

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

RONALD F. KIBBE, Appellant

and

**DEPARTMENT OF THE NAVY,
NAVAL AIR SYSTEMS COMMAND,
Point Mugu, CA, Employer**

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**Docket No. 04-984
Issued: May 20, 2005**

Appearances:
Steven E. Brown, Esq., for the appellant
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
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On March 4, 2004 appellant filed an appeal from an October 14, 2003 decision of the Office of Workers' Compensation Programs which affirmed the determination of 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 properly reduced appellant's compensation to reflect his capacity to perform the constructed position of process server.

FACTUAL HISTORY

On May 22, 1985 appellant, then a 35-year-old laborer, sustained low back strain and a left-sided herniated disc at L5-S1 while lifting asphalt in the performance of duty. The diagnosis of left lower extremity radiculopathy was also accepted as being related to his low back condition. Appellant underwent surgery for an L5-S1 laminectomy on October 10, 1985. Following surgery, he continued to experience weakness in his left leg which caused him to fall

in July 1988 and injure his left shoulder. The Office accepted the condition of left shoulder impingement as a consequential injury.

Dr. James C. Giles, an attending Board-certified orthopedic surgeon, opined that appellant was unable to work as of August 13, 1991. However, on October 26, 1992, he found that appellant could perform light-duty work. The record reflects that, in September and November 1994, appellant worked as an extra on a movie set. On November 11, 1996 Dr. Giles again opined that he was totally disabled.

On September 19, 1997 the Office referred appellant for a second opinion examination to Dr. Ibrahim Yashruti, a Board-certified orthopedic surgeon. In an October 31, 1997 report, he reviewed appellant's factual and medical history and his physical complaints. Upon examination, Dr Yashruti diagnosed status postlumbar laminectomy, status post left shoulder arthroscopy and a torn medial meniscus of the left knee. He found that appellant voluntarily limited his left shoulder range of motion and stated that there were no objective findings regarding residuals in his low back and that he magnified and exaggerated his symptoms. Dr. Yashruti opined that appellant was capable of working full-time light-duty work with restrictions on repetitive squatting, kneeling and climbing and with a 25-pound lifting limitation.

The Office found that a conflict in medical opinions was created between Dr. Giles and Dr. Yashruti over the nature and extent of appellant's residuals due to the accepted injuries and his capacity to perform light-duty work. It referred appellant for an impartial medical examination to Dr. Domenick J. Sisto, a Board-certified orthopedic surgeon.

In a report dated March 13, 1998, Dr. Sisto noted that appellant presented himself for examination with complaint of left shoulder, left knee, low back and left hand pain. He reviewed appellant's history of injury and medical treatment, noting the laminectomy in 1985. Physical examination of the cervical spine revealed a full range of motion with negative Adson and Spurling signs and no tenderness, spasm or deformity in the paracervical musculature. Arm circumferences were equal bilaterally with equal reflexes at the elbow and wrists. Examination of the shoulder revealed a full range of motion with no instability to anterior, posterior or inferior stress and a negative impingement sign. No tenderness was found at the acromioclavicular joint or sternoclavicular joint. Speed and Yeagerson's signs were reported negative with mild tenderness in the anterior aspect of the shoulder. The elbow revealed a full range of motion as did the wrist, with mild tenderness about the dorsal aspect of the wrist. Tinel's and Phalen's signs were reported negative. The lumbar spine showed a well-healed incision of the mid-line which was nontender, with a decreased range of motion in that appellant could only place his fingers within 20 centimeters of his toes. Toe and heel walking was within normal limits with reduced range of motion noted. Straight leg raising was negative both in a sitting and supine position. Motor testing and reflexes were reported as equal, as were thigh and calf circumferences. Examination of the left knee revealed a five degree valgus alignment with a full range of motion and no effusion about the knee joint. Appellant noted tenderness in the anterior aspect of the knee, but there was no medial or lateral joint line tenderness. Patella tracking was reported normal with no crepitus in the retropatellar space.

