

employment related.¹ The Office accepted his claim for a permanent aggravation of preexisting lumbar spinal stenosis and degenerative disease on September 20, 2001 and authorized lumbar laminectomy surgery, which was performed on January 20, 2000. The Office expanded appellant's accepted conditions to include L4-5 spinal stenosis and L4-5 anterolisthesis with L4-5 lumbar instability.

On December 23, 2001 appellant filed a claim for a recurrence of disability beginning January 20, 2000, which the Office accepted. The Office subsequently placed him on the periodic compensation rolls for temporary total disability.

In a report dated January 7, 2002, Dr. Gregg Coodley, an attending Board-certified internist, diagnosed permanent aggravation of spinal stenosis and degenerative disc disease. He reported that a magnetic resonance imaging test showed "moderate foraminal stenosis" at L5-S1 and increased degenerative changes at L4-5. He stated that appellant's "continuing symptoms included persistent pain and numbness with walking, decreased tolerance for walking and other activities" and that activity aggravated appellant's chronic pain. The physician opined appellant's symptoms "are all certainly consistent with nerve root inflammation, as well as permanent aggravation of his preexisting lumbar spinal stenosis." Dr. Coodley opined that appellant was totally disabled due to the aggravation of his lumbar spinal stenosis and that this condition "is worsened by progression of degenerative dis[c] and joint disease."

In a report dated March 8, 2002, Dr. Thad C. Stanford, a second opinion Board-certified orthopedic surgeon, diagnosed "[b]ilateral L5 nerve compromise with radiculopathy, primarily in the left lower extremity" and "[p]ostoperative L4-5 dis[c]ectomy for lumbar stenosis. With regard to the condition of spinal stenosis, Dr. Stanford concluded it was "not found on examination today" and "the primary finding is that of his radiculopathy secondary to the stenosis and surgery for same." He concluded that appellant was capable of returning to work "as a [m]edical [d]octor with restrictions." In an attached work capacity evaluation, Dr. Stanford opined that appellant had reached maximum medical improvement and was capable of working with restrictions.

On September 3, 2002 the Office referred appellant to Dr. Stephen J. Thomas, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Dr. Coodley and Dr. Stanford on the issue of whether appellant was totally disabled or was capable of working with restrictions.

In a report dated September 27, 2002, Dr. Thomas, based upon a review of the medical evidence, statement of accepted facts and physical examination, diagnosed L4-5 spinal stenosis and L4-5 anterolisthesis with instability at L4-5. A physical examination revealed appellant "walks with an unsteady gait" and "is able to walk on his toes and heels but does it everso (sic) slowly." Appellant's "squat and rise is 50 percent of normal and he is unstable." Range of motion of the lumbar spine included 30 degrees flexion, 16 degrees extension and 20 degrees left and right lateral bending. Dr. Thomas reported Waddell's test with compression, rotation and traction as negative. He opined that appellant was only partially disabled and capable of working

¹ The employing establishment noted that appellant was a "contract employee" and that his term of employment expired on February 4, 2000.

with restrictions. Restrictions include no bending, lifting or stooping and an inability to “stand for over a short time” or to “walk for over a short distance.” Dr. Thomas further noted that appellant could not “stand over 10 minutes or walk over a half block.” He opined that appellant could perform a sedentary job and “could potentially perform the duties of an administrative doctor where he would be at a desk the majority of the time.”

On December 3, 2002 the Office referred appellant for vocational rehabilitation.

In an April 2, 2003 vocational rehabilitation report, Kathryn Heatherly, rehabilitation counselor, reported the labor market for a sedentary administrative medicine position is quite small, generally is nationwide, and competition for few existing jobs was quite keen. She noted appellant was “not Board-certified, as is quite often required and/or preferred.”

In a July 22, 2003 vocational rehabilitation report, Ms. Heatherly closed the vocational rehabilitation services at the Office’s request and noted appellant’s probability of success in securing employment remained limited.

In a September 14, 2003 report, Marty Sharf, a rehabilitation counselor, identified the position of medical and health service manager as within appellant’s emotional and physical capabilities. The position is sedentary and included occasional lifting of up to 10 pounds “or exerting negligible force in pushing, or pulling,” and brief periods of standing or walking. With regard to availability of the position, Mr. Sharf noted an annual average of 19 job openings in appellant’s commuting area. He concluded that appellant was qualified for the position based upon his physician’s license and work experience. He stated that “many of these positions are within his sedentary work restrictions” and based upon the “19 average annual job openings” within appellant’s commuting area, the job was performed in sufficient numbers as to be considered reasonably available. The pay rate for the position was listed as \$1,391.60 per week or \$34.79 per hour.

On September 17, 2003 the Office issued a notice of proposed reduction of compensation.

In letters dated October 9 and 16, 2003, appellant disagreed with the Office’s preliminary determination to reduce his compensation benefits on the grounds that he was capable of performing the duties of medical and health service manager. Appellant submitted medical evidence from Dr. Coodley which included an August 12, 2003 attending physician’s report (Form CA-20) and an October 6, 2003 letter. In the October 6, 2003 letter, Dr. Coodley stated that he had not been provided any job descriptions to review and that appellant experienced bilateral leg pain. In the attending physician’s report, Dr. Coodley indicated that appellant had not reached maximum medical improvement and he “may do trial of sedentary work up to 4 h[ou]rs [per] day provided [he] may rest lying down 20 min[utes] each hour.”

