

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PAUL GALVAN, JR. and DEPARTMENT OF DEFENSE, COMMISSARY
SERVICE, GOODFELLOW AIR FORCE BASE, TX

*Docket No. 00-1451; Submitted on the Record;
Issued August 24, 2001*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation based on his ability to earn wages as a cashier working 40 hours a week.

On August 10, 1989 appellant, then a 46-year-old meat cutter worker, filed a notice of occupational disease alleging back problems and an asthma condition causally related to factors of his federal employment. On September 10, 1990 the Office accepted the claim for permanent aggravation of a preexisting asthma condition and a lumbosacral strain. Appellant last worked on July 29, 1989.¹

Dr. Daniel C Parsons, a Board-certified internist, who had been treating appellant for asthma since 1985,² advised that appellant was being admitted to the hospital for shortness of breath and expiratory wheezes in both lung fields on October 10, 1989. He noted that appellant's asthma became worse several years ago after he breathed in fumes from meat wrapping paper. Dr. Parson indicated that appellant's asthma had also been aggravated by frequent changes in temperature in the working environment of the meat department.

In a June 10, 1992 report, Dr. Parsons noted that appellant continued to have diffuse expiratory wheezes associated with the diagnosis of meat wrapper's asthma.

In a work restriction report dated December 19, 1992, Dr. Parsons opined that appellant had reached maximum medical improvement. He noted that appellant was able to stand intermittently for four hours per day, stand continuously for six hours per day, sit continuously for four hours per day, and sit intermittently for eight hours per day. Dr. Parson imposed a 10- to

¹ The record indicates that appellant was exposed to bleach fumes at work on January 24, 1989 which caused an acute asthma attack with associated coughing, abdominal cramping, nausea and chest pain.

² Appellant has a long history of asthma and underwent a partial ethmoidectomy and nasal ploypectomy in 1976.

20-pound lifting restriction and advised appellant to limit bending and avoid dampness, cold, dust and fumes.

On April 28, 1993 appellant underwent nasal surgery consisting of endoscopic bilateral ethmoidectomies, bilateral partial middle turbinate resections, endoscopic left frontal sinusotomy, bilateral maxillary antrostomies and endoscopic right sphenoidotomy.

The Office referred appellant for a second opinion evaluation with Dr. John R. Holcomb, a Board-certified pulmonary specialist. In a report dated April 26, 1994, Dr. Holcomb, opined that appellant's ongoing impairment should not be classified as "disabling" but would certainly preclude a number of work activities. He also stated that appellant could not return to his previous occupation as a meat cutter worker. Nonetheless, Dr. Holcomb opined that appellant retained the residual function to perform a wide range of duties within the "light-work" category. He found no objective evidence of impairment from appellant's lumbosacral strain. Dr. Holcomb recommended that appellant avoid working in areas where he would be exposed to fumes, dusts, or noxious odors.

In an OWCP-5 work restriction form dated April 27, 1994, Dr. Holcomb indicated that appellant could work eight hours a day with intermittent standing, bending, lifting, squatting, climbing, twisting, kneeling and walking. He also imposed a 10- to 20-pound lifting restriction.

The employing establishment notified that Office that there was no work available for appellant within the medical restrictions imposed by Dr. Holcomb. Accordingly, the Office referred appellant for vocational rehabilitation services.

In a February 26, 1997 report Dr. Parsons stated:

"[Appellant] has been a patient of mine for a number of years at this point. He has had pretty much unremitting, unrelenting asthma for the years I have followed him. There may have been a few times that he was almost clear but for the most part he has diffuse expiratory wheezing and bronchospasm at all times. It is hard for me to imagine any kind of gainful employment that he could engage in."

