

FACTUAL HISTORY

On October 29, 1992 appellant, then a 53-year-old construction inspector, filed a Form CA-1, traumatic injury claim, alleging that he injured his back the previous day when he fell at work. He returned to work on November 16, 1992. On December 18, 1992 the Office accepted that he sustained an employment-related left lumbar strain. A magnetic resonance imaging (MRI) scan of the lumbar spine performed on January 11, 1993 demonstrated a left lateral disc herniation at L3-4.¹ On January 18, 1993 Dr. Joseph H. Miller, a Board-certified neurosurgeon, performed surgical removal of the disc at L3-4. Appellant was placed on the periodic rolls at that time and has not returned to work. A July 19, 1993 lumbar myelogram demonstrated reherniation at L3-4 and an L5-S1 disc bulge.

The Office referred appellant to Dr. Larry E. Mahon, Board-certified in orthopedic surgery, for a second opinion evaluation. In reports dated November 1, 1993, he advised that appellant could work four to six hours a day with restrictions to his physical activity. In January 1994, appellant was referred to vocational rehabilitation. In reports dated October 8 and 22, 1999, Dr. Miller advised that appellant's condition was unchanged and he could not return to work.

The Office determined that a conflict in medical evidence existed between the opinions of Dr. Miller and Dr. Mahon regarding appellant's ability to work. He was referred, together with a statement of accepted facts, a set of questions and the medical record, to Dr. David S. Raskas, a Board-certified orthopedic surgeon, for an impartial medical evaluation. In a report dated January 3, 2001, Dr. Raskas noted appellant's complaints, the history of injury, his review of the medical records and findings on physical examination. He diagnosed recurrent disc herniation after surgery, failed laminectomy syndrome and severe disc degeneration at L3-4 with segmental instability and recommended functional capacity evaluation. A February 12, 2001 functional capacity evaluation was conducted, which concluded that appellant had a medium work capacity. In a February 19, 2001 work restriction evaluation, Dr. Raskas advised that appellant could work eight hours a day with specified restrictions to his physical activity.

In February 2002, appellant was again referred to vocational rehabilitation. He underwent coronary bypass surgery in May 2002. In a July 1, 2002 report, Dr. Gilbert D. Smith, an attending Board-certified family physician, advised that appellant could not work. On August 13, 2002 appellant signed a vocational rehabilitation plan which identified several jobs within his capabilities. By letter dated September 10, 2002, the Office informed appellant that he was being given 90 days to secure employment and after that time his compensation would be reduced based on his wage-earning capacity. In an October 3, 2002 report, Dr. Smith noted that appellant had chronic lumbar disc disease with failed L3-4 disc surgery. He advised that appellant had significant limitations to pushing, pulling, bending, lifting, twisting and squatting.

As appellant was unable to secure employment, in May 2003 the vocational rehabilitation counselor, Karen Kane, identified the positions of reservation clerk, production assembler and automobile salesperson as sedentary to light-duty work, within appellant's physical restrictions

¹ The accepted conditions were expanded to include removal of extruded disc at L3-4.

and reasonably available in the local labor market. By letter dated June 25, 2003, the Office proposed to reduce appellant's compensation benefits based on his capacity to earn wages as an automobile salesperson.² The Office advised appellant that, if he disagreed with the proposed reduction, he should submit additional evidence or argument within 30 days. In response, appellant submitted a narrative statement dated July 15, 2003 in which he stated that Dr. Smith disagreed that he could work, that he had applied for 92 positions and that he could not stand up straight. In a July 14, 2003 report, Dr. Smith advised that appellant was in constant pain from chronic lumbar disc disease with failed surgery at L3-4 and further noted that he had significant limitations to most activities and should be considered totally disabled.

By decision dated July 28, 2003, the Office reduced appellant's compensation benefits, effective August 10, 2003, based on his capacity to earn wages as an automobile salesperson. In an August 1, 2003 letter, the Office modified the July 28, 2003 decision to correct deductions for life insurance.

On August 8, 2003 appellant, through his attorney, requested a hearing. In a September 3, 2003 report, Dr. Smith provided the history of appellant's employment injury and noted complaints of long-term numbness into the lateral aspect of his right foot with constant low back pain and stiffness. Dr. Smith noted that an August 20, 2003 MRI scan demonstrated significant degenerative changes which contributed to mild bilateral neural foraminal stenosis at L3-4 and L5-S1 and moderate to severe bilateral stenosis at L4-5 with superimposed left lateral disc protrusion at L3-4 and subsequent further narrowing at the left L3-4 nerve root and lateral recess stenosis. He opined that appellant had objective evidence of left nerve root damage and diagnosed chronic lumbar disc disease and degenerative arthritis. Dr. Smith stated:

“Whereas he can occasionally lift up to [10] pounds and occasionally crouch from time to time, he cannot do so without exacerbating his pain. It is my opinion that he requires frequent rest breaks and the use of medications to manage his painful state effectively. Being on the premises of a work environment would not allow him to deal with his pain. It is my opinion that [his] condition is a result of his original work-related injury.”

Appellant also submitted a vocational evaluation report in which Dr. Hurley, a licensed psychologist, noted his review of Office vocational reports and appellant's medical record. He opined that appellant was not capable of performing any of the jobs identified by the vocational rehabilitation specialist, stating that, in order for appellant to perform the jobs mentioned, he would have to be able to perform the full range of sedentary jobs which would require functioning on the job with only standard breaks and would not be able to rest as needed. Dr. Hurley concluded that appellant could not perform any of the jobs listed.