In a November 11, 2003 letter, Dr. Coodley stated:

“This spring there was the most recent development of expanded paresthesias into new and additional dermatomal pattern. This is entirely consistent with his known and documented anterolothesis. Additionally during [v]oc[at]ional [r]ehab[ilitation] sedentary at home work of four h[ou]rs [per] day there was an

exacerbation of symptoms which was only partially ameliorated by lying down each hour.”

Dr. Coodley indicated that appellant could perform a trial of work up to 4 hours per day provided he could change positions, including moving every 15 minutes and lying down for 20 minutes per hour.

In a November 17, 2003 letter, appellant argued rehabilitation counselor failed to consider his age “as a potential barrier to finding employment” and the Office failed to consider his age when it determined his loss of wage-earning capacity.

By decision dated November 20, 2003, the Office reduced appellant’s compensation on the grounds that he was able to perform the duties of the selected position of medical and health service manager.

LEGAL PRECEDENT

Once the Office determines that an employee is totally disabled as a result of an employment injury, it has the burden of justifying a subsequent reduction in compensation benefits.² As part of its burden, the Office must show that the employee is physically capable of performing the duties of the job selected as representative of his wage-earning capacity.³

Under section 8115(a) of the Federal Employees’ Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably 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 due 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.⁴ Wage-earning capacity is a measure of the employee’s ability to earn wages in the open labor market under normal employment conditions.⁵ The job selected for determining wage-earning capacity must be reasonably available in the general labor market in the commuting area in which the employee lives.⁶

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

² *Joseph A. Brown, Jr.*, 55 ECAB ____ (Docket No. 04-376, issued May 11, 2004).

³ *William H. Woods*, 51 ECAB 619 (2000).

⁴ *John D. Jackson*, 55 ECAB ____ (Docket No. 03-2281, issued April 8, 2004).

⁵ *David L. Scott*, 55 ECAB ____ (Docket No. 03-1822, issued February 20, 2004).

⁶ *Lawrence D. Price*, 54 ECAB ____ (Docket No. 02-1541, issued May 19, 2003).

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. Finally, application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.⁷

ANALYSIS

In the instant case, the Office referred appellant to Dr. Thomas to resolve the conflict in the medical opinion evidence between Dr. Coodley and Dr. Stanford on the issue of whether appellant was totally disabled or was capable of working with restrictions. Dr. Thomas concluded that appellant was only partially disabled and capable of working with restrictions. These restrictions include no bending, lifting or stooping and an inability to "stand for over a short time" or to "walk for over a short distance." Dr. Thomas further noted that appellant could not "stand over 10 minutes or walk over a half block." He opined that appellant could perform a sedentary job and "could potentially perform the duties of an administrative doctor where he would be at a desk the majority of the time." Based upon Dr. Thomas' September 27, 2002 report, the Office referred appellant for vocational rehabilitation.

A review of the medical evidence in the present case indicates that there is insufficient medical evidence to support a finding that the selected position of medical and health services manager was within appellant's physical limitations. The issue of whether appellant has the physical ability to perform a selected position is primarily a medical question that must be resolved by the medical evidence.⁸ In his September 27, 2002 report, Dr. Thomas indicated that appellant was partially disabled, that he could perform a sedentary position and noted restrictions which included no bending, lifting or stooping and an inability to "stand for over a short time." Based on these restrictions, Mr. Sharf, a rehabilitation counselor selected the position of medical and health service manager on September 14, 2003. However, while the job description listed the position as sedentary, the physical requirements listed conflict with Dr. Thomas' work restrictions. More specifically, the position required occasional lifting of up to 10 pounds, a requirement which directly contradicted Dr. Thomas' restriction of no lifting. The position required walking or standing for brief periods, but the position description did not specify the lengths of time which would be required for these activities and it remains unclear whether the position would violate the restriction that appellant could not "stand over 10 minutes or walk over a half block." Thus, notwithstanding the impartial medical examiner's explicit restrictions, Mr. Sharf, a rehabilitation counselor, selected a position as a medical and health services manager necessitated a level of physical exertion which exceeded his physical restrictions.⁹

⁷ *Pasquale C. D'Arco*, 54 ECAB ____ (Docket No. 02-1913, issued May 12, 2003).

⁸ See *Maurissa Mack*, 50 ECAB 498 (1999); *Robert Dickinson*, 46 ECAB 1002 (1995).

⁹ Moreover, August and November 2003 reports of Dr. Coodley, an attending Board-certified internist, indicated that appellant could only perform a trial of work for up to 4 hours per day provided he could change positions frequently and recline for 20 minutes per hour.

CONCLUSION

Based upon the above reasons, the Office did not meet its burden of proof to establish that the position of “medical and health services manager” reflected appellant’s wage-earning capacity.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers’ Compensation Programs dated November 20, 2003 is reversed.

Issued: November 2, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member