United States Department of Labor
Employees' Compensation Appeals Board

L.L., Appellant	)	
and	)	**Docket No. 07-617**
	)	**Issued: July 24, 2007**
DEPARTMENT OF STATE, BUREAU OF ADMINISTRATION, Washington, DC, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 3, 2007 appellant filed a timely appeal from a December 12, 2006 merit decision of the Office of Workers' Compensation Programs that reduced his wage-loss compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the wage-earning capacity decision.

ISSUE

The issue is whether the Office met its burden of proof in reducing appellant's wage-loss compensation benefits effective December 24, 2006 based on its determination that the part-time constructed position of telephone sales representative represented his wage-earning capacity.

FACTUAL HISTORY

On January 11, 2001 appellant, then a 53-year-old building services specialist, sustained a severe low back strain while attempting to move a flag, a pole and a base. He stopped work on January 16, 2001. Dr. P.F. Abraham, a Board-certified radiologist, performed a January 19, 2001 magnetic resonance imaging (MRI) scan of appellant's lumbosacral spine. He diagnosed

degenerative disc disease from the L3 level to the S1 level with spondyloarthrosis. The Office accepted appellant's claim for lumbar strain and paid appropriate compensation.

In a May 29, 2001 attending physician's report, Dr. Randolph B. Cook, a Board-certified orthopedic surgeon, diagnosed a herniated nucleus pulposis and stated that appellant was not capable of maintaining employment at even sedentary duty. On April 11, 2001 Dr. Cook recommended that appellant remain off work until his symptoms could be controlled further. On April 30, 2001 Dr. Cook noted appellant's medical history and findings upon examination and concluded that appellant was ambulatory with a cane but could not sit or stand for prolonged periods of time due to pain. He advised that appellant needed medication to control the pain which affected his physical function. Dr. Cook concluded that "it may be that he would not be functional at any level job, depending on the effect of the medications and/or his inability to sit for prolonged periods."

On October 10, 2002, at the Office's request, Dr. Harry M. Freedman, an orthopedic surgeon, examined appellant and provided a second opinion concerning whether he remained disabled by the January 10, 2001 work injury. He determined that appellant sustained a disc herniation at the L4-5 level. Dr. Freedman opined that appellant had residuals of his work injury, namely "severe debilitating back pain with right sciatica" and concluded that appellant was totally disabled. In a work capacity evaluation prepared the same day, Dr. Freedman reiterated that appellant was completely disabled from work.

Appellant also provided an August 21, 2003 work capacity evaluation from Dr. Richard P. DuShuttle, a Board-certified orthopedic surgeon, who noted that appellant could work two hours per day with restrictions. Dr. DuShuttle determined that appellant could sit, walk, stand and reach for two hours, could reach above shoulder level for one hour and could operate a motor vehicle for one half hour.

On October 20, 2003 the Office referred appellant to Dr. Robert Draper, a Board-certified orthopedic surgeon, for a second opinion examination performed on November 19, 2003. In a report prepared the same day, Dr. Draper diagnosed low back pain syndrome involving "preexisting degenerative lumbar disc disease at L3-4, L4-5, L5-S1 with degenerative lumbar disc disease, work injury aggravated." Dr. Draper found that appellant had some residuals from the employment injury, explaining that the injury exacerbated the preexisting conditions and caused appellant to have some continued discomfort in the back on a permanent basis. He concluded that appellant was mildly disabled or partially disabled in terms of performing excessive heavy lifting and should avoid lifting more than 50 pounds. However, appellant could perform work as long as he did not lift more than 50 pounds. He could work full time, 8 hours a day, 40 hours per week. In a corresponding work capacity evaluation, Dr. Draper reiterated that appellant could work eight hours daily within limitations.

The Office found a conflict in the medical evidence regarding whether appellant could work eight hours per day with restrictions. By letter dated May 7, 2004, the Office referred appellant to Dr. David Sopa, an osteopath and a Board-certified orthopedic surgeon, selected to resolve the conflict.

Dr. Sopa examined appellant and prepared a report on May 26, 2004. He noted appellant's medical history and reviewed the record. Following a physical examination, Dr. Sopa diagnosed advanced degenerative disc disease of the lumbar spine from L3 to the sacrum, with severe degenerative disc disease at L4-5, with nerve root compression and a relative spinal stenosis. He noted that the "extensiveness of the degenerative disc disease is significant for [appellant] at his age." Dr. Sopa opined that because of the nature of appellant's preexisting degenerative disc disease he would ultimately have become injured either at work or at home. He explained:

> "At some point the disease process is advanced enough that there is not enough disc material that could herniate. It is believed that the condition hurt because of the underlying condition while lifting and turning. There was not an exacerbation of the underlying condition, since, statistically speaking, he had this back condition … for a number of years."

Dr. Sopa concluded that appellant could return to work at a desk job provided the employing establishment allowed him to work within restrictions designed to preserve his comfort. He noted that appellant's back condition was reflective of his underlying severe back degeneration rather than the one incident of lifting flags. Dr. Sopa stated: "As far as the injury pattern is concerned he would have achieved a maximum medical improvement at some time through his treatment that he received and that he *would be able* to return to work." (Emphasis in the original.)

