United States Department of Labor
Employees' Compensation Appeals Board

DEXTER EUSTIS, Appellant	)	
and	)	**Docket No. 04-522**
	)	**Issued: April 7, 2004**
DEPARTMENT OF COMMERCE, CENSUS BUREAU, Wyman Township, ME, Employer	)	

Appearances:
Dexter Eustis, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On December 17, 2003 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated July 2, 2003 pertaining to a schedule award and a July 28, 2003 decision, denying modification of a wage-earning capacity determination. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly reduced appellant's compensation based on its determination that he has the capacity to earn wages in the constructed position of a cashier II; and (2) whether appellant has greater than a two percent impairment of the right upper extremity for which he received a schedule award.

FACTUAL HISTORY

On March 11, 2000 appellant, then a 56-year-old census enumerator, filed a traumatic injury claim alleging that on March 10, 2000 he slipped and fell on an icy street while in the

performance of duty. The Office accepted the claim for a right rotator cuff tear, cervical and lumbar strains, a herniated disc at L4-5 and a left elbow contusion. Appellant received continuation of pay from March 11 through April 24, 2000, he subsequently retired and elected to receive a retirement annuity provided by the Office of Personnel Management in lieu of disability compensation provided under the Federal Employees' Compensation Act.

The record reflects that appellant moved to North Carolina and came under the care of Dr. James E. Rice, a general practitioner, for treatment of his back injury. In a report dated August 27, 2001, Dr. Rice opined that appellant had reached maximum medical improvement with respect to his herniated disc and opined that he had a five percent impairment for his back alone. He made no limitations with respect to appellant's work activities, but recommended that he see a specialist for continued shoulder and neck pain which he felt was causally related to appellant's work injury. Appellant was seen in consultation by Dr. David P. Fedder, a Board-certified orthopedic surgeon, who began treating him for rotator cuff tendinitis and arthritis of the back and shoulder.

In order to determine whether the claim should be expanded to include rotator cuff tendinitis and arthritis, the Office sent appellant for a second opinion evaluation with Dr. Surendrapel S. Mac, a Board-certified orthopedic surgeon. In a report dated September 26, 2001,[1] Dr. Mac noted that appellant's chief complaints were pain in his low back area, neck and shoulders. He noted physical findings and diagnosed resolved lumbar and cervical strains, rotator cuff tendinitis, bursitis of the right shoulder and degenerative arthritis of the lumbar and cervical spine. Dr. Mac opined that the rotator cuff tendinitis and subacromial bursitis were unrelated to appellant's work injury of March 10, 2000. He stated that appellant could work 8 hours a day with restrictions of pushing and pulling no more than 80 pounds and a maximum lifting restriction of 30 pounds.

Due to the conflict in the medical opinions of Drs. Mac and Rice, the Office referred appellant for an impartial medical evaluation with Dr. Zane T. Walsh, Jr., a Board-certified orthopedic surgeon. In a report dated March 5, 2002, Dr. Walsh noted appellant's history of injury and discussed the medical evidence of record. He provided physical findings and reported that appellant's lower back pain and left elbow contusion were resolved. The physician advised that appellant continued to suffer from neck and shoulder pain due to cervical arthritis and rotator cuff tendinitis. Dr. Walsh opined that appellant would benefit from a cervical magnetic resonance image. He completed a work restriction form indicating that appellant could work eight hours a day with limitations of pushing, pulling, lifting and reaching above the shoulder no more than two hours a day. Appellant was also given a 25-pound lifting restriction and was precluded from all lifting above the shoulder.

Based on the report of Dr. Walsh, the Office referred appellant for rehabilitation services. In a report dated April 19, 2002, a rehabilitation specialist identified the positions of gate tender and cashier II as being consistent with appellant's educational background and work experience in customer services and protective services. The rehabilitation specialist confirmed that full and

[1] Dr. Mac examined appellant on October 19, 2001. It, therefore, appears that the date of this report listing "September" is a typographical error.

part-time cashier jobs were reasonably available in appellant's commuting area by contacting the state employment agency in North Carolina.

As defined in the Department of Labor, *Dictionary of Occupational Titles*, (DOT 211.462-010) a cashier II receives cash from customers or employees in payment for goods or services received. A cashier is required to compute or recompute a bill, itemize lists or tickets showing the amount due using an adding machine or cash register, make change, cash checks, issue receipts or tickets to customers, read and record totals on cash register tape. There is frequent handling, fingering and feeling involved with the position. The job is sedentary to light duty with no above-shoulder lifting and below-shoulder lifting requirements of up to 20 pounds.

