U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LOUIS DITOMASO and DEPARTMENT OF DEFENSE, DEFENSE LOGISTICS AGENCY, Philadelphia, PA

Docket No. 00-2333; Submitted on the Record;
Issued August 9, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly determined that the position of cashier represented appellant's wage-earning capacity.

On September 9, 1992 appellant, then a 54-year-old motor vehicle operator, filed a claim for traumatic injury occurring in the performance of duty. He alleged that he twisted his lower back on September 9, 1992 while moving a bag of concrete. The Office accepted appellant's claim on January 12, 1993 for aggravation of degenerative disc disease. He received continuation of pay from September 18 through November 1, 1992 and was paid compensation for total wage loss beginning November 2, 1992.

Appellant's attending physician, Dr. Marc S. Zimmerman, a Board-certified orthopedic surgeon, performed a functional capacity evaluation on appellant on May 21, 1996 and stated in an evaluation that appellant should limit his sitting to 6 hours a day (in 30 minute intervals), stand for a maximum of 1 hour a day, lift and carry a maximum of 10 pounds and avoid using foot controls. Dr. Zimmerman added in a June 24, 1996 report that appellant may never crawl or climb, and may only occasionally bend, squat or reach.

Dr. Zimmerman later submitted an addendum letter dated July 1, 1996, in which he stated that he was now of the opinion that appellant cannot yet work eight hours per day and should start out working for two to four hours per day.

The Office then referred appellant to Dr. Frank A. Mattei, a Board-certified orthopedic surgeon, for a second opinion examination. He examined appellant on May 19, 1999 and indicated in a work restriction form that appellant could work eight hours per day with no restrictions on sitting, walking or standing. Dr. Mattei also indicated that appellant could lift, pull, and push up to 10 pounds for 4 to 6 hours per day and reach above the shoulder, twist, squat, kneel and climb for 4 to 6 hours per day.

On May 27, 1999 Dr. Zimmerman submitted an additional work restriction evaluation form, again indicating that appellant was only able to work two to four hours per day. He noted that appellant could sit intermittently for 30 to 45 minutes at a time for up to 6 hours per day. Dr. Zimmerman also stated that appellant could walk, lift and stand intermittently for up to one hour per day. He indicated that appellant's lifting restriction was 10 pounds and that he may bend "rarely" and could do no squatting, climbing, kneeling or twisting.

In order to resolve the conflict in medical opinion between Dr. Zimmerman and Dr. Mattei, the Office referred appellant to Dr. Easwaran Balasubramanian, a Board-certified orthopedic surgeon, for a impartial medical examination. He examined appellant on September 2, 1999 and completed a work restriction evaluation form indicating that there was no reason appellant could not work eight hours per day with the following restrictions: sitting 4 to 6 hours per day; walking, standing and reaching 3 to 4 hours per day; lifting, pulling and pushing up to 10 pounds 4 to 6 hours per day; and squatting, kneeling and climbing 4 to 6 hours per day.

Thereafter, the Office selected the position of cashier to represent appellant's wage-earning capacity. According to the Department of Labor's *Dictionary of Occupational Titles*, the physical demands for this position are described as sedentary (maximum lifting of 10 pounds), with the ability to reach, handle, finger, feel, talk, hear and see.

By letter dated December 2, 1999, Dr. Zimmerman stated that appellant informed him that he was to return to work as a cashier standing for eight hours per day. He indicated, referring to his May 27, 1999 work evaluation, that appellant is unable to stand as a cashier for eight hours per day. Dr. Zimmerman stated that appellant could only stand for one hour per day, but may sit for six hours per day, with frequent rest breaks for change of position.

By decision dated January 4, 2000, the Office, based on Dr. Balasubramian's impartial medical opinion, adjusted appellant's compensation effective January 30, 2000 to reflect his capacity to earn wages as a cashier.

In a decision dated May 15, 2000, an Office hearing representative affirmed the prior decision.

The Board finds that the Office did not meet its burden of proof to determine that the position of cashier reflected appellant's wage-earning capacity effective January 30, 2000.

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 of benefits.[1] Under section 8115(a) of the Federal Employees' Compensation Act,[2] 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 the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of the

[1] *David W. Green*, 43 ECAB 883 (1992); *Harold S. McGough*, 36 ECAB 332 (1984).

[2] 5 U.S.C. §§ 8101-8193.

employee's injuries and the degree of physical impairment, his usual employment, the employee's age and vocational qualifications and the availability of suitable employment.[3]

After the Office makes a medical determination of partial disability and of special work restrictions, it may refer the employee's case 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 market, that fits the 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 services or other applicable services. 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.[4]

In this case, the position chosen for appellant was the position of cashier, which is described as sedentary (maximum lifting of 10 pounds), with the ability to reach, handle, finger, feel, talk, hear and see. As the description of this position in the Department of Labor's *Dictionary of Occupational Titles* does not indicate whether it is less than full time, the Board assumes that the position would be full time, involving sitting for eight hours per day.[5] The Board further notes that Dr. Balasubramanian, in his work restriction evaluation form, indicated that appellant could only sit for four to six hours per day. The Board also notes that Dr. Balasubramanian indicated in his report that appellant should take breaks "as needed for comfort." The description of the position does not indicate whether or not and how often, breaks would be possible. As Dr. Balasubramanian indicated that appellant may only sit for four to six hours per day, his restrictions regarding appellant's work ability would not allow appellant to perform the selected cashier position.

When a case is referred to a impartial medical specialist for the purpose of resolving a conflict of medical opinion, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background must be given special weight.[6]

The Board finds that the Office did not meet its burden of proof in modifying appellant's compensation benefits because it did not clarify the Department of Labor's description of cashier and whether it corresponded to the restrictions recommended by Dr. Balasubramanian, the impartial medical specialist.

[3] *Samuel J. Chavez*, 44 ECAB 431 (1993).

[4] *Albert C. Shadrick*, 5 ECAB 376 (1953).

[5] The Board notes that Dr. Balasubramanian indicated in his report that appellant should take breaks "as needed for comfort." The description of the position does not indicate whether or not, and how often, breaks would be possible.

[6] *See Wiley Richey*, 49 ECAB 166 (1997).

The May 15, 2000 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, DC
August 9, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member