On December 7, 2004 the Office requested that Dr. Sopa supplement his report with a work capacity evaluation. On December 10, 2004 Dr. Sopa stated that appellant could work eight hours per day with restrictions. He also noted that appellant had a degenerative condition and that he did not believe that a one-time work accident caused appellant's low back condition.

By letter dated January 13, 2005, the Office referred appellant for vocational rehabilitation. Appellant submitted a March 15, 2005 work capacity evaluation from Dr. DuShuttle, who reiterated his opinion that appellant could work no more than two hours per day with restrictions.

On March 7, 2006 the employing establishment informed the Office that it did not have any positions matching appellant's work restrictions and qualifications. In an April 30, 2006 report, the vocational rehabilitation counselor noted that appellant was interested in the "professional technology field" and the "skilled arts field" and was currently searching for sedentary employment with a new employer in his commuting area. In an undated report, the counselor noted that appellant's vocational tests were administered on February 24 and March 28, 2006 and interpreted on April 11, 2006. She determined that the following jobs were appropriate for an individual with appellant's skill level and restrictions: software engineer, loan interviewer, customer service representative and purchasing agent. In April 22 and 24, 2006 reports, the vocational rehabilitation counselor stated that appellant could perform the following positions: customer service representative, a light-duty position; loan interviewer, a sedentary position; or telephone sales representative, a sedentary position. An April 24, 2006 Form CA-66 job classification report for the telephone sales representative position noted that the position was available and would require appellant to solicit orders for services over the telephone, speak to

prospective customers, quote prices and attempt to persuade customers to purchase products, record purchase information and refer orders to others for filling.

In a June 1, 2006 report, Dr. DuShuttle explained that appellant's condition had not changed. He noted that there was "still decreased flexion and extension with pain and stiffness. Bilateral sciatic notch tenderness with buttock pain." Dr. DuShuttle diagnosed multilevel degenerative disc disease and lumbar spine facet spondylosis from L3 to the sacrum and stated: "[Appellant] was given a work restriction of permanent two hours a day only, alternating sitting and standing." In a June 16, 2006 work capacity evaluation, Dr. DuShuttle reiterated his opinion that appellant could not work more than two hours daily.

In a June 20, 2006 note, the Office indicated that additional evidence was necessary for a full adjudication of appellant's claim. The Office referred appellant to Dr. Jerry Case, a Board-certified orthopedic surgeon, for an updated medical examination and report.

Dr. Case examined appellant and prepared a report on August 29, 2006. He noted appellant's medical history and indicated that appellant was taking medication for pain. Dr. Case diagnosed multilevel degenerative disc disease from L3 to S1 and history of back strain on January 11, 2001 aggravating underlying degenerative disc disease. He stated that, based on a review of the x-rays and the physical findings, it was "difficult to explain the level of pain" appellant complained of. Dr. Case advised that, although there certainly are objective findings to be responsible for some back pain," based on objective findings, appellant "should be capable of full-time sedentary work with restrictions of avoiding continuous standing and walking, avoiding bending and twisting and no lifting over 10 pounds." He concluded: "Because of his level of subjective complaints … it is unlikely that he will be able to return to work on a full-time basis. But I would think that certainly he could return to work on a part-time basis, four hours a day within the above restrictions." In a work capacity evaluation corresponding to the narrative report, Dr. Case stated that appellant could work four hours per day with restrictions.

On September 25, 2006 the vocational rehabilitation counselor prepared a new CA-66 job classification report for the telephone sales representative position, noting that the position was reasonably available, either full time or part time, in appellant's commuting area at a weekly wage of $400.00. The vocational rehabilitation counselor confirmed that the position was available in appellant's commuting area based on her contact with a state employment service representative.

On October 31, 2006 the Office issued a notice of proposed reduction of benefits finding that appellant was capable of earning wages as a part-time telephone sales representative. The Office noted Dr. Sopa's impartial opinion but stated that this report was dated while appellant underwent vocational rehabilitation such that the matter was referred to Dr. Case for a more current evaluation. The Office noted that Dr. Case found that appellant could work for four hours daily within certain restrictions. The Office also indicated that appellant's vocational rehabilitation counselor had recommended the position of telephone sales representative, a sedentary position within appellant's restrictions, which was found available within appellant's commuting area. The Office calculated appellant's loss of wage-earning capacity based on his ability to earn $200.00 per week as a part-time telephone sales representative.

On November 8, 2006 appellant disagreed with the Office's proposed reduction of benefits, stating that his injury still caused him great pain and discomfort. In a November 16, 2006 work capacity evaluation, Dr. B. Venkataramana, a Board-certified neurosurgeon, advised that appellant was "disabled and can[no]t work for a living."

By decision dated December 12, 2006, the Office reduced appellant's wage-loss compensation, effective December 24, 2006, to reflect his ability to earn wages as a part-time telephone sales representative.

