United States Department of Labor
Employees' Compensation Appeals Board

RICHARD A. CHANEY, Appellant	)	
and	)	**Docket No. 05-370**
	)	**Issued: July 6, 2005**
DEPARTMENT OF THE ARMY, ARMY FIELD ARTILLARY CENTER, Fort Sill, OK, Employer	)	

Appearances:
Richard A. Chaney, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member

JURISDICTION

On November 30, 2004 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated November 10, 2004, which found that the constructed position of hotel clerk represented his wage-earning capacity. 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 met its burden of proof in reducing appellant's compensation based on its determination that the constructed position of hotel clerk represented his wage-earning capacity.

FACTUAL HISTORY

On March 11, 1994 appellant, a 35-year-old engineering equipment operator, filed a traumatic injury claim alleging that he injured his neck on March 10, 1994 when he was involved in a motor vehicle accident. The Office accepted the claim for cervical and thoracic strains, aggravation of preexisting spondylitic spondylolisthesis and authorized L4-5 fusion surgery,

which occurred on February 9, 1995. Appellant stopped work on March 10, 1994 and the Office subsequently placed him on the periodic rolls for temporary total disability effective September 18, 1994.

In a report dated May 16, 2000, Dr. Houshang Seradge, a Board-certified orthopedic surgeon, concluded that appellant was capable of working eight hours a day in a sedentary position. Dr. Seradge reported that appellant "passed 79 percent of his validity criteria" in a May 2, 2000 functional capacity evaluation. Based upon this, Dr. Seradge concluded that appellant was able to work eight hours per day in a sedentary position and that appellant was capable of performing the duties of an engineering equipment operator. Dr. Seradge also opined that appellant no longer had any residuals due to his accepted cervical strain, thoracic strain and temporary aggravation of the spondylitic spondylolisthesis.

In a May 3, 2000 report, Dr. Robert M. Simpson, an attending Board-certified orthopedic surgeon, diagnosed chronic low back pain, lumbar spine degenerative osteoarthritis and disc disease and employment injury aggravated spondylitic spondylolisthesis. A physical examination revealed poor range of motion, muscle spasm and an antalgic gait when walking.

Dr. Seradge, in a May 24, 2000 supplemental report, noted appellant's nerve conduction studies were essentially normal for his upper and lower extremities. In concluding, Dr. Seradge opined that appellant was capable of working eight hours per day.

On January 9, 2001 the Office issued a notice of proposed termination of compensation and medical benefits. The Office finalized the termination of appellant's benefits on February 16, 2001 effective February 24, 2001.

Appellant requested reconsideration of the termination of his benefits on the grounds that he remained totally disabled due to his employment injury.

By decision dated September 13, 2001, the Office reversed the February 16, 2001 decision and reinstated appellant's compensation benefits.

In a report dated September 25, 2001, Dr. Simpson diagnosed postfusion status, painful lower extremities, chronic low back pain, lumbar spine degenerative osteoarthritis and disc disease and spondylitic spondylolisthesis. A physical examination revealed restricted range of motion, muscle spasm, he failed "to reverse his lumbar curve with forward flexion and an antalgic gait when walking. Dr. Simpson concluded that appellant remained totally disabled.

On December 3, 2001 the Office referred appellant to Dr. Michael H. Wright, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Dr. Simpson and Dr. Seradge regarding whether appellant was capable of working in a sedentary position.

In a report dated December 13, 2001, Dr. Wright, based upon a review of the medical evidence, statement of accepted facts and physical examination, opined that appellant was capable of working an eight-hour day with restrictions. A physical examination of the cervical spine revealed 30 degrees of flexion, 30 degrees extension, 60 degrees right and left rotation and 25 degrees right and left bending. Dr. Wright reported "some mild tenderness at the

cervicothoracic junction." A physical examination of the lumbar spine revealed 45 degrees of flexion, 10 degrees extension and 10 degrees right and left bending and "axial compression of the lumbar spine causes some mild to moderate complaints of low back pain as does simulated rotation of the pelvis." He diagnosed "mechanical low back pain, status postmultiple low back procedures resulting in an L5-S1 posterolateral fusion. Dr. Wright also opined that appellant had "no objective findings related to the current work-related condition other than the retained hardware in the lumbar spine" which he opined could be causing his radicular complaints. He then concluded that appellant had reached maximum medical improvement and was capable of working a modified light-duty job with restrictions including no pulling, lifting or pushing more than 25 pounds and avoiding repetitive stooping and bending.

On January 31, 2002 the Office referred appellant for vocational rehabilitation based upon Dr. Wright's opinion that appellant was capable of working with restrictions.

