed established procedures for determining the vocational suitability and reasonable availability of the position selected, the Board finds that the Office, having given due regard to the factors specified at section 8115(a) of the Act, properly reduced appellant's monetary compensation on the grounds that he has the capacity to earn wages as a jewelry sorter.

The Board further finds that the Office acted within its discretion in refusing to reopen appellant's case for a merit review under 5 U.S.C. § 8128(a).

In his February 4, 1998 letter requesting reconsideration of the Office's November 5, 1997 decision, appellant stated:

> "[T]he original denial was based upon the premise that I could be a jewelry sorter and my pension was cut accordingly. Mr. Gielniak and myself contacted all big jewelers within a 100-mile area, with no finding of such a job as a jewelry sorter. Finally Mr. Gielniak my compensation representative, contacted the Michigan Employment Security Agency, they represent the state of Michigan. Their letter which is enclosed, state[s] there is no job as a jewelry sorter."

In its February 24, 1998 decision, the Office stated:

> "[T]he claimant disagreed with this [November 5, 1997] decision and presented a one-page argument that he was unable to find the position as determined by the rehabilitation counselor. He advised that no positions were available. However, he provided no proof of this or documentation to refute the rehabilitation counselor's prior reports. Thus, this letter lacks any probative value."

The Board finds that the Office informed appellant that it had not received the evidence allegedly submitted by appellant in February 1998 in its February 24, 1998 decision. The Office stated that appellant had failed to provide any proof or documentation of his argument that there were no jewelry sorter positions available in Michigan.

Inasmuch as appellant has submitted insufficient evidence to establish that the Office erroneously applied or interpreted a point of law, advanced a point of law or a fact not previously considered by the Office or submitted relevant and pertinent evidence not previously considered by the Office under 8128(a) of the Act, the Board finds that the Office did not abuse its discretion.

The February 24, 1998 and November 5, 1997 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

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

Dated, Washington, DC
October 11, 2000

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member