LEGAL PRECEDENT

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction of benefits.[1] Under section 8115(a) of the Federal Employees' Compensation Act,[2] wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent his or her wage-earning capacity, or 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, his or her usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect wage-earning capacity in his or her disabled condition.[3]

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, *Dictionary of Occupational Titles* (DOT) or otherwise available in the open 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 labor market should be made through contact with the state employment service or other applicable service. Finally, application of the principles set forth in *Albert C. Shadrick*,[4] will result in the percentage of the employee's loss of wage-earning capacity.[5]

ANALYSIS

Appellant's claim was accepted for lumbar strain. He submitted reports from his attending physicians, Dr. Cook, who opined that he could not work in even a sedentary position, and Dr. DuShuttle, who concluded that he could work only two hours per day with restrictions. The Office referred appellant to Dr. Draper, a second opinion physician, who concluded that

[1] *David W. Green*, 43 ECAB 883 (1992).

[2] 5 U.S.C. § 8115(a).

[3] *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

[4] 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.403(d)-(c).

[5] *James A. Birt*, 51 ECAB 291 (2000); *Francisco Bermudez*, 51 ECAB 506 (2000).

appellant could work eight hours per day with restrictions. To resolve the conflict between appellant's physicians and Dr. Draper, the Office referred appellant to Dr. Sopa for an impartial medical evaluation.[6] Dr. Sopa, on May 26, 2004, concluded that appellant's condition was the result of a preexisting condition and not of residuals from his employment injury and opined that appellant could return to work for eight hours per day with restrictions. The Office requested a supplemental work capacity evaluation report which Dr. Sopa provided on December 10, 2004, noting that appellant could work eight hours per day with restrictions. These reports established that appellant could work within restrictions for up to eight hours daily.[7] Thereafter, the Office referred appellant for vocational rehabilitation.

After the employing establishment confirmed that it did not have any limited-duty position for appellant, the vocational rehabilitation counselor identified several selected positions that appellant could perform and which were reasonably available. One of these positions was that of a telephone sales representative, a sedentary position involving occasional reaching, handling and lifting of up to 10 pounds. The rehabilitation counselor indicated that this position fell within appellant's work restrictions and was reasonably available in appellant's commuting area.

As appellant had submitted additional reports from Dr. DuShuttle in 2005 and 2006 reiterating that he could work no more than two hours per day, the Office properly referred appellant to Dr. Case to obtain a current report on appellant's work restrictions.[8] In his August 29, 2006 report, Dr. Case examined appellant, reviewed his history and diagnosed multilevel degenerative disc disease from L3 to S1 and a history of back strain on November 1, 2001, which aggravated underlying degenerative disc disease. Dr. Case concluded that there was sufficient objective evidence to explain some of appellant's back pain. He stated, however, that based solely on the objective findings, appellant would be capable of working a full eight-hour day in a limited-duty assignment. Nonetheless, Dr. Case recommended that appellant work no more than four hours per day as his subjective complaints, which outweighed the objective findings, were serious enough in Dr. Case's estimation to make a full eight-hour day inadvisable. Dr. Case also set forth appellant's work restrictions indicating that appellant could lift, pull and push up to 10 pounds with limitations on a variety of activities such as walking, standing, twisting and reaching about his shoulder.

In contrast, appellant provided Dr. Venkataramana's November 16, 2006 report, stating that appellant was disabled and could not work for a living. However, he provided no medical

[6] 5 U.S.C. § 8123(a). Section 8123(a) of the Act provides in part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician, who shall make an examination."

[7] It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on proper factual and medical background, must be given special weight. *Phillip H. Conte*, 56 ECAB ___ (Docket No. 04-1524, issued December 22, 2004).

[8] There is some indication in the record that the Office considered Dr. Case to be an impartial specialist. However, Dr. Sopa had previously resolved the conflict regarding whether appellant could work more than two hours. Dr. Case's report is considered to be that of a second opinion physician.

reasoning explaining the basis of his stated conclusion. Similarly, Dr. DuShuttle's 2005 and 2006 reports offered no additional reasoning or rationale, beyond that previously considered, to explain why appellant could not work more than two hours daily. Consequently, the Board finds that Dr. Case's well-reasoned opinion established that appellant was medically capable of working four hours per day within restrictions.

After receipt of Dr. Case's report, the vocational rehabilitation counselor, on September 25, 2006, confirmed with a state employment service representative that the position of telephone sales representative was available on a part-time basis in appellant's commuting area. Evidence from the rehabilitation counselor also establishes that appellant has the appropriate knowledge, training and background to perform the selected position. The Board finds that the sedentary telephone sales representative position conforms to work restrictions set forth by Dr. Case. The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the duties of telephone sales representative and that such a position was reasonably available within the general labor market of her commuting area. The Office properly calculated appellant's loss of wage-earning capacity by using his date-of-injury pay rate, his current pay rate for his job and the pay rate for the selected position.[9]

Accordingly, the Office met its burden of proof to establish that the position of a telephone sales representative reflected appellant's wage-earning capacity effective December 24, 2006, the date it reduced his wage-loss compensation benefits.

CONCLUSION

The Board finds that the Office properly reduced appellant's wage-loss compensation effective December 24, 2006.

[9] *See Shadrick, supra* note 4.

ORDER

IT IS HEREBY ORDERED THAT the December 12, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 24, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board