Dr. Sisto reviewed appellant's x-rays and diagnostic studies consisting of computerized tomography (CT) scans and magnetic resonance imaging (MRI) scans. He noted a CT scan of May 29, 1990 showed narrowing of the C3-4 articulation with no encroachment on the neurovascular structures. All x-rays of the left knee were reported normal with the radiographs of the lumbar spine showing the laminectomy but no other significant changes. The November 8, 1996 MRI scan of the left knee did not reveal any tear of the meniscus. An October 29, 1996 MRI of the lumbar spine showed no encroachment.

Following review of the medical reports of record, Dr. Sisto stated that, as to the left shoulder, appellant complained of pain which was slight and occasional. He described very mild tenderness to the anterior aspect of the left shoulder and noted that this constituted a very mild disability which did not preclude restrictions at work. Dr. Sisto opined that appellant noted that he had a very mild impingement syndrome which had resolved and did not cause any residual problem. As to the left knee, he stated that appellant described slight to occasional pain, indicating there was very mild tenderness about the knee, but no signs of any mechanical derangement or instability. Dr. Sisto noted that the medical evidence included a prior diagnosis of a possible meniscus tear, but stated that he had reviewed the MRI scan study at length and could find no evidence to support this diagnosis. He stated that appellant would not be precluded from performing his usual and customary employment activities due to his left knee and was released without any knee restrictions and required no further care. As to appellant's left hand, he noted that he complained of pain that was minimal and occasional. Dr. Sisto could find no objective evidence of disability, noting that appellant complained that his grip strength was decreased. However, he stated that he did not believe that appellant gave a true effort. Dr. Sisto described appellant's contention as "fictitious" as to weakness of grip and stated there was no preclusion from performing his usual and customary employment with no need of further medical care for the left wrist. As to his lumbar spine, Dr. Sisto noted appellant's complaint of low back pain which was described as slight and occasional. He noted that appellant's laminectomy and decreased range of spinal motion which would preclude him from performing repeated bending and stooping or heavy lifting. Dr. Sisto opined that appellant was disabled from his usual and customary employment due to residuals of his L5-S1 disc and that physical therapy and vocational rehabilitation were appropriate options. He noted, however, that he could find no evidence of radiculopathy and that the EMG and nerve conduction studies correlated with his clinical findings on examination.

Dr. Sisto reiterated that there was no disability with regard to the left knee, no evidence of a meniscal tear and no indication for surgery. Although he noted that appellant related a history of twisting his left knee, there was no clinical evidence of any problem. Dr. Sisto noted that further surgery was not warranted for treatment of appellant's low back or for his left shoulder condition. He found that appellant was capable of returning to light-duty work, with the only limitations being for his low back condition. Dr. Sisto indicated that appellant's complaints of pain, however, did not conform to any nerve roots. He indicated that appellant could work 8 hours per day with restrictions on performing more than 6 hours of repetitive motion with his elbow and no more than 4 hours of pushing, pulling and lifting, with a limit on pushing, pulling or lifting more than 30 pounds.

On October 23, 1998 appellant was granted a schedule award for a one percent impairment of his left upper extremity. The award ran for the period October 11 to November 1, 1998, a total of 3.12 weeks of compensation.

On December 17, 1998 appellant was referred to a vocational counselor. Vocational rehabilitation was again undertaken on January 5, 1999 with the objective that he trained as a private investigator or process server within limitations based on Dr. Sisto's physical restrictions.

By letter dated January 20, 1999, the Office requested clarification from Dr. Sisto as to appellant's upper extremity work restrictions. On January 27, 1999 the physician clarified that there were no work restrictions for the left upper extremity.

