U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FRANK J. ARGENTIERI and DEPARTMENT OF THE NAVY, PHILADELPHIA NAVAL SHIPYARD, Philadelphia, PA

Docket No. 02-594; Submitted on the Record;
Issued September 3, 2002

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 reduced appellant's compensation benefits to reflect his wage-earning capacity as a dispatcher.

The Board has duly reviewed the case record in this appeal and finds that the Office improperly determined appellant's wage-earning capacity.

In the present case, the Office accepted that on September 10, 1990 appellant, then a 44-year-old insulation worker, sustained a lumbosacral strain and sprain during his federal employment. He returned to light-duty work, four hours a day, on July 15, 1991, but sustained a recurrence of disability on July 30, 1991 and has not returned to work.

On March 20, 1998 the Office referred appellant, together with a statement of accepted facts, a list of questions to be answered and copies of the relevant medical evidence, to Dr. Mario J. Arena, a Board-certified orthopedic surgeon, for a second opinion examination. In a narrative report dated May 6, 1998, Dr. Arena noted that appellant had undergone surgery to remove a herniated disc in approximately 1969 and that he had underlying degenerative disc disease of the lumbosacral spine due to this prior surgery. He further opined that appellant's 1990 work injury had resolved and that he had no residuals of the injury. On an accompanying work restriction form, Dr. Arena indicated that appellant could perform full time light duty with restrictions of no sitting more than 7 hours, walking over 4 hours or standing over 6 hours, no pushing or pulling over 25 pounds and no lifting/carrying over 25 pounds occasionally and 10 pounds frequently, no continuous reaching, reaching above the shoulder or twisting and no squatting, kneeling or climbing over 2 hours.

Appellant's treating physician, Dr. Marc S. Zimmerman, a Board-certified orthopedic surgeon, submitted a report dated May 11, 1999, in which he diagnosed degenerative disc disease at L5-S1, left posterolateral herniation at L5-S1, posterior bulge at L4-5 and epidural fibrosis at L5-S1 and explained that appellant's September 10, 1990 employment injury had aggravated the underlying degenerative changes of appellant's spine. Dr. Zimmerman

completed an attending physician's work restriction form wherein he indicated that appellant had reached maximum medical improvement and could return to work, four hours a day, with restrictions of sitting intermittently for four hours, no walking over two hours intermittently, no twisting or standing over one hour intermittently and no lifting, bending, squatting, climbing or kneeling. He further checked boxes indicating that appellant could lift 0 to 10 pounds, could work or reach above the shoulder, but could not be exposed to cold, dampness or heights.

The Office determined that a conflict existed in the medical opinion evidence regarding appellant's ability to return to work and referred appellant to Dr. Parviz Kambin, a Board-certified orthopedic surgeon, for an impartial medical evaluation. In a report dated May 30, 2000, Dr. Kambin diagnosed nerve root irritation at the lower lumbar spine associated with degenerative disc pathology, epidural scar formation and disc protrusion and opined that appellant's preexisting degenerative disc disease had been aggravated by his September 10, 1990 work injury. With respect to appellant's ability to return to some type of work, Dr. Kambin stated, in pertinent part:

> "Due to the fact that [appellant] has not been able to work for nine years, it is my opinion that his present disability will remain permanent."
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> "The prognosis of [appellant's] difficulties will remain guarded regardless of the treatment rendered to him in the future. It is my opinion that he will continue to exhibit symptomatology which will prevent him from returning to his previous work and occupation. Although a sedentary type of work is within his capability, I am doubtful that he will accept or sustain this type of occupation."
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> "I do not believe that [appellant] will be able to work above the shoulder level. He cannot lift, bend or squat which apparently is required during his working activities."

On June 15, 2000 an Office medical adviser completed a work capacity evaluation form, OWCP-5, based on Dr. Kambin's May 30, 2000 narrative report. The Office medical adviser noted that appellant could work eight hours a day, with restrictions on pushing, pulling and lifting over ten pounds for more than one hour, no walking or standing for more than one hour and no reaching above the shoulder, twisting, squatting or kneeling. The Office medical adviser further noted that appellant should be able to change from sitting to standing or walking as needed.

On January 24, 2001, at the request of the Office, a rehabilitation counselor identified the job of dispatcher as a job that was within appellant's physical restrictions, appellant could learn to perform with three to six months of training and was reasonably available. The job duties were described, in part, as dispatching customer service workers to install, service and repair electric, gas or steam powered systems or appliances or cable television systems; reviewing work orders from departments or complaints from customers and recording type and scope of service to be performed. The physical requirements were described as sedentary with occasional lifting up to 10 pounds. Occasional was defined as up to one third of the time. The position also called

for no climbing, balancing, stooping, kneeling, crouching or crawling, occasional reaching and feeling and frequent handling, fingering and talking. The position did not require exposure to any environmental extremes, such as heat, cold or dampness.