In an April 8, 2002 report, Jeffrey L. Owen, vocational rehabilitation specialist noted that the most recent medical evidence was in 2000 and was comprised of reports from Dr. Simpson and Dr. Seradge. Mr. Owen indicated, based upon the Wide Range Achievement test, appellant had a fifth grade level for spelling and reading and a sixth grade level for arithmetic. The test also revealed appellant was "functioning in the low average range of intelligence." He noted that appellant had a high school education and "[t]here are sedentary jobs that require only a high school education for employment."

On April 23, 2002 Mr. Owen noted that appellant was "not interested in participation with plan development activities until" he was released to work by his attending physician.

On July 11, 2002 Mr. Owen recommended vocational services for appellant be discontinued due to his "lack of participation in job placement services." He indicated that appellant was interested in a medical retirement and was currently receiving social security benefits.

On August 19, 2002 Mr. Owen advised the Office that the job description of hotel clerk fit appellant's restrictions and skill level. He noted the position was classified as sedentary and required three to six months of specific vocational preparation. He noted that appellant's education and work experience met the specific vocational preparation. The physical requirements required no more than 20 pounds for strength and occasional reaching and handling. The rehabilitation counselor noted the position was available in sufficient numbers based upon the Oklahoma state employment service. The weekly wage was noted as $257.00. Appellant's weekly pay rate when injured on March 10, 1994 was $463.60 and the current pay rate for his date-of-injury position was $638.54 as of September 10, 2002. The Office found that appellant had a 40 percent wage-earning capacity which, when multiplied by the date-of-injury salary resulted in an adjusted wage-earning capacity of $185.44. The loss of wage-earning capacity equaled $278.16, multiplied by the 2/3 compensation rate resulted in $208.62 plus cost-of-living adjustments made it a total of $245.00 per week. The job description required appellant to collect payment, compute the bill for the hotel guest and make change. In addition, the position required him to maintain; "records of room availability and guests' accounts manually or using computer."

In a July 16, 2002 report, Dr. Simpson reported that appellant was limited "due to his pain and restricted range of motion with some muscle spasm." He opined that appellant was unable to perform "any type of gainful employment at this time on a full-time basis," but stated that he was "a candidate for vocational rehabilitation training and evaluation" with regards to part-time or sedentary work.

On August 2 and October 9, 2002 appellant elected compensation under the Civil Service Retirement System. Based upon appellant's August 2, 2002 election, the Office deleted appellant from the periodic rolls effective September 8, 2002.

On September 10, 2002 the Office issued a notice of proposed reduction of compensation.

Appellant disagreed with the proposal to reduce his benefits in a September 17, 2002 letter. He contended that he was totally disabled based upon the determination by the Social Security Administration.

In a decision dated October 10, 2002 and finalized on October 16, 2002, the Office finalized the reduction of appellant's compensation finding that he was capable of earning wages in the selected position of hotel clerk. The Office noted October 10, 2002 as the date the reduction of compensation would be effective.

Appellant requested review of the written record by an Office hearing representative in an October 23, 2002 letter.[1]

In an April 2, 2003 decision, an Office hearing representative affirmed the reduction of appellant's compensation based upon his ability to perform the duties of the selected position of hotel clerk.

Appellant requested reconsideration in an April 19, 2003 letter.

In a nonmerit decision dated May 28, 2003, the Office denied appellant's request for reconsideration of the October 10, 2002 decision, which had been affirmed by an Office hearing representative.

On June 16, 2003 appellant filed an appeal with the Board, which was docketed as No. 03-1628.[2] On December 23, 2003 the Office issued an order remanding the case as the case record was incomplete and thus an informed adjudication by the Board could not be undertaken.

[1] On January 4, 2003 appellant filed an election form requesting to receive compensation under the Federal Employees' Compensation Act effective October 9, 2002.

[2] Docket No. 03-1628 (issued December 23, 2003).

The Board then set aside the decisions dated October 16, 2002, April 2 and May 28, 2003 and remanded for further action by the Office.[3]

On remand, by decision dated November 10, 2004, the Office reissued its October 10, 2002 decision, which reduced appellant's compensation based upon a determination that he was capable of earning wages in the selected position of hotel clerk. The Office noted October 10, 2002 as the date the reduction of compensation would be effective.