In a May 2, 2002 decision, the Office reduced appellant's compensation to zero based on a determination that he had the capacity to earn wages in the constructed position of a cashier II, at the rate of $272.40 a week. The Office determined that appellant had zero percent loss of wage-earning capacity.[2]

In letters dated July 24, 2002, the Office recognized that Dr. Fedders was the primary treating physician of record and requested that he provide an opinion as to the extent of impairment of the extremities due to appellant's accepted employment injury under the fifth edition of American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). Dr. Fedders, however, did not provide an opinion as requested.

The record next contains a March 20, 2003 report from Dr. Robert M. Moore, a Board-certified orthopedic surgeon, who discussed appellant's history of injury and noted physical findings. He reported active range of motion of the right shoulder as 170 degrees abduction, 170 degrees forward elevation, 30 degrees extension, 40 degrees adduction, 80 degrees of internal rotation and 90 degrees of external rotation. Dr. Moore indicated that appellant had pain in the lateral subacromial region of the right shoulder at the end ranges of abduction and rotation. Examination revealed mild tenderness in the lateral subacromial region and acromioclavicular (AC) joint of the right shoulder. With respect to the left shoulder, Dr. Moore reported 175 degrees abduction, 180 degrees of forward elevation, 40 degrees extension, 40 degrees adduction, 95 degrees of internal rotation and 90 degrees of external rotation. Strength testing for both the right and left shoulder was Grade 5 for active abduction, flexion, adduction, internal and external rotation. No pain was reported with range of motion or strength testing in the left shoulder. An x-ray of the right shoulder showed moderate degrees of degenerative changes in the AC joint, while a left shoulder x-ray showed mild degenerative changes in the AC joint. The diagnosis was listed as subacromial impingement, bursitis and acromioclavicular osteoarthritis of the right shoulder. Dr. Moore stated that appellant had reached maximum medical improvement and calculated appellant's permanent impairment under the A.M.A., *Guides* (5th edition). Based

[2] On October 21 2001 the Office had notified appellant that his rate of weekly compensation to which he was entitled under the Act was $229.70. At the time of his work injury, appellant was employed as a census worker at the rate of $12.25 an hour. Daily pay for census workers is computed at a rate of 6.5 hours a day times $12.25 an hour for $29.63 a day. Because appellant was not shown to have been engaged in similar employment during the year prior to his work injury, his weekly compensation rate was computed by using the formula of 150 multiplied by the daily wage and then divided by 52. *See* 5 U.S.C. § 8114(3). Using this formula, appellant's weekly rate of compensation was found to be 150 multiplied by $79.63 divided by 52 or $229.70 a week.

on Figure 16-40, page 476, he stated that appellant had a one percent impairment resultant from loss of flexion and a one percent impairment from loss of extension. Based on Figure 16-43, page 477, he stated that there was no impairment from loss of abduction or adduction. Based on Figure 16-46, page 479, he found no impairment for loss of internal or external rotation. Dr. Moore concluded that appellant had a two percent impairment of the right upper extremity and zero percent impairment of the left upper extremity due to his work injury.

The Office forwarded a copy of Dr. Moore's report to a district medical adviser for calculation of a schedule award. On March 27, 2003 the district medical adviser agreed with Dr. Moore's finding of two percent impairment based on loss of motion. He noted that appellant had a one percent impairment each for extension and flexion measurements of 170 degrees, according to page 476 of the A.M.A., *Guides* (5th edition).

By letter dated April 22, 2003, appellant requested reconsideration of the Office's May 2, 2002 decision. He submitted reports dated March 3 and May 27, 2003 from Dr. Henry Moyle, a physiatrist, who noted that appellant had been followed for complaints of neck, back and shoulder pain. Dr. Moyle stated that appellant had responded well to a right-sided C-4 root sleeve injection to relieve his right shoulder pain and recommended that he undergo the same procedure on the left side to get rid of his remaining left shoulder pain. Appellant also argued that if he was ever expected to work again, he would chose to work in the computer field at a much higher wage than the rated wage of a cashier II.

On May 14, 2003 appellant filed a CA-7 claim for a schedule award.