² The Department of Labor's *Dictionary of Occupational Titles* defines sales person, automobiles (retail trade), 273.353-010 as “Sells new or used automobiles, trucks and vans on premises of vehicle sales establishment. Explains features and demonstrates operations of car in showroom or on road. Suggests optional equipment for customer to purchase. Computes and quotes sales price, including tax, trade-in allowance, license fee and discount, and requirements for financing payment of vehicle on credit. Performs other duties as described under Salesperson (retail trade); wholesale, etc. Master Title. May be designated Salesperson. New Cars (retail trade); Salesperson, Used Cars (retail trade). Strength level is light work, reasoning level 4, mathematics level 3, language skills level 4 and specific vocational preparation (SVP) is level 6 or 1 to 2 years.

At the hearing, held on February 17, 2005, appellant testified that he could perform light housekeeping chores, described back pain which radiated down both legs, stated that his pain medication caused drowsiness and that he went on 92 job searches. Appellant also submitted laboratory test reports and treatment notes from Dr. Smith dating from October 14, 2003 to January 18, 2005, in which the physician provided examination findings and diagnosed hypertension, hyperlipidemia, atherosclerotic heart disease, chronic obstructive pulmonary disease and chronic lumbar disc disease. He also provided a copy of the August 20, 2003 MRI scan.

By decision dated May 13, 2005, an Office hearing representative affirmed the July 28, 2003 decision, finding that the weight of the evidence rested with the opinion of Dr. Raskas, the impartial medical examiner, noting that the subsequently submitted medical evidence did not overcome the weight of Dr. Raskas' opinion.³

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.⁴ An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.⁵

Section 8115 of the Federal Employees' Compensation Act⁶ and Office regulations provide that 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 the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, the degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect his wage-earning capacity in his disabled condition.⁷

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.⁸

³ The Board notes that the hearing representative misidentified the September 3, 2003 report, stating that it was from Dr. Miller, whereas it was from Dr. Smith.

⁴ *James M. Frasher*, 53 ECAB 794 (2002).

⁵ 20 C.F.R. §§ 10.402, 10.403; *John D. Jackson*, 55 ECAB ____ (Docket No. 03-2281, issued April 8, 2004).

⁶ 5 U.S.C. §§ 8101-8193.

⁷ 5 U.S.C. § 8115; 20 C.F.R. § 10.520; *John D. Jackson*, *supra* note 5.

⁸ *Manuel Gill*, 52 ECAB 282 (2001).

The Office must initially determine a claimant's medical condition and work restrictions before selecting an appropriate position that reflects his or her wage-earning capacity. The medical evidence upon which the Office relies must provide a detailed description of the condition.⁹ Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.¹⁰

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 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 that 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.¹¹ Finally, application of the principles set forth in *Albert C. Shadrick*¹² will result in the percentage of the employee's loss of wage-earning capacity.¹³

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 result from both injury-related and preexisting conditions, but not impairments resulting from postinjury or subsequently acquired conditions. 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.¹⁴

ANALYSIS

In this case, the medical evidence as characterized by the impartial examination of Dr. Raskas in January 2001 established that appellant was no longer totally disabled and the Office referred him for vocational rehabilitation counseling in February 2002. Because appellant underwent coronary bypass surgery in May 2002, a rehabilitation plan was not signed until August 2002. The vocational rehabilitation counselor thereafter identified three positions that she felt fit appellant's capabilities and the Office determined that he had the capacity to earn wages as an automobile salesperson. The Office determined that appellant could perform the physical requirements of the selected position based on the January 3 and February 9, 2001 reports of Dr. Raskas, who performed an impartial evaluation for the Office.

⁹ *William H. Woods*, 51 ECAB 619 (2000).

¹⁰ *John D. Jackson*, *supra* note 5.

¹¹ *James M. Frasher*, *supra* note 4.

¹² 5 ECAB 376 (1953).

¹³ *James M. Frasher*, *supra* note 4.

¹⁴ *John D. Jackson*, *supra* note 5.

The Board finds that there is no recent medical evidence in the record supporting that appellant is capable of performing the duties required for the selected position of automobile salesperson as Dr. Raskas' reports were dated January 3 and February 19, 2001 and the Office did not render its decision until July 28, 2003. Appellant's attending physician, Dr. Smith, submitted reports dated July 14 and September 3, 2003, in which he advised that appellant was in constant pain from chronic degenerative disc disease with failed surgery at L3-4 caused by his employment injury. He stated that appellant had significant limitations to most activities and, due to his constant pain, physical limitations and drowsiness from medication, should be considered totally disabled. A wage-earning capacity determination must be made on a reasonably current medical evaluation.¹⁵ As Dr. Raskas' reports were completed more than two years prior to the Office's July 28, 2003 decision, they are not reasonably current. The Office, therefore, failed to meet its burden of proof to establish that the position of automobile salesperson represented appellant's wage-earning capacity and failed to properly reduce his compensation benefits.¹⁶

CONCLUSION

The Board finds that the Office failed to meet its burden of proof in reducing appellant's wage-earning capacity based on his ability to earn wages in the constructed position of automobile salesperson as there is no current medical evidence supporting its finding that appellant was capable of performing the duties of this position.

¹⁵ The Board has held that reasonably current medical evidence is generally less than two years old. See *Keith Hanselman*, 42 ECAB 680 (1991).

¹⁶ The Board further notes that the *Dictionary of Occupational Titles* states that the SVP of the automobile salesperson position is level six, whereas the vocational rehabilitation specialist characterized it as level five. *Supra* note 2. It is also unclear from the record whether the vocational specialist determined whether appellant had the necessary reasoning, mathematical or language skills to perform the selected position. *James M. Frasher, supra* note 4.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 13, 2005 be reversed.

Issued: November 3, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board