In a September 25, 1997 report, the rehabilitation counselor noted that appellant had a two-year liberal arts degree, that he had prior work experience as a Director of veterans affairs and as a forklift operator at a warehouse. Appellant also had nine months training as a paralegal. The rehabilitation counselor indicated that appellant began working on July 14, 1997 as a shoe salesman then found a position as a cashier at Luby's cafeteria where he was working 27 hours a week at \$5.50 an hour. The rehabilitation counselor advised that appellant had been approved for full-time duty, eight hours a week. Therefore, a survey of available jobs in his commuting area had been conducted and it was found that appellant could work the position of cashier with an entry-level pay of \$5.50 an hour or \$220.00 for a 40-hour week.

The Dictionary of Occupational Titles (DOT) describes the position of cashier II (211462010) as follows:

“Receives cash from customers or employees in payment for goods or services and records amounts received: Recomputes or computes bill, itemized lists and tickets showing amount due, using adding machine or cash register. Makes change, cashes checks and issues receipts, or ticket to customers. Record amounts received and prepares reports of transactions. Reads and records the totals shown on cash register tape and verifies against cash on hand. May be required to know value and features of items for which money is received. May give cash refunds or issue credit memorandums to customers for returned merchandise. May operate ticket-dispensing machine. May operate cash register with peripheral electronic data processing equipment by passing individual price coded items across electronic scanner to record price, compile printed list and display cost of customer purchase, tax, and rebates on monitor screen. May sell candy, cigarettes, gum and gift certificates and issue trading stamps. May be designated according to nature of establishment as Cafeteria Cashier (hotel & rest); cashier, parking lot (automotive service); dining room cashier (hotel & rest); service-bar cashier (hotel & rest); store cashier (clerical); or according to type of account as cashier, credit (clerical); cashier, payments received (clerical). May press numeric keys of computer corresponding to gasoline pump to reset meter on pump and to record amount of sale and be designated cashier, self-service gasoline (automotive service). May receive money, make change and cash checks for sales personnel on some floor and be designated floor cashier (clerical). May make change for patrons at places of amusement other than gambling establishments and be designated change booth cashier (amusement & recreation).”

The physical requirements of a cashier under DOT are listed as light duty with frequent reaching, handling and fingering.

On October 17, 1997 the Office issued a notice of proposed reduction of compensation. The Office found that, although appellant was only working part time as a cashier he was capable of working full time in the constructed position of a cashier. Appellant was advised that he had 30 days to submit additional evidence or argument if he disagreed with the proposed action.

By letter dated November 12, 1997, appellant advised the Office that he was unable to continue working at Luby’s cafeteria because he had experienced a sudden asthma attack on November 8, 1997 and had to be hospitalized until November 11, 1997 for treatment. According to appellant, Dr. Parson advised him that he “may not be able to return to work due to my having certain problems with Luby’s patrons wearing perfume, hairspray, cologne, aftershave lotion, and handling checks [and] cash that ha[ve] been coughed and sneezed upon as they are handed to [appellant] to make change.” Appellant stated that he had a follow-up examination scheduled with Dr. Parson’s on November 13, 1997.

In a November 21, 1997 letter, the Office notified appellant that his compensation benefits had been adjusted to reflect that he had worked 20 hours a week from July 14 to August 31, 1997 and that on September 1, 1997 his hours increased to 27 a week.

In a November 25, 1997 decision, the Office reduced appellant's compensation effective December 7, 1997 on the grounds that he was no longer totally disabled and had the capacity to earn wages as a cashier.³

Appellant subsequently requested a hearing and submitted treatment notes from Dr. Parsons. On December 3, 1997 Dr. Parsons noted that appellant was blowing blood out of his nose and that his sinuses were backed up. On January 14, 1998 he stated that appellant was back with intermittent difficulty breathing. Dr. Parsons related that appellant said he was exposed to second hand smoke at work and smelling dollar bills was even bothering him.

In a decision dated September 3, 1998, an Office hearing representative affirmed the Office's September 3, 1998 decision.⁴

In a March 12, 1999 letter, appellant requested reconsideration.⁵

In support of his reconsideration request, appellant submitted an October 28, 1998 report from Dr. Caldwell, who advised that he had not seen appellant for eight years, but that appellant had "recurrent discomfort to the rib cage." He advised appellant to avoid elements that increase the physical stresses of his asthma and thereby cause the left-sided rib pain.

