

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

J.S., Appellant)	
)	
and)	Docket No. 07-1318
)	Issued: October 11, 2007
U.S. POSTAL SERVICE, WASHINGTON)	
TOWNSHIP POST OFFICE, Dayton, OH,)	
Employer)	
)	

Appearances:
Alan J. Shapiro, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 17, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated February 7, 2007. 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 to reduce appellant's compensation benefits based on his capacity to earn wages as a part-time billing clerk.

FACTUAL HISTORY

On April 28, 2003 appellant, then a 50-year-old mail carrier technician, filed a Form CA-2, occupational disease claim, alleging that a ruptured disc in his neck and right shoulder injury were caused by factors of his federal employment. He stopped work on

February 12, 2003. On May 12, 2003 the Office accepted that appellant sustained employment-related cervical and right shoulder strains and cervical nerve root impingement. Appellant was placed on the periodic roll.

On October 20, 2003 the Office referred appellant to Dr. E. Gregory Fisher, Board-certified in orthopedic surgery, for a second opinion evaluation. In reports dated December 3, 2003, Dr. Fisher noted his review of the medical record and statement of accepted facts. He noted that appellant's past medical history of nonemployment-related Hodgkin's disease, hypertension, coronary artery disease and diabetes. Dr. Fisher stated that appellant's neck and shoulder complaints began in 2002 and, by February 2003, he had difficulty straightening his neck. Current complaints included daily neck pain radiating down his right arm with numbness and paresthesias of the right upper extremity. Examination findings included decreased neck range of motion with muscle spasms. Dr. Fisher diagnosed generalized cervical arthritis and spondylosis over multiple levels of the cervical area with cervical nerve root impingement which caused appellant's neck pain and numbness and paresthesias over the right upper extremity. He advised that the accepted cervical and shoulder strains had resolved and that the arthritis/spondylosis and degenerative disc disease preexisted appellant's employment injury. However, the constant carrying a mailbag through the years had aggravated the underlying conditions. Dr. Fisher concluded that appellant could not perform the regular duties of a letter carrier but could work for four hours of limited duty a day with permanent restrictions of no overhead work and a carrying restrictions of 5 pounds frequently and 10 pounds occasionally.

By report dated January 13, 2004, Dr. D.L. Reveal, appellant's attending Board-certified orthopedic surgeon, diagnosed severe spinal stenosis, degenerative arthritis and scoliosis of the cervical spine. He advised that appellant had pain on a 24-hour basis, had to frequently rest and took narcotics for pain. Dr. Reveal opined that appellant could not work at any activity, even on a light sedentary basis, because of his constant pain and disability.

The Office determined that a conflict in medical evidence arose between the opinions of Drs. Fisher and Reveal. On January 27, 2004 it referred appellant to Dr. John W. McGrail, also Board-certified in orthopedic surgery, for an impartial evaluation. In an April 28, 2004 report, Dr. McGrail noted his review of the medical record, statement of accepted facts and appellant's complaints and description of his daily activities. Physical examination demonstrated marked limitation of cervical motion with appellant holding his head in a flexed position. There was kyphotic deformity of the upper thoracic area with some compensatory lordosis in the cervical spine. Shoulder motion was satisfactory and strength of both upper extremities was within normal limits with the exception of decreased strength in the right triceps of 4+/5. Dr. McGrail advised that appellant's cervical and shoulder strains and right nerve impingement, which were employment related, were stable and nonprogressive. He opined that appellant's ongoing degenerative cervical spondylosis, aggravated by repetitive activities at work and carrying a mailbag, had stabilized but that appellant could not return to his previous job as a letter carrier or any light-duty capacity because this would further aggravate his preexisting condition. Dr. McGrail stated that appellant had reached maximum medical improvement and that the recommendation of no work was permanent. In a work capacity evaluation dated May 10, 2004, he advised that appellant could not work and was totally restricted from all activities listed.

On May 12, 2004 the Office requested that Dr. McGrail explain why appellant could not perform any work when he could shower and run errands. The Office explained that restrictions which were prophylactic in nature or a fear of recurrence or future injury were not compensable. By report dated July 1, 2004, Dr. McGrail advised that appellant's ongoing conditions had not resolved but had reached maximum medical improvement as far as the work-related portion of his injury. He concluded:

“Based on the definitions available from the Department of Labor, [appellant] could work four hours per day. However, my concern is that the preexisting conditions are sufficiently severe to prevent [him] from returning to work and, therefore, he may need to pursue other avenues such as medical retirement, social security disability. If [he] is offered four hours/day with restrictions of limited repetitive weight lifting over 10 [pounds] and in a desk job ergonomically set up to avoid aggravation of the condition, then he could return to work.”

On August 10, 2004 appellant was referred to Vanessa Harris, a rehabilitation counselor, for vocational rehabilitation. Initial testing was completed in December 2004.¹ On February 14, 2005 the counselor identified the positions of storage facility clerk and billing clerk, stating that they were within appellant's work restrictions and reasonably available in the local labor market.² A strength level was not designated for either position, although the billing clerk position noted that frequent reaching was required. On February 23, 2005 a computer training program was authorized. The training was completed in July 2005. On December 2, 2005 the Office accepted that appellant sustained a temporary aggravation of cervical spondylosis and on January 20, 2006 confirmed that both positions were reasonably available part time.

On February 8, 2006 the Office proposed to reduce appellant's compensation benefits based on his capacity to earn wages as a part-time billing clerk. The Office advised appellant that, if he disagreed with the proposed reduction, he should submit additional evidence or argument within 30 days.

By decision dated March 20, 2006, the Office reduced appellant's compensation benefits based on her capacity to earn wages as a billing clerk, part time.

On April 9, 2006 appellant, through his attorney, requested a hearing. In a March 25, 2006 report, Dr. William O. Smith, a Board-certified neurosurgeon, noted appellant's past medical history and a chief complaint of neck and bilateral arm pain. Dr. Smith stated that in terms of activity appellant had trouble dressing, had to hold his head up with his left hand when using a computer, could not reach overhead with his right arm but could drive a car and stand for

¹ This noted that the most recent medical evidence was the reports of Dr. McGrail dated April 28 and May 10, 2004. It does not appear the evaluator was furnished with Dr. McGrail's July 1, 2004 report.

² The job description for billing clerk was as follows: “Operates calculator and typewriter to com[p]ile and prepare customer charges, such as labor and material cost: Reads computer printout to ascertain monthly cost, schedule of work completed and type and type [sic] of work performed for customer, such as plumbing, sheet metal, and insulation. Computes cost and percentage of work completed using calculator. Compiles data for billing personnel. Types invoices indicating total items for projects and cost amounts.” It was identified by Department of Labor, *Dictionary of Occupational Titles* (DOT), Number 214.382-014.

about 20 minutes and walk for 20 to 25 minutes. Examination, including manual muscle testing, demonstrated marked deficits in the range of motion of the cervical spine with pain and tight muscles in spasm with motion in all directions. Pinprick was diminished over the right trapezius, down the radial side of the arm including all fingers and up to the inside of the right arm. Pinprick was normal in the left upper extremity. Grip strength was diminished on the right and shoulder motion was restricted bilaterally. Dr. Smith diagnosed multilevel cervical spondylosis and radiculopathy of the right upper extremity, Hodgkin's disease in remission, arteriosclerotic vascular disease involving the heart, bilateral carotid arteries and probably the subclavian artery on the right, postoperative splenectomy, recurrent infection of the salