United States Department of Labor
Employees' Compensation Appeals Board

JOHN E. CANNON, Appellant	)	
and	)	**Docket No. 03-347**
	)	**Issued: June 24, 2004**
DEPARTMENT OF THE NAVY, PHILADELPHIA NAVAL SHIPYARD, Philadelphia, PA, Employer	)	

Appearances:
Simon J. Rosen, Esq., for the appellant
Jim C. Gordon, Jr., Esq., for the Director

Oral Argument April 21, 2004

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On November 25, 2002 appellant, through his attorney, filed an appeal of an October 21, 2002 merit decision of the Office of Workers' Compensation Programs reducing his wage-loss compensation benefits on the grounds that he had the capacity to earn wages as a telephone solicitor. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly reduced appellant's compensation effective November 3, 2002 on the grounds that he had the capacity to earn wages as a telephone solicitor.

FACTUAL HISTORY

This case is before the Board for the second time. In a decision dated January 21, 2000, the Board reversed the Office's January 24, 1997 decision terminating appellant's benefits on the grounds that he had no further disability due to his accepted conditions of lumbar and thoracic

strain resulting from an August 22, 1994 employment injury.[1] The Board found that the opinion of the impartial medical specialist was of diminished probative value and insufficient to support the Office's burden of proof to terminate compensation. The findings of fact and conclusions of law from the prior decision are hereby incorporated by reference.

On June 2, 2000 the Office reinstated appellant's compensation. By letter dated January 11, 2001, the Office referred appellant to Dr. Donald F. Leatherwood, II, a Board-certified orthopedic surgeon, for a second opinion evaluation.

In a report dated February 26, 2001, Dr. Leatherwood opined that appellant had "fully recovered from his work injury" and could return to his usual employment. He further found that appellant had degenerative disc disease of the lumbosacral spine unrelated to the employment injury.

On April 5, 2001 the Office issued a notice of proposed termination of compensation. Appellant submitted a report dated April 18, 2001 from his attending physician, Dr. Roy M. Lerman, a Board-certified physiatrist, who found that appellant had continued back problems due to the accepted employment injury. He opined that appellant had "ongoing significant limitations as a result of his injury and cannot return to his prior work activities."

The Office determined that a conflict of medical opinion existed between Dr. Leatherwood and Dr. Lerman and referred appellant to Dr. E. Balasubramanian, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a report dated October 26, 2001, Dr. Balasubramanian discussed the history of injury, reviewed the evidence of record and listed findings on physical examination. He described appellant's complaints of constant back pain and numbness in his left leg and right buttock and an ability to sit for 30 minutes. Dr. Balasubramanian noted that objective studies revealed degenerative disc disease. He opined that appellant sustained a soft tissue injury due to his August 1994 employment injury which aggravated his preexisting degenerative disc disease. He found that appellant could not return to his regular employment but could return to work with restrictions. In an accompanying work capacity evaluation dated September 4, 2001, Dr. Balasubramanian found that appellant could work 8 hours per day with the following limitations: sitting for 4 hours; walking for 2 hours; standing for 2 hours; reaching and reaching above the shoulder for 4 hours; twisting and operating a motor vehicle for 2 hours; pushing and pulling up to 20 pounds for 4 hours; lifting up to 20 pounds; and occasional squatting, kneeling and climbing. He further found that appellant should take a 5- to 10-minute break every 2 hours.

On December 18, 2001 the Office referred appellant to a rehabilitation counselor for vocational rehabilitation.[2] In a report dated January 29, 2002, the rehabilitation counselor reviewed Dr. Balasubramanian's work restrictions and transferable skills. She developed a rehabilitation plan for placement of appellant with a new employer based on labor market

[1] Docket No. 97-1689 (issued January 21, 2000).

[2] The Office noted that appellant had previously undergone vocational testing in 1995.

research. On March 5, 2002 appellant signed an individual rehabilitation plan agreeing to search for jobs as an assembler, cashier and telephone solicitor in his geographical region.

In a closing report dated June 14, 2002, the rehabilitation counselor noted that appellant was currently in Florida and opined that he had been "minimally cooperative with [the] process over service period." The rehabilitation counselor submitted job classifications for the positions of assembler, telephone solicitor and cashier. The rehabilitation counselor reviewed the constructed position of telephone solicitor and found that it was within appellant's vocational abilities. She noted that he was a high school graduate and had performed work requiring higher specific vocational preparation. The rehabilitation counselor further found that the job was reasonably available within appellant's commuting area with wages between $280.00 and $600.00 per week.

On September 12, 2002 the Office notified appellant that it proposed to reduce his wage-loss compensation based on its finding that he had the capacity to earn wages of $280.00 per week as a telephone solicitor.

In a letter dated October 15, 2002, appellant's attorney argued that the Office should not reduce appellant's compensation. He submitted a report dated October 14, 2002 from Dr. Marc Cohen, a chiropractor, who Dr. Cohen related that he disagreed with Dr. Balasubramanian's work restrictions for appellant because the physician had not performed a functional capacity evaluation. He also found that appellant did not have the physical capacity to perform the duties of a telephone solicitor and contended that Dr. Balasubramanian found that appellant could only sit for 30 minutes.

By decision dated October 21, 2002, the Office reduced appellant's compensation effective November 3, 2002, based on its finding that he had the wage-earning capacity to perform the selected position of telephone solicitor.

LEGAL PRECEDENT

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.[3] Under section 8115(a), wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent his or her wage-earning capacity, or 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.[4]

[3] *David W. Green*, 43 ECAB 883 (1992).

[4] *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

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's *Dictionary of Occupational Titles* or otherwise available in the open market, that fits the employee's capabilities with regard to his or her 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. Finally, application of the principles set forth in *Albert C. Shadrick*,[5] will result in the percentage of the employee's loss of wage-earning capacity.[6]

ANALYSIS

As appellant did not have actual earnings which fairly and reasonably represented his wage-earning capacity, the Office properly selected a position for determination of wage-earning capacity. The weight of the medical evidence supports a finding that appellant is not totally disabled. The Office properly found a conflict in medical opinion between the Office referral physician, Dr. Leatherwood, who found that appellant had no further residuals of his employment injury and could return to his regular employment and appellant's attending physician, Dr. Lerman, who opined that appellant continued to have work restrictions due to his employment injury. In a report dated October 26, 2001, Dr. Balasubramanian, a Board-certified orthopedic surgeon who performed an impartial medical examination, discussed the history of injury, reviewed the evidence of record and listed findings on physical examination. He opined that appellant sustained a soft tissue injury due to his August 1994 employment injury which aggravated his preexisting degenerative disc disease. Dr. Balasubramanian found that appellant could not return to his regular employment but could work full time in a limited-duty capacity. He listed specific work restrictions in a work capacity evaluation dated September 4, 2001, including lifting up to 20 pounds.

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.[7] In this case, Dr. Balasubramanian provided a detailed report expressing his opinion that appellant was not totally disabled and providing work restrictions. He relied on his physical examination of appellant, a review of the medical evidence of record, including the results of objective testing and the history of injury in reaching his conclusions. The Board finds that Dr. Balasubramanian provided a detailed and well-rationalized report based on a proper factual background and thus his opinion is entitled to the special weight accorded an impartial medical examiner. His report, therefore, constitutes the weight of the medical opinion evidence and establishes that appellant was capable of performing work within the provided work restrictions. As the job classification of a telephone solicitor is

[5] 5 ECAB 376 (1953).

[6] *James A. Birt*, 51 ECAB 291 (2000); *Francisco Bermudez*, 51 ECAB 506 (2000).

[7] *Gary R. Sieber*, 46 ECAB 215 (1994).

sedentary and requires only occasional lifting under 20 pounds, the medical evidence supports a finding that appellant has the physical capacity to perform the duties of the position.

Appellant submitted a report dated October 14, 2002 from Dr. Cohen, a chiropractor, who related that he disagreed with Dr. Balasubramanian's work restrictions for appellant because he had not performed a functional capacity evaluation. He further opined that appellant did not have the physical capacity to perform the position of telephone solicitor. However, section 8101(2) of the Federal Employees' Compensation Act provides that the term "physician" includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist.[8] As Dr. Cohen did not diagnose a subluxation, his report is of no probative value as he is not a physician under the Act.

As discussed above, in assessing the claimant's ability to perform the selected position, the Office must consider not only physical limitations but also take into account his work experience, age, mental capacity and educational background. In this case, the rehabilitation counselor found that appellant had the skills necessary to perform the position of telephone solicitor based on his high school education and previous work experience. She further found that the position was reasonably available in appellant's commuting area with wages of $280.00 to $600.00 per week. The Board finds that the Office considered the proper factors, such as availability of suitable employment, appellant's physical limitations and employment qualifications, in determining that the position of telephone solicitor represented his wage-earning capacity. The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and training to perform the position and that such a position was reasonably available within the general labor market of appellant's commuting area. The Office further properly determined appellant's loss of wage-earning capacity in accordance with the formula developed in *Albert C. Shadrick*,[9] and codified at 20 C.F.R. § 10.403. Therefore, the Office properly determined that the position of telephone solicitor reflected appellant's wage-earning capacity effective November 3, 2002.[10]

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation effective November 3, 2002 on the grounds that he had the capacity to earn wages as a telephone solicitor.

[8] 5 U.S.C. § 8101(s); *Sheila A. Johnson*, 46 ECAB 323 (1994).

[9] *See supra* note 5.

[10] On appeal, appellant's attorney argued that Dr. Balasubramanian's report is insufficient because he did not perform a functional capacity evaluation on appellant as required by the Americans with Disabilities Act. However, a finding of disability under one federal statute does not establish disability under the Act. *See David Budzik*, 52 ECAB 339 (2001).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 21, 2002 is affirmed.

Issued: June 24, 2004
Washington, DC

Alec J. Koromilas
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member