

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VERNON W. RICHARDSON and SMITHSONIAN INSTITUTION,
NATIONAL GALLERY OF ART, Washington, DC

*Docket No. 99-1809; Submitted on the Record;
Issued February 23, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation, effective November 9, 1997, based on his capacity to earn wages as a loan application clerk.

On September 23, 1991 appellant, then a 40-year-old painter leader, filed a traumatic injury claim for an injury to his low back sustained that day by carrying a bicycle rack up four stairs. The Office accepted that this incident resulted in lumbosacral and cervical strains and a herniated disc at L5-S1. Appellant received continuation of pay from September 23, 1991, when he stopped work, until November 6, 1991, after which the Office began paying him compensation for temporary total disability.

Pursuant to an Office rehabilitation program, appellant received an associate's degree in business management at Prince George's Community College in August 1995. On June 28, 1996 the Office reduced appellant's compensation based on his capacity to earn wages as a loan application clerk. Appellant requested a hearing and an Office hearing representative, by decision dated October 29, 1996, found that there was a conflict of medical opinion between appellant's attending physicians and the Office's referral physician. Appellant's compensation for total disability was reinstated and he was referred, with a statement of accepted facts and the case record, to Dr. Robert O. Gordon, a Board-certified orthopedic surgeon, to resolve the conflict of medical opinion.

On September 24, 1997 the Office issued a notice of proposed reduction of compensation on the basis that appellant had the capacity to earn wages as a loan application clerk. By decision dated October 29, 1997, the Office reduced appellant's compensation effective November 9, 1997 based on his capacity to earn wages as a loan application clerk. Appellant requested a hearing, which was held on November 20, 1998. By decision dated February 2, 1999, an Office hearing representative found that the evidence established that appellant had the capacity to earn wages as a loan application clerk; the Office's reduction of appellant's compensation was affirmed.

Section 8115 of the Federal Employees' Compensation Act,¹ titled "Determination of wage-earning capacity," states in pertinent part:

"In determining compensation for partial disability, ... if the actual earnings of the employee do not fairly and reasonably represent his wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity as appears reasonable under the circumstances is determined with due regard to --

- (1) the nature of his injury;
- (2) the degree of physical impairment;
- (3) his usual employment;
- (4) his age;
- (5) his qualifications for other employment;
- (6) the availability of suitable employment; and
- (7) other factors or circumstances which may affect his wage-earning capacity in his disabled condition."

The Board finds that the Office properly reduced appellant's compensation effective November 9, 1997, based on his capacity to earn wages as a loan application clerk.

As found by the Office, there was a conflict of medical opinion between appellant's attending physicians, Drs. Hampton J. Jackson, Eric Dawson and Stephen S. Haas and the Office's referral physician, Dr. Robert A. Smith, over whether appellant was able to perform sedentary work. Drs. Jackson and Dawson, who are associates, concluded that appellant had been totally disabled since December 1995 and was unable to work. Dr. Haas also concluded, in a November 21, 1996 report, that appellant was totally disabled and unlikely to return to even sedentary work. In a report dated November 3, 1995, Dr. Smith stated that appellant could not return to work as a painter but that he was capable of sedentary or light duty, with no lifting over 10 pounds, no repetitive bending or lifting and no straining of any kind.

To resolve this conflict of medical opinion, the Office, pursuant to section 8123(a) of the Act,² referred appellant, the case record and a statement of accepted facts to Dr. Gordon. In a

¹ 5 U.S.C. § 8115.

² 5 U.S.C. § 8123(a) states 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."

report dated February 24, 1997, he set forth appellant's history, complaints and findings on examination. Dr. Gordon concluded:

"He does have some radicular complaints of the right lower extremity, but there are also some inconsistent findings on examination, which indicates that there may be a functional component to his complaints.

"I have not yet seen the patient's MRI [magnetic resonance imaging] scan, but based on my examination of the patient [and] my review of the medical records that have been thus far provided, I believe that the patient has the physical capacity for light or sedentary work activity. He is not, in my opinion, totally disabled by any objective criteria. He should avoid work that requires lifting greater than 20 pounds or any repeated bending.

"I would think the patient would have the physical capacity to be a clerk, or any other type of clerical activity as there is no evidence of any condition, based on my examination of the patient and my review of the medical records, that should cause symptoms to the extent that would preclude him from sedentary or light work activity. However, if the actual MRI becomes available, I will review it and comment further with any modifications of my opinion in that regard.

"I believe the patient should avoid work that requires lifting of greater than 20 pounds or any repeated bending. Whether this patient will return to work, in my opinion, will depend to a significant extent on his motivation since patients who have not worked for this long often do not return to work even if there is no objective basis for continued total disability."

The MRI that was done on November 5, 1991 was not available, and the Office authorized another one, which was performed on August 1, 1997. In a supplemental report dated August 7, 1997, Dr. Gordon stated that this MRI showed "degenerative disc disease at the L5-S1 level as well as some disc protrusion, which is primarily central, but which does have a right-sided component that affects the right nerve root and which could be called a disc herniation." Dr. Gordon concluded that surgery was a reasonable option and stated, "another option is to avoid strenuous lifting and bending activities as I have discussed in my previous report February 24, 1997. I believe this patient does have the physical capacity for work of a sedentary or light nature."

In situations where there are 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 conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.³ The report of Dr. Gordon was based on an accurate history and contains sufficient rationale to be given special weight and be considered the weight of the medical opinion evidence. The reports submitted by appellant from Drs. Jackson and Haas subsequent to the examination by Dr. Gordon are essentially reiterative of the prior reports from these physicians and are insufficient to outweigh the opinion of

³ *James P. Roberts*, 31 ECAB 1010 (1980).

Dr. Gordon or to create a new conflict of medical opinion.⁴ The limitations set forth by Dr. Gordon would not prevent appellant from performing the duties of a loan application clerk, which are sedentary in nature. He was also provided with a description of the duties and physical requirements of the selected position and indicated appellant could perform this position.

The evidence also establishes that appellant has the education and experience needed to perform the selected position. The Department of Labor's *Dictionary of Occupational Titles* indicates that the specific vocational preparation required is three to six months and appellant received an associate's degree in business management. An Office rehabilitation specialist confirmed on September 5, 1997 that the position of loan application clerk was reasonably available in appellant's commuting area.

The February 2, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
February 23, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Priscilla Anne Schwab
Alternate Member

⁴ See *Dorothy Sidwell*, 41 ECAB 857 (1990).