

**United States Department of Labor
Employees' Compensation Appeals Board**

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MATTHEW KUCHARCZYK, Appellant)	
)	
and)	Docket No. 04-1438
)	Issued: December 14, 2004
DEPARTMENT OF THE NAVY,)	
PHILADELPHIA NAVAL SHIPYARD,)	
Philadelphia, PA, Employer)	
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Appearances:
Matthew Kucharczyk, *pro se*
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On May 10, 2004 appellant filed a timely appeal of the Office of Workers' Compensation Programs' decision dated April 12, 2004¹ which denied modification of its determination that appellant was capable of earning wages in the selected position of Cashier II, but granted appellant's request for modification of the pay rate for the position of Cashier II. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly denied modification of its determination that the position of Cashier II represents appellant's wage-earning capacity; and (2) whether the

¹ Appellant also requested reconsideration of a decision dated May 13, 2003. A review of the record indicates there is no decision with this date. However, the Board issued a decision on May 15, 2003 which affirmed the Office's reduction of his compensation based on his ability to earn wages in the selected position of Cashier II. The Board also found that appellant had failed to meet his burden of proof to establish a recurrence of disability.

Office properly determined the rate of pay for the selected position of Cashier II. On appeal appellant contends that he is unable to perform the duties of a Cashier II.

FACTUAL HISTORY

This is the second appeal in the present case. In the prior appeal, the Board issued a decision and order on May 15, 2003 in which it affirmed the Office decisions dated October 29, 2001 and January 28, 2002.² In its decision, the Board found that the Office properly reduced appellant's compensation benefits effective August 15, 1999³ based on its determination that the selected position of Cashier II⁴ represented his wage-earning capacity and that the duties of this position were not of a repetitive nature. The Board also found that appellant failed to meet his burden of proof in establishing a recurrence of disability on or after August 28, 2000 causally related to his accepted March 15, 1982 employment injury. The facts and circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.⁵

In an August 7, 2003 letter, appellant contended that the Office erred in its determination of the rate of pay for the position of Cashier II as it used the higher salary determination for men and that this was a violation of his civil rights as gender was used to calculate his rate of pay.

Appellant, in an August 10, 2003 letter, requested reconsideration of the January 28, 2002 decision and alleged that his wage-earning capacity was incorrectly computed. Appellant requested modification in an August 21, 2003 letter on the grounds that his civil rights had been violated.

In a nonmerit October 21, 2003 decision, the Office denied appellant's request for reconsideration.

In letters dated October 23, 2003, appellant requested reconsideration on the grounds that the Office used the incorrect rate of pay in determining his wage-earning capacity for the selected position. On January 31 and February 5, 2004 appellant requested reconsideration on

² Docket No. 02-2265 (issued May 15, 2003).

³ The Office issued its initial decision reducing the rate of appellant's compensation benefits based on his wage-earning capacity as a Cashier II, effective August 15, 1999, on July 16, 1999.

⁴ The Department of Labor, *Dictionary of Occupational Titles* (DOT) describes the position of cashier II, (code 211.462-010) as follows:

"Receives cash from customer or employees in payment for goods or services and records amounts received. Makes change, cashes checks and issues receipts or tickets to customers."

DOT describes the job requirements as follows: "Sedentary position (lifting up to 10 pounds); requires the ability to reach, handle and finger; must be able to see, talk and hear; requires 30 days of short demonstration."

⁵ The Board notes that appellant filed an appeal of a May 15, 2003 decision on July 29, 2003 and the Board docketed is appeal as 03-1923 and 03-2022. On October 6, 2003 the Board granted appellant's request to dismiss his appeal in Docket No. 03-1923, and also issued an order dismissing Docket No. 03-2022 as a duplicate appeal of Docket No. 03-1923.

the issue of the rate of pay used for the selected position of Cashier II and his subsequent reduction in compensation. Appellant also submitted a July 9, 2003 clinic note by Dr. Joseph J. Thoder, an attending Board-certified orthopedic surgeon.

In his July 9, 2003 clinic note, Dr. Thoder reported a history of “right upper extremity complaints of the hand from a former injury.” He noted that appellant had multiple surgeries “not the least of which was arthrodesis” and “some compressive neuropathies.” Dr. Thoder noted that he was currently treating appellant primarily for “a lateral epicondylitis of the left upper extremity, which in my opinion is at least secondarily related to the initial injury because of the altered position of hand use precipitating lateral epicondylitis.” Dr. Thoder indicated that he had reviewed the job requirements of the Cashier II position and noted that, while the job is classified as light duty, it involves “frequent reaching, handling and fingering, which in my opinion can be construed as repetitive.” Dr. Thoder opined that appellant would “have difficulty performing those tasks secondary to the repetitive nature of the process.”

In a decision dated April 12, 2004, the Office found Dr. Thoder’s opinion insufficient to warrant modification of the determination that appellant was capable of performing the duties of the selected position. The Office, however, found the evidence sufficient to warrant modification of the mean earnings of Cashier II as the Office incorrectly selected a higher rate in using the earnings for men of \$353.78 when the earnings for women was \$321.99. The Office then determined the correct determination for earnings would be a mean wage of \$327.52 and modified his wage-earning capacity to reflect this amount.

Appellant requested reconsideration in an April 19, 2004 letter and contended that the physical demands of the position were not fairly represented.