LEGAL PRECEDENT

The general test for determining loss of wage-earning capacity is whether the injury-related residuals prevent the employee from performing the kind of work he was doing when injured. When the medical evidence establishes that the residuals of an employment injury prevent the employee from continuing in his employment, the employee is entitled to compensation for any resulting loss of wage-earning capacity.[4]

Under section 8115(a) of the Act,[5] 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 employee's actual earnings do not fairly and reasonably represent his or her wage-earning capacity or if the employee has no actual earnings, the Office uses the factors provided in 5 U.S.C. § 8115(a) to select a position which represents his or her wage-earning capacity.[6]

The Office must initially determine appellant's medical condition and work restrictions before selecting an appropriate position that reflects appellant's vocational wage-earning capacity. The Board has stated that the medical evidence upon which the Office relies must

[3] The record indicates that subsequent to appellant's June 16, 2003 appeal to the Board and prior to the Board's December 23, 2005 decision on that appeal, the Office issued a December 18, 2003 decision in which an Office hearing representative finalized the Office's preliminary determination finding fact of an overpayment of compensation for the period October 10, 2002 to May 17, 2003, based on his receipt of compensation for total disability when he was declared partially disabled to perform the duties of a hotel clerk. Additionally, the hearing representative found that appellant was not without fault in the creation of the overpayment. Under the principles discussed in *Douglas E. Billings*, 41 ECAB 880 (1990), the Office's December 18, 2003 decision, issued while the Board had jurisdiction over the matter in dispute, is null and void. *Linda Thompson*, 51 ECAB 694 (2000); *Cathy B. Millin*, 51 ECAB 331 (2000). The Board further notes that appellant filed a claim for a schedule award on July 12, 2004. As no final decision has been issued regarding appellant's claim for a schedule award, the Board has no jurisdiction to review these issues. 20 C.F.R. § 501.2(c) (the Board's jurisdiction is limited to deciding appeals from final decisions of the Office).

[4] *Elsie L. Price*, 54 ECAB ____ (Docket No. 02-755, issued July 23, 2003).

[5] 5 U.S.C. §§ 8101-8193., 8115(a).

[6] *See* 20 C.F.R. § 10.403(a); 5 U.S.C. § 8115(a)(1)-(7).

provide a detailed description of appellant's condition.[7] Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.[8]

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 labor 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 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.[9]

In determining an employee's wage-earning capacity based on a position deemed suitable but not actually held, the Office must consider the degree of physical impairment, including impairments resulting from both injury-related and preexisting conditions, but not impairments resulting from postinjury or subsequently acquired conditions.[10] Any incapacity to perform the duties of the selected position resulting from subsequently acquired conditions is immaterial to the loss of wage-earning capacity that can be attributed to the accepted employment injury and for which appellant may receive compensation.

Where vocational rehabilitation is unsuccessful the rehabilitation counselor will prepare a final report, which lists two or three jobs which are medically and vocationally suitable for the employee and proceed with information from a labor market survey to determine the availability and wage rate of the position.[11]

ANALYSIS

In finding that appellant was physically capable of performing the duties of a hotel clerk as of October 10, 2002, the Office relied on a December 13, 2001 medical report of Dr. Wright, the impartial medical specialist. The Office found that a conflict of medical opinion existed between the opinions of Dr. Simpson, appellant's Board-certified orthopedic surgeon and Dr. Seradge, a Board-certified orthopedic surgeon and Office referral physician. The Office

[7] *See William H. Woods*, 51 ECAB 619 (2000); *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

[8] *Carl C. Green, Jr.*, 47 ECAB 737, 746 (1996).

[9] *See William H. Woods*, *supra* note 7; *Hattie Drummond*, 39 ECAB 904 (1988); *see Albert C. Shadrick*, 5 ECAB 376 (1953); 20 C.F.R. § 10.403.(d).

[10] *See James Henderson, Jr.*, 51 ECAB 268 (2000).

[11] *Dorothy Jett*, 52 ECAB 246 (2001).

properly referred appellant for an impartial medical examination by Dr. Wright, a Board-certified orthopedic surgeon.[12]

In cases where the Office has referred appellant to an impartial medical specialist to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[13]

In his December 13, 2001 report, Dr. Wright reviewed the entire case record and statement of accepted facts. He examined appellant thoroughly and related his clinical findings. Based on his examination, which showed 30 degrees of flexion and extension, 25 degrees right and left bending and 60 degrees right and left rotation of the cervical spine. He also reported some limitations in movement in the lumbar spine. Dr. Wright pointed out that appellant had "no objective findings related to the current work-related condition other than the retained hardward in the lumbar spine." He concluded that appellant was capable of working an 8-hour day with restrictions, which included no pulling, lifting or pushing more than 25 pounds and no repetitive stooping and bending. The Board finds that Dr. Wright provided an opinion that is sufficiently well rationalized to resolve the issue of whether appellant was capable of performing the duties of the offered position. The Board finds that Dr. Wright's opinion represents the special weight of the medical evidence establishing that appellant is capable of performing the constructed position.

