



## **FACTUAL HISTORY**

Appellant has filed several claims for back injuries during the course of his employment. The Office accepted that he sustained a back strain/sprain on May 10, 1991. On August 9, 1993 he, sustained another low back strain. Appellant filed an additional claim on February 15, 1994 alleging that he pulled a muscle in his back in the performance of duty on February 11, 1994. The Office accepted this claim for back strain on May 10, 1994. Appellant's physician released him to full-duty work on March 7, 1995 with no lifting over 100 pounds repetitively or repetitive bending or twisting. On December 28, 1995 appellant filed a fourth traumatic injury claim alleging that he injured his low back when he slipped while in the performance of duty. The Office accepted this claim for low back strain on March 14, 1996. His attending physician released him to full duty on June 18, 1996. Appellant filed a fifth traumatic injury claim on August 25, 1997 alleging that his left leg "went stiff." The Office accepted this claim on October 3, 1997 for sacroiliac sprain and sprain of the knee and leg.

Appellant's attending physician, Dr. Vernon K. Fong, a Board-certified orthopedic surgeon, found that he had reached maximum medical improvement on November 29, 1997 and provided work restrictions based on an October 30, 1997 functional capacity evaluation. He noted that appellant could sit for five to six hours, walk three to four hours, stand four to five hours and climb stairs occasionally. Dr. Fong completed a work restriction evaluation on November 27, 2001 and listed appellant's restrictions as sitting for up to five hours, walking up to four hours, kneeling up to two hours, twisting up to one hour, standing up to four hours, climbing up to three hours, bending up to two hours, pushing up to two hours, grasping for up to three hours and fine manipulation for up to three hours.

The employing establishment removed appellant from his position effective October 18, 2002 as he was not capable of performing functions of his position description and the employing establishment could not accommodate his physical restrictions.

The Office entered appellant on the periodic rolls on December 10, 2002 and referred him for vocational rehabilitation counseling. In a report dated January 6, 2003, the vocational rehabilitation counselor listed appellant's conditions as right shoulder, left leg and back injuries as well as three heart attacks, two strokes and an ulcer. The vocational rehabilitation counselor determined that he could work as a messenger or outside deliverer.

The position of outside deliverer entails delivering messages, telegrams, documents, packages and other items to business establishments and private homes, traveling on foot or by bicycle, motorcycle, automobile or public conveyance. The physical requirements of the position provided include lifting up to 20 pounds occasionally and 10 pounds frequently, no climbing, balancing, stooping, kneeling, crouching or crawling, frequent reaching and handling as well as occasional fingering. The position did not list the walking, standing or sitting requirements.

Appellant underwent an additional functional capacity evaluation on July 3, 2003. These tests revealed that he could sit for six to seven hours, stand for two to three hours and walk for three to four hours. Dr. Fong diagnosed L5-S1 spondylolisthesis as well as multilevel degenerative disc disease of the lumbar spine. He reviewed the July 3, 2003 functional capacity

evaluation on July 30, 2003 and found that appellant could work eight hours a day within the restrictions of the functional capacity evaluation which Dr. Fong concluded were approximately the same as the October 30, 1997 tests.

On July 30, 2003 the Office found that the position of outside deliverer was within his work restrictions. On December 10, 2003 the rehabilitation specialist closed appellant's vocational rehabilitation file, finding that he had received more than 90 days of job placement and job seeking skills services, but failed to obtain employment.

The Office proposed to reduce appellant's compensation benefits on January 13, 2004 based on his capacity to earn wages as an outside deliverer. The Office listed the physical requirements of the constructed position only as lifting up to 20 pounds occasionally and up to 10 pounds frequently. The Office allowed appellant 30 days to respond.

Appellant submitted a report dated February 2, 2004, from Dr. M. Jacqueline Galang, a Board-certified internist, listing his restrictions as no prolonged walking or standing, no repetitive bending or stooping, no kneeling or squatting and no climbing of stairs or ladders. She also found that he should not lift over 10 pounds.

By decision dated February 18, 2004, the Office reduced appellant's compensation benefits based on his capacity to earn wages in the constructed position of outside deliverer. The Office found that Dr. Galang's work restrictions were not supported by objective medical findings and that the weight of the medical opinion evidence was accorded to Dr. Fong.