In a notice of proposed reduction of compensation dated July 9, 2001, the Office found that Dr. Kambin's opinion constituted the weight of the evidence and that appellant could perform the sedentary position of dispatcher. The Office found that the position was inside 75 percent of the time, required lifting up to 10 pounds and the ability to reach, handle, finger and see and required 3 to 6 months of experience or education. The Office also found that appellant had the experience to perform the job and it was reasonably available. The Office, therefore, proposed to reduce appellant's compensation to reflect his wage-earning capacity as a dispatcher. The Office gave appellant 30 days to respond.

On July 17, 2001 appellant submitted a narrative statement contesting the Office's proposed decision.

By decision dated August 27, 2001, the Office reduced appellant's compensation on the grounds that the position of dispatcher represented his wage-earning capacity.

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, if the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, his or her usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect wage-earning capacity in his or her disabled condition.[2] 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, *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.[3] Finally, application of the principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.[4] The basic rate of compensation paid under the Act is 66 2/3 percent of the injured employee's monthly pay.

[1] *Sylvia Bridcut*, 48 ECAB 162 (1996); *James B. Christenson*, 47 ECAB 775 (1996).

[2] *See Wilson L. Clow, Jr.*, 44 ECAB 157 (1992), *petition for recon. denied*, Docket No. 92-118 (issued February 11, 1993); *see also* 5 U.S.C. § 8115(a).

[3] *Raymond Alexander*, 48 ECAB 432 (1997); *Dorothy Lams*, 47 ECAB 584 (1996).

[4] *Dorothy Lams*, *supra* note 3; *Albert C. Shardrick*, 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.303.

In this case, to resolve the conflict between Drs. Zimmerman and Arena regarding appellant's ability to work, the Office referred appellant to the impartial medical specialist Dr. Kambin. In his May 30, 2000 report, Dr. Kambin opined both that appellant's present disability will remain permanent[5] and that a sedentary type of work is within his capability. With respect to appellant's specific physical capabilities, Dr. Kambin opined only that appellant cannot work above the shoulder level and cannot lift, bend or squat. He did not appear to be aware that sedentary positions can require lifting of up to 10 pounds. In addition, Dr. Kambin did not specify whether appellant could work full or part time or indicate the duration for which he could perform any physical activities. The Office did not ask Dr. Kambin to complete a work-capacity evaluation form, OWCP-5, to review the selected position or to otherwise elaborate on appellant's capabilities, but rather asked an Office medical examiner to complete the form based on Dr. Kambin's findings.

When the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from the specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting a defect in the original report.[6] If the impartial medical specialist's statement of clarification or elaboration is not forthcoming or if the specialist is unable to clarify or elaborate on the original report or if the specialist's supplemental report is also vague, speculative or lacks rationale, the Office must submit the case record together with a detailed statement of accepted facts to a second impartial specialist for a rationalized medical opinion on the issue in question.[7] Unless this procedure is carried out by the Office, the intent of section 8123(a) of the Act[8] will be circumvented when the impartial specialist's medical report is insufficient to resolve the conflict of medical evidence.[9]

In the present case, the Office selected Dr. Kambin as an impartial specialist to resolve the conflict in the medical evidence on whether appellant could return to some form of work. The Office cited his May 30, 2000 report as a basis for its decision to reduce appellant's compensation based on his ability to earn wages as a full-time dispatcher. Dr. Kambin's report, however, failed to establish that appellant actually had the physical capability to perform this job, and the Office asked an Office medical adviser, rather than Dr. Kambin himself, to elaborate on appellant's physical capabilities.

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[5] From the context of Dr. Kambins' report, one might assume that appellant's disability is for his prior employment, but this requires clarification.

[6] *Elmer K. Kroggel*, 47 ECAB 557-58 (1996); *April Ann Erickson*, 28 ECAB 336, 341-42 (1997).

[7] *Talmadge Miller*, 47 ECAB 673, 682 n. 21 (1996).

[8] 5 U.S.C. § 8123(a) provides the following: "An employee shall submit to examination by a medical officer of the United States or by a physician designated or approved by the Secretary of Labor, after the injury and as frequently and at the times and places as may be reasonably required. The employee may have a physician designated and paid by [him] present to participate in the examination. 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."

[9] *Harold Travis*, 30 ECAB 1071 (1979).

The August 27, 2001 decision of the Office of Workers' Compensation Programs is hereby reversed.[10]

Dated, Washington, DC
September 3, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[10] Subsequent to the Office's August 27, 2001 decision, appellant submitted additional medical evidence from his treating physician, Dr. Zimmerman. The Board's review is limited to the evidence that was before the Office at the time it issued its final decision. *Charles P. Mulholland, Jr.*, 48 ECAB 604 (1997). As this evidence was not considered by the Office prior to its final decision, the Board cannot consider this evidence on appeal.