On May 17, 1999 Dr. Alex D. Gazau, an attending Board-certified orthopedic surgeon, provided a report which described appellant's pain complaints ranging from his cervical spine to his right great toe. He found slight to moderate paraspinal muscle spasms of the cervical and lumbar spine. Dr. Gazau diagnosed myofascial sprain of the cervical, thoracic and lumbar spine, bilateral shoulder tendinitis/impingement syndrome, a left knee medial meniscus tear, right knee strain and opined that appellant's knee conditions and shoulder condition arose from continuous trauma in his employment. A return to light work was recommended.

On June 16, 2000 the rehabilitation counselor provided a labor market survey for 21 jobs which included those of a private investigator, insurance, claims, fraud and undercover work and a process server. On June 21, 2000 the rehabilitation counselor found that the positions of private investigator and process server were suitable for appellant based on his education and vocational experience. The counselor noted that he had approximately 30 semester hours of college credit studying general education and criminology, that he studied military surveying and drafting while in the Navy, that he completed a six-month course in electronics in 1987 and that he was able to converse in Spanish. The counselor also noted that appellant had worked as an engineering aide, a counter clerk, an assembly/machinist, a special effects technician, a school bus driver, a hardware sales clerk and an engineering liaison technician and that he had volunteered for two years with the Santa Paula Police Department. The counselor identified the Nick Harris Detective Academy as being suitable for appellant's training.

On June 22, 2000 appellant agreed to vocational training with the goal identified as placement as a private investigator, process server or undercover operator. On July 10, 2000 the rehabilitation specialist approved the plan and noted that a labor market survey revealed a favorable market for private investigators and process servers.

On July 26, 2000 Dr. Giles noted that appellant was attending the Nick Harris private investigator school. He opined that the size of the class and the accommodations seemed to be appropriate for appellant and recommended that he continue the program. On September 25, 2000 Dr. Giles terminated his treatment of appellant and referred him to Dr. Luga Podesta, Board-certified in physical medicine and rehabilitation. Dr. Podesta examined him and opined that his subjective complaints were somewhat exaggerated and were not entirely substantiated by objective findings.

On October 27, 2000 appellant received a diploma from the Nick Harris Detective Academy for a Master's in Private Investigation.

In a November 28, 2000 note, Dr. Podesta stated that he was skeptical of appellant's complaints and he recommended a work capacity evaluation. On December 15, 2000 a functional capacity evaluation was accomplished and found that he was functioning below the sedentary physical demand level and that could lift negligible pounds.

Appellant found employment effective February 6, 2001 as a dispatcher for 12 hours a week.

In a report dated February 20, 2001, Dr. Podesta noted that, although appellant had been retrained as a private investigator, he was unable to sit for long periods of time and unable to repetitively type.

By report dated June 28, 2001, Dr. Francis P. Lagattuta, Board-certified in physical medicine and rehabilitation, opined that appellant was totally disabled due to left adhesive capsulitis, left wrist sprain, left medial meniscus tear, left cervical strain and left lumbar sprain. In reports dated August 28 to December 19, 2001, Dr. Kathleen M. Abbott, a physician associated with Dr. Lagattuta, reiterated his previous opinion as to disability. Dr. Abbott reiterated that appellant remained totally disabled on January 15, 2002.

On July 3, 2002 the a rehabilitation counselor conducted a labor market survey for the position of process server in the Ventura and South Santa Barbara County areas. It was noted that out of 10 employer contacts, two current openings were located at a salary of \$10.00 to \$15.00 an hour. On July 28, 2002 the rehabilitation counsel completed a Form OWCP-66, job classification for the position of process server, DOT No. 249.367-062. The position description was provided with the physical demand of the position described as light, with occasional lifting to a 20-pound maximum. It was noted that the position would not demand climbing, stooping, kneeling, crouching or crawling. As to vocational preparation, it was noted that the job was a semi-skilled position and built upon appellant's transferable skills and his level of education. Availability of the position was confirmed by telephone contact with "Milane of Attorney Diversified Service and Lynn of Rezac-Meyer, Attorney Services." The weekly wage was listed as \$400.00.