The medical evidence appellant submitted subsequent to Dr. Wright's report is insufficient to overcome the special weight accorded to his medical opinion as the impartial medical specialist. In a July 16, 2002 report, Dr. Simpson noted that appellant was limited "due to his pain and restricted range of motion with some muscle spasm." He opined that appellant was unable to perform full-time gainful employment, but recommended he be referred to vocational rehabilitation for evaluation for part-time work or a sedentary position. While the physician opined that appellant was incapable of full-time gainful employment, he also opined that appellant was capable of working in a sedentary position or part-time after referral for vocational rehabilitation. As appellant was referred for vocational rehabilitation and the position offered is sedentary, this opinion does not provide evidence that appellant is totally disabled. Furthermore, Dr. Simpson, appellant's attending physician, was on one side of the conflict resolved by Dr. Wright. Therefore, the physician's report is insufficient to overcome the weight of the impartial medical specialist's reports or to create a new conflict of medical opinion.[14]

[12] The Act provides that, "if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician, who shall make an examination." 5 U.S.C. § 8123(a); *Thomas J. Fragale*, 55 ECAB ___ (Docket No. 04-835, issued July 8, 2004); *Shirley L. Steib*, 46 ECAB 309, 317 (1994). A simple disagreement between two physicians does not, of itself, establish a conflict. To constitute a true conflict of medical opinion, the opposing physicians' reports must be of virtually equal weight and rationale. 20 C.F.R. §§ 10.321(a) and 10.502 (1999); *see John D. Jackson*, 55 ECAB ___ (Docket No. 03-2281, issued April 8, 2004); *Robert D. Reynolds*, 49 ECAB 561, 565-66 (1998).

[13] *Michael Hughes*, 52 ECAB 387 (2001); *Manuel Gill*, 52 ECAB 282 (2001).

[14] *See id.*, *Michael Hughes*; *Dorothy Sidwell*, 41 ECAB 857 (1990).

As appellant's vocational rehabilitation was unsuccessful, the counselor properly prepared a final report. In a report dated August 19, 2002, appellant's vocational rehabilitation counselor determined that appellant was able to perform the position of hotel clerk and that state employment services showed the position was available in sufficient numbers so as to make it reasonably available within his commuting area. The rehabilitation specialist also determined that the weekly wage of the position was $257.00, provided a job description for the position of hotel clerk and confirmed that the job was listed as light duty and consistent with appellant's medical restrictions. As a rehabilitation counselor is an expert in the field of vocational rehabilitation, the Office claims examiner may rely on his or her opinion as to whether a job is reasonably available and vocationally suitable.[15] Appellant has not submitted sufficient evidence or argument to show that he could not vocationally or physically perform the hotel clerk position. As previously noted, Dr. Wright's restrictions establish that appellant is capable of performing the duties of the constructed position.

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 position of hotel clerk represented appellant's wage-earning capacity.[16] Further, the Office properly applied the *Shadrick* formula[17] and codified at 20 C.F.R. § 10.403 in determining appellant's loss of wage-earning capacity. The Office indicated that appellant was capable of earning a weekly wage of $257.00. His weekly pay rate on the date of injury, March 10, 1994, was $463.60 and the current pay rate for his date-of-injury position as of September 10, 2002 was $638.54. Dividing what appellant was capable of earning, $257.00, by the current pay rate for the date-of-injury position, $638.54, the Office found that appellant a 40 percent wage-earning capacity which, when multiplied by the date-of-injury pay rate of $463.60 resulted in an adjusted wage-earning capacity of $185.44. Further, the Office subtracted the date-of-injury pay rate of $463.60 from the adjusted wage-earning capacity of $185.44, which resulted in a loss of wage-earning capacity of $278.16. The Office multiplied the $278.16 by the 2/3 compensation rate for no dependents, which resulted in $208.62 plus cost-of-living adjustments made it a total of $245.00 per week.

Because the weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of cashier and that such a position was reasonably available within the general labor market of appellant's commuting area, the Office properly determined that the position of a cashier reflected his wage-earning capacity.

CONCLUSION

The Board finds that the Office properly determined that the constructed position of hotel clerk reflected appellant's wage-earning capacity.

[15] *Id.*

[16] *Id.*

[17] *Albert C. Shadrick, supra* note 9.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 10, 2004 is affirmed.

Issued: July 6, 2005
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member