In an April 19, 2004 letter, the Office informed appellant that the April 12, 2004 decision addressed both the suitability of the selected position and the pay rate. It then advised appellant to follow the appeal rights accompanying the April 12, 2004 decision if he wished to dispute the decision.

In an April 23, 2004 letter, appellant reiterated his contention that the selected position was medically incorrect and referenced Dr. Thoder’s report.

LEGAL PRECEDENT -- ISSUE 1

Once loss of wage-earning capacity is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous. The burden of proof is on the party attempting to show the award should be modified.⁶

⁶ *Marie A. Gonzales*, 55 ECAB ____ (Docket No. 03-1808, issued March 18, 2004).

ANALYSIS -- ISSUE 1

In this case, appellant did not submit sufficient evidence to show that the Office's original determination with regard to his wage-earning capacity should be modified. In a July 16, 1999 decision, the Office determined that appellant had the wage-earning capacity to perform the position of Cashier II and reduced his wage-loss benefits accordingly. This determination was reviewed by the Board in the prior appeal and affirmed.

In support of his argument that his wage-earning capacity should be modified, appellant submitted a July 9, 2003 clinic note by Dr. Thoder. Dr. Thoder did not provide a rationalized medical opinion explaining how appellant's employment-related condition prevented him from performing the Cashier II position or otherwise establish that the Office improperly determined his wage-earning capacity.

In his July 9, 2003 clinic note, Dr. Thoder indicated that he had previously treated appellant for "right upper extremity complaints of the hand" including arthrodesis and "some compressive neuropathies" and that he was currently treating appellant for "a lateral epicondylitis of the left upper extremity" which he attributed to the employment injury. Although Dr. Thoder provided some support for causal relationship in a conclusory statement, he did not provide a rationalized opinion regarding the causal relationship between appellant's right and left upper extremity conditions and the employment incident of March 15, 1982. The Board has found that vague and unrationalized medical opinions on causal relationship have little probative value.⁷

Next, Dr. Thoder stated that he had reviewed the job requirements of the selected position of Cashier II and noted that, while the job is classified as light duty, the position involves "frequent reaching, handling and fingering, which in my opinion can be construed as repetitive." The physician then concluded that appellant would "have difficulty performing those tasks secondary to the repetitive nature of the process." Dr. Thoder opined that the position of Cashier II is unsuitable due to what he believed was the repetitive nature of the position. As noted in the Board's prior decision, the Board rejected appellant's arguments that the duties were repetitive. In addition, Dr. Thoder provided no rationale explaining why he believed the position involved repetitive movements nor how this restriction was causally related to appellant's accepted employment injury. It is well established that medical conclusions unsupported by rationale are of diminished probative value.⁸ Furthermore, the rehabilitation counselor determined that appellant was able to perform the position, based upon the medical evidence, and the work was reasonably available within his commuting area. The position was described as: "A sedentary position (lifting up to 10 pounds); requires the ability to reach, handle and finger; must be able to see, talk and hear; requires 30 days of short demonstration." Dr. Thoder's opinion that the position was repetitive movements is not supported by the evidence of record and is based on an inaccurate description of the job duties of the selected position of Cashier II and, thus, is of little

⁷ See *Jimmie H. Duckett*, 52 ECAB 332 (2001); *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value).

⁸ *Jacqueline L. Oliver*, 48 ECAB 232 (1996).

probative value.⁹ The report by Dr. Thoder is insufficient to warrant modification of the Office's July 16, 1999 loss of wage-earning capacity determination. Appellant failed to carry his burden to justify modification of the Office's July 16, 1999 loss of wage-earning capacity determination.

LEGAL PRECEDENT -- ISSUE 2

When the Office makes a medical determination of partial disability and of specific 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, *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 labor market should be made through contact with the state employment service or other applicable service.¹⁰ 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.¹¹

ANALYSIS -- ISSUE 2

In the instant case, the Office granted appellant's request for modification of the determination of the wage rate used in determining the rate of pay for the selected position of Cashier II. The Office found that appellant correctly pointed out that it had erred in failing to consider wage rates for both men and women when it used the higher rate of pay for men in the selected position of Cashier II of \$353.78. The Office amended appellant's wage rate to \$327.52, which it determined was the mean between wage rate or earnings for men of \$353.78 and the wage rate or earnings for women of \$321.99. The Board is unable to determine the authority or reasoning the Office relied on when it decided to use the mean between the wage rate for earnings for men and women in the selected position. In addition, if the Office was correct in determining to modify the wage rate, it is unclear why it did not use the lower rate for women instead of calculating a mean rate. On remand, the Office should provide clarification as to its rationale and the supporting authority for using a mean between the wage rate for men and women instead of either using the lower wage rate or continuing to use the wage rate for men.

CONCLUSION

The Board finds that appellant has not established that a modification of the wage-earning capacity is warranted. The Board also finds that the case must be remanded to the Office to provide clarification on its calculation of appellant's wage rate by using a mean wage rate.

⁹ See generally *Douglas M. McQuaid*, 52 ECAB 382 (2001) (medical reports based on an incomplete or inaccurate history are of little probative value).

¹⁰ See *Dennis D. Owen*, 44 ECAB 475 (1993).

¹¹ 5 ECAB 376 (1953); see also 20 C.F.R. § 10.403.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 12, 2004 is affirmed in part, set aside in part and the case remanded for further proceedings consistent with this opinion.

Issued: December 14, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member