On September 11, 2002 the Office issued a notice of proposed reduction of compensation based on appellant's capacity to perform the job of process server. The Office determined that appellant had a 91 percent wage-earning capacity.

Appellant objected to the proposed reduction of compensation and submitted the September 27, 2002 report of Dr. Lagattuta. He noted that he had treated appellant over the prior two years for treatment of cervical spondylosis, lumbar spondylosis, left subacromial bursitis and a herniated thoracic disc. Dr. Lagattuta stated that, in spite of extensive treatment, appellant was unable to return to his work. He indicated that appellant "was working four hours in an eight-hour day but was unable to do much of anything." Dr. Lagattuta stated that appellant described neck and low back pain that was constant and severe and also experience left knee pain. He

indicated that these conditions “make it difficult for him to sit, stand, walk or do any other type of activity.” Dr. Lagattuta opined that appellant was permanently disabled.

By decision dated October 17, 2002, the Office found that the position of process server represented appellant’s wage-earning capacity. The Office noted that the conditions diagnosed by Dr. Lagattuta and which disabled appellant were not accepted as employment-related. The Office also noted that it did not authorize him to change attending physicians from Dr. Podesta to Dr. Lagattuta and that Dr. Podesta had found appellant fit for sedentary duty.

On November 14, 2002 appellant requested an oral hearing, which was held on July 15, 2003. He submitted a brief and testimony from witnesses contending that process serving was not sedentary work, medical evidence from Dr. Sisto was too old and all of appellant’s physical conditions were not considered by the Office.

By decision dated October 14, 2003, an Office hearing representative affirmed the October 17, 2002 wage-earning capacity determination. She found that the weight of the medical evidence established was represented by the reports of Dr. Sisto and Dr. Podesta and established that appellant could perform the duties of a process server.

LEGAL PRECEDENT

Once the Office has made a determination that a claimant is disabled as a result of an employment injury, it has the burden of proof in justifying a subsequent reduction or modification of compensation benefits.¹ It is the policy of the Office to emphasize the return of partially disabled workers to suitable employment after rehabilitation efforts, first with the employing establishment and then a new employer.² As a last resort, benefits will be reduced on the basis of an estimated earning capacity, based on a job not actually held by the employee but performed to a reasonable extent in his or her commuting area and suitable to the employee’s education and vocational background.³

Under section 8115(a) of the Federal Employees’ Compensation Act,⁴ wage-earning capacity is determined by actual wages received by an employee if such earnings fairly and reasonably represent wage-earning capacity. 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, age, qualifications for other employment, the availability of suitable employment and other facts and circumstances which may affect wage-earning capacity in the employee’s disabled condition.⁵ The Board has held that wage-earning capacity is a measure of

¹ *Ronald Litzler*, 51 ECAB 588 (2000); *Daniel Renard*, 51 ECAB 466 (2000).

² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.3 (December 1993).

³ *Id.*

⁴ 5 U.S.C. § 8115(a).

⁵ *See Dorothy Jett*, 52 ECAB 246 (2001); *Richard Alexander*, 48 ECAB 432 (1997).

the employee's ability to earn wages in the open labor market under normal employment conditions.⁶ Accordingly, the evidence must establish that jobs in the position selected for determining wage-earning capacity are reasonably available in the general labor market in the commuting area in which the employee lives. In determining an employee's wage-earning capacity, the Office may not select a makeshift or odd-lot position or one not reasonably available in the open labor market.⁷

In determining a loss of wage-earning capacity where the residuals of an injury prevent an employee from returning to his or her regular duties, those impairments which preexisted the injury, in addition to the accepted injury-related impairment, must be taken into consideration in the selection of a job within the employee's work tolerance. Medical conditions causing subsequent impairment unrelated to the employment injury are excluded from consideration in the determination of the employee's work capability.⁸

ANALYSIS

Appellant was injured on May 22, 1985 and his claim was accepted by the Office for a low back strain with a herniated disc at L5-S1, for which he underwent surgery. The Office also accepted left lower extremity radiculopathy and a left shoulder injury consequential to weakness in the left leg. Based on a conflict of medical opinion between Dr. Giles, an attending physician who found appellant totally disabled and the second opinion specialist, Dr. Yahruti, who found that he could perform light-duty work subject to work restrictions, the Office referred appellant to Dr. Sisto for an impartial medical examination and opinion on his residual disability for employment.