In a decision dated July 2, 2003, the Office issued a schedule award for a two percent impairment of the right upper extremity. The period of the award was March 1 to April 13, 2003.

In a July 28, 2003 decision, the Office denied modification of its May 2, 2002 decision. The Office informed appellant that the wage-earning capacity determination based on the position of a cashier II, did not in any way prevent appellant from obtaining employment in a job that paid a higher wage. The Office further found that appellant had not provided any medical evidence to demonstrate that he was incapable of working under the medical restrictions provided by the impartial medical examiner or that he was unable to work in the constructed position of a cashier II as determined by the Office's May 2, 2002 decision.

LEGAL PRECEDENT -- ISSUE 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 termination or a subsequent reduction of benefits.[3] Under section 8115(a) of the Act,[4] wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably

[3] *Dorothy Jett*, 52 ECAB 246 (2001); *James B. Christenson*, 47 ECAB 775 (1996).

[4] 5 U.S.C. §§ 8101-8193.

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.[5] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[6] 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.[7]

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's DOT 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.[8]

ANALYSIS -- ISSUE 1

In this case, the Office obtained a referral opinion from Dr. Walsh, who offered a rationalized opinion[9] that appellant could return to work for 8 hours a day with pushing and pulling of no more than 80 pounds and lifting no more than 30 pounds.[10] Appellant was referred for vocational rehabilitation and a rehabilitation specialist identified the positions of gate tender and cashier II as being consistent with appellant's educational background and the physical limitations set forth by Dr. Walsh. The rehabilitation specialist reported that there were full and part-time cashier positions available in sufficient numbers in appellant's commuting area so as to make the position reasonably available to him. He provided a job description for the cashier II position verifying that it was essentially sedentary in nature with no above shoulder lifting and no below shoulder lifting over 20 pounds.

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

[6] *Richard Alexander*, 48 CAB 432 (1997).

[7] *Id*.

[8] *Richard Alexander, supra* note 6.

[9] Rationalized medical opinion evidence is evidence, which includes a physician's rationale on the issues presented and contains an accurate factual and medical background. *See generally James H. Botts*, 50 ECAB 265 (1999).

[10] The Board notes that Dr. Walsh's impartial medical opinion was obtained to resolve a conflict in the record between Drs. Mac and Rice concerning the etiology of appellant's rotator cuff tendinitis and arthritis. However, there was no conflict at that time with respect to whether appellant was disabled for work. Dr. Rice had made no limitations with respect to appellant's work capability. Dr. Walsh's opinion is, therefore, considered only to be a second opinion regarding the extent of appellant's disability for work.

The Board finds that the Office considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment, age and employment qualifications, in determining that the constructed position of cashier II 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 position of cashier II 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 a cashier with an entry-level salary of $272.40 a week.

LEGAL PRECEDENT -- ISSUE 2

Section 8107 of the Act sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.[11] The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the Office as the appropriate standard for evaluating schedule losses.[12] Effective February 1, 2001, schedule awards are determined in accordance with the fifth edition of the A.M.A., *Guides*.[13]

ANALYSIS -- ISSUE 2

In this case, appellant alleges that he is entitled to greater than a two percent impairment of the right upper extremity for which he received his schedule award. The Board has carefully reviewed the record and finds that he has no greater than two percent right arm impairment. Dr. Moore determined, based on his examination of appellant, that he had two percent impairment based on loss of motion. He noted that, under Figure 16-40 of the A.M.A., *Guides*, appellant had one percent impairment each for extension and flexion measurements of 170 degrees. An Office medical adviser properly reviewed the opinion of Dr. Moore and agreed with the physician's impairment rating, noting that it was consistent with the A.M.A., *Guides* (5th edition). Because appellant has provided no medical evidence to contradict the findings of the Office medical adviser and there are no other physical findings of record from which to conclude that appellant has greater than a two percent impairment of the right upper extremity, the Board finds that the Office properly issued its schedule award for a two percent right upper extremity impairment.

[11] The Act provides that, for a total or 100 percent loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

[12] 20 C.F.R. § 10.404 (1999).

[13] FECA Bulletin No. 01-05 (issued January 29, 2001).

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation based on its determination that he has the capacity to earn wages in the constructed position of a cashier II. The Board also finds that appellant has no greater than a two percent impairment of the right upper extremity for which he received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated July 28 and 2, 2003 is affirmed.

Issued: April 7, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member