Appellant requested reconsideration on May 29, 2004 and submitted additional medical evidence. In a report dated April 5, 2004, Dr. Morteza Farr, an osteopath, noted his employment incident in 1997 and stated that he also sustained a fall in March 2004 which exacerbated his back pain. He stated that appellant was totally disabled due to severe back pain. Dr. Farr diagnosed degenerative disc disease lumbar.

By decision dated June 23, 2004, the Office denied modification of the February 18, 2004 decision, finding that the fall appellant sustained in March 2004 was a separate and intervening injury that did not need to be considered in a wage-earning capacity determination.<sup>1</sup>

### **LEGAL PRECEDENT -- ISSUE 1**

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>2</sup> 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

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<sup>1</sup> Following the Office's June 23, 2004 decision, appellant submitted additional new evidence. As the Office did not consider this evidence in reaching a final decision, the Board may not review the evidence for the first time on appeal. See 20 C.F.R. § 501.2(c).

<sup>2</sup> *Jorge E. Stotmayor*, 52 ECAB 105, 106 (2000).

disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.<sup>3</sup>

Section 8115(a) of the Federal Employees Compensation Act<sup>4</sup> provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by actual earnings if actual earnings fairly and reasonable represent the wage-earning capacity.<sup>5</sup> 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.<sup>6</sup>

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 or other applicable service.<sup>7</sup> The formula for determining loss of wage-earning capacity,<sup>8</sup> which was developed in *Albert C. Shadrick*,<sup>9</sup> has been codified by regulation at 20 C.F.R. § 10.403.<sup>10</sup>

### **ANALYSIS -- ISSUE 1**

The medical evidence at the time of the Office's February 18, 2004 decision consists of reports from Dr. Fong, a Board-certified orthopedic surgeon, and Dr. Galang, a Board-certified internist. Dr. Fong indicated that appellant was capable of working with restrictions. As he did not have actual earnings which fairly and reasonably represented his wage-earning capacity, the Office selected a position for determination of wage-earning capacity as an outside deliverer.

Appellant's attending physician, Dr. Fong provided work restrictions including two to three-hours of standing and three to four hours of walking. Dr. Galang, listed his restrictions as including no prolonged walking or standing.

The Board finds that the position of outside deliverer does not list the physical demands of the position with regard to walking or standing. The position of outside deliverer entails

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<sup>3</sup> *John D. Jackson*, 55 ECAB \_\_\_\_ (Docket No. 03-2281, issued April 8, 2004).

<sup>4</sup> 5 U.S.C. §§ 8101-8193, § 8115(a).

<sup>5</sup> *Sherman Preston*, 56 ECAB \_\_\_\_ (Docket No. 05-721, issued June 20, 2005).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Hayden C. Ross*, 55 ECAB \_\_\_\_ (Docket No. 04-136, issued April 7, 2004).

<sup>9</sup> 5 ECAB 376 (1953).

<sup>10</sup> 20 C.F.R. § 10.403.

delivering messages, telegrams, documents, packages and other items to business establishments and private homes, while traveling on foot or by bicycle, motorcycle, automobile or public conveyance. This position indicates extensive walking, if appellant is to make deliveries while traveling on foot and would also include some amount of walking if deliveries were to be made by wheeled or motorized conveyance. Furthermore, he would be required to stand if he is to make deliveries *via* public transportation. The vocational rehabilitation counselor nor the position description for an outside deliverer detailed the extent of the requirements for walking and standing. The medical evidence of record establishes that appellant's work-related restrictions included limitations on his ability to walk and stand. There is no evidence that the Office considered these limitations in determining his wage-earning capacity as an outside deliverer.

The Board finds that the Office failed to consider all of appellant's work-related physical impairments in determining that the selected position of outside deliverer constituted his wage-earning capacity. The Office did not obtain information on the amount of walking or standing required in the position. The Office failed to meet its burden of proof to reduce appellant's compensation benefits based on his ability to earn the wages of the selected position of outside deliverer.

### **CONCLUSION**

The Board finds that the Office failed to meet its burden of proof to reduce appellant's compensation benefits based on his capacity to earn wages in the selected position of outside deliverer as it did not consider all of his employment-related work restrictions.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 23 and February 18, 2004 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: September 12, 2005  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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