In a March 13, 1998 report, Dr. Sisto provided his findings on physical examination of appellant and review of the medical history and diagnostic records. He noted that as to the accepted low back condition, appellant had residuals of the laminectomy and a decreased range of motion which would preclude his usual and customary employment. Dr. Sisto stated, however, that there was no evidence of any ongoing lumbar strain and that he could not find any evidence of radiculopathy of the left leg. He reported that the EMG and nerve conduction studies correlated with his clinical findings on examination. As to the accepted shoulder condition, Dr. Sisto reported that appellant had a full range of motion with no instability around the shoulder joint and a negative impingement sign. He stated that appellant complained of mild tenderness about the shoulder but that this did not preclude restricted work. Dr. Sisto noted that appellant's shoulder condition did not preclude restricted work or result in any work limitations. He addressed his left knee complaints and stated there was no evidence of any tear of the meniscus or sign of any mechanical derangement or instability. Dr. Sisto noted that the MRI scan study was reviewed which did not evidence any possible meniscus tear and that appellant was not precluded from his usual and customary work activities by any left knee condition and had no physical restrictions pertaining to the left knee. As to appellant's left wrist and hand complaints, he could find no

⁶ *Id.*

⁷ *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

⁸ *James Henderson, Jr.*, 51 ECAB 268 (2000).

objective evidence of any disability and stated that he did not believe that appellant gave a true effort on grip strength testing. Dr. Sisto termed appellant's left wrist weakness complaints as "fictitious" and noted there were no restrictions from his usual and customary-work activities. He concluded that appellant was capable of performing full time light-duty work, with the only restrictions pertaining to his low back condition. In a supplemental report of January 27, 1999, Dr. Sisto reiterated that there were no work restrictions pertaining to appellant's left upper extremity.

It is well established that, when there exist 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 upon a proper factual background, must be given special weight.⁹ The Board finds that the reports of Dr. Sisto are based on a proper factual background and a very thorough medical report which listed his findings both as to the medical conditions accepted as resulting from appellant's employment injury and as to his complaint's regarding his left wrist and left knee conditions. Dr. Sisto's medical reports provided extensive findings on physical examination and provided his interpretation of the diagnostic studies of record. He explained the nature of the objective findings on physical examination and correlated these to the diagnosed conditions. The reports of Dr. Sisto are complete and well rationalized as to finding that appellant was limited in returning to light-duty work only as to residuals related to his accepted laminectomy.

Following the report of Dr. Sisto, appellant entered vocational training and obtained a diploma in private investigation on October 27, 2000. During this period, his treatment by Dr. Giles was terminated and he was referred to Dr. Podesta, who indicated that appellant's complaints were somewhat exaggerated and not substantiated by objective findings on examination. On November 28, 2000, Dr. Podesta reiterated that he was skeptical of appellant's complaints. Thereafter, he came under the treatment of Dr. Lagattuta, who diagnosed left adhesive capsulitis, left wrist sprain, left medial meniscus tear, left cervical strain and left lumbar sprain. He found appellant totally disabled for work. Dr. Lagattuta subsequently diagnosed cervical spondylosis, lumbar spondylosis, left subacromial bursitis and a herniated thoracic disc.