Appellant also submitted reports dated August 12 and October 28, 1999 from Dr. Parsons, who indicated on August 12, 1998 that appellant continued to have exacerbations of his asthma with fairly unrelenting bronchospasm. Appellant suffered a near respiratory arrest at home in October 1998 due to his asthma condition.

On October 28, 1999 Dr. Parsons reported that appellant had again been admitted to the hospital for a severe asthma attack with cardiac complications. He indicated that appellant continued to have unremitting asthma and respiratory wheezing.

In a December 21, 1999 decision, the Office denied modification following a merit review.

The Board finds that the Office properly reduced appellant's wage-loss compensation based on his ability to earn wages in the position of a cashier working 40 hours a week.

³ The computation of appellant's gross compensation for loss of wage-earning capacity, which is based on his ability to earn \$5.50 an hour as a cashier, was shown on the attached Form CA-816.

⁴ The Office hearing representative, however, directed the Office to revisit the issue of the overpayment withheld from appellant's October 24, 1997 because the Office failed to follow proper regulatory procedures set forth at 20 C.F.R. § 10.430 (1999).

⁵ The Office did not initially recognize this letter as a reconsideration request but it was later recognized by the Office on December 10, 1999.

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.⁶

Under section 8115(a) of the Federal Employees Compensation Act,⁷ 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 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.⁸ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.⁹ 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.¹⁰

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 Labors' 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.¹¹

Appellant had been approved for light duty for eight hours a day by Dr. Holcomb, a Board-certified specialist, who provided a reasoned opinion with respect to appellant's work capacity.

Appellant's vocational rehabilitation counselor determined that although appellant was working as a part-time cashier, he was capable of doing that job for 40 hours a week. He reported that there were full-time cashier positions available in sufficient numbers in appellant's commuting area to make the position reasonably available to him, and that the minimum wage for such a job was \$220.00 a week or \$5.50 an hour. The rehabilitation counselor stated that he had located jobs for which appellant met the requirements and which were within appellant's medical restrictions. He provided a job description for the claims examiner position under the DOT indicating that the position was sedentary with a lifting requirement not to exceed 10 pounds consistent with appellant's work restrictions. According to appellant's vocational

⁶ *Bettye F. Wade*, 37 ECAB 556 (1986); *Ella M. Gardner*, 36 ECAB 238 (1984).

⁷ 5 U.S.C. § 8101-8193.

⁸ *See Pope D. Cox*, 39 ECAB 143 (1988); 5 U.S.C. § 8115(a).

⁹ *Richard Alexander*, 48 ECAB 432 (1997); *Albert L. Op*, 37 ECAB 684 (1986).

¹⁰ *Id.*

¹¹ *Richard Alexander*, *supra* note 9.

rehabilitation counselor there were cashier jobs that were reasonably available within the general labor market of appellant's commuting area.

The Board finds that the Office considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment, and age and employment qualifications, in determining that the constructed position of cashier represented appellant's wage-earning capacity. The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the duties of a cashier as described in the DOT. The rehabilitation counselor also verified that such position was reasonably available within appellant's commuting area. Therefore, the Office properly determined that appellant had the ability to earn wages as a cashier with an entry-level salary of \$220.00 a week.

Additionally, although appellant has submitted medical reports from Dr. Parsons indicating that appellant continues to experience residuals of his asthma condition, the doctor has never offered an opinion that appellant is unable to work as a cashier for eight hours a day. Consequently, the Board concludes that the Office properly reduced appellant's wage-loss compensation based on his ability to earn wages as a cashier.

The decision of the Office of Workers' Compensation Programs dated December 21, 1999 is hereby affirmed.

Dated, Washington, DC
August 24, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member