The Board finds that the Office properly accorded the weight of medical opinion in this case to the reports of Dr. Sisto, the impartial medical specialist, and to the reports of Dr. Podesta, an attending physician. With regard to the conditions accepted by the Office: low back strain, herniated disc at L5-S1 for which a laminectomy was performed, radiculopathy to the left leg and left shoulder impingement, the report of Dr. Sisto carries the weight of an impartial medical specialist. He found that appellant's accepted conditions had resolved without residual or the necessity for work limitations for each condition except for residuals of the L5-S1 laminectomy. He specifically addressed each medical condition and found no objective support for appellant's complaints of left leg radiculopathy or impingement of the left shoulder. Dr. Sisto expressed his opinion that these accepted conditions had resolved without residual. He went on to address several conditions which were not accepted as employment related and ruled out any tear of the left knee meniscus and labeled appellant's left wrist complaints as "fictitious."

⁹ See *Charles A. Jackson*, 53 ECAB 671 (2002); *James P. Roberts*, 31 ECAB 1010 (1980).

Although Dr. Lagattuta expressed his opinion that appellant had a left wrist sprain, a left knee medial meniscus tear, left lumbar strain and left cervical strain, the Board finds that his medical opinion is clearly outweighed by the reports of the impartial medical specialist. The reports of Dr. Lagattuta are not as thorough as those of Dr. Sisto in relating objective findings on physical examination and his knowledge of the medical background is not as complete as that of the impartial medical specialist. The Board notes that Dr. Lagattuta diagnosed a herniated disc of the thoracic spine, when the accepted herniated disc in this case was of L5-S1. Moreover, he provided an extensive listing of new medical conditions which he diagnosed for the first time: left adhesive capsulitis, cervical spondylosis, lumbar spondylosis, left subacromial bursitis and the thoracic herniated disc. With regard to the relevance of these diagnoses and the Office's wage-earning capacity determination, it is well established that the Office is not required to consider medical conditions arising subsequent to the work-related injury or disease in determining whether a position represents an employee's wage-earning capacity.¹⁰ The Board finds that the weight of medical opinion as to appellant's capacity for light-duty work is represented by the report of the impartial medical specialist. The subsequently submitted medical reports are not well rationalized in support of appellant's contention of total disability due to residuals of the accepted conditions. The impartial medical specialist resolved the conflict in medical evidence as to those conditions accepted by the Office as employment related. The subsequently submitted medical reports are not well rationalized as to explaining how appellant remains disabled due to the conditions accepted in this case.¹¹ Rather, they indicate that appellant's disability is due to conditions that have arisen subsequent to the employment injury.

The Board finds, however, that the Office's wage-earning capacity determination is deficient with regard to finding that the position of process server is reasonably available. In this regard, the evidence must establish that jobs for the selected position are reasonably available in the general labor market in the commuting area in which the employee lives.¹² On July 2, 2002 the report of the rehabilitation counsel noted that out of contact with 10 entities, there were two current openings and one possible opening. The OWCP-66 prepared on July 28, 2002, described the basis for finding the position of process server as reasonably available based on telephone contact with "Milane of Attorney Diversified Services and Lynn of Rezac-Meyer, Attorney Services." There was no indication of any contact with the California State Employment Service and the contacts listed are not sufficiently identified to allow the Board to conclude that the position is reasonably available in appellant's commuting area. For this reason, the Board will set aside the wage-earning capacity determination in this case.

¹⁰ See *Dorothy Jett*, *supra* note 5.

¹¹ On appeal, counsel for appellant argued that the report of Dr. Sisto, the impartial medical specialist, was not reasonably contemporaneous to support the wage-earning capacity determination. For the reasons noted, the Board finds that the facts of this case are distinguishable from those of *Douglas W. Lenton*, Docket No. 98-899 (issued December 15, 2000), as cited by counsel.

¹² See *Dim Njaka*, 50 ECAB 424 (1999).

CONCLUSION

The Office did not meet its burden of proof in determining appellant's wage-earning capacity as a process server, as it did not demonstrate the position was reasonably available.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 14, 2003 is hereby reversed.

Issued: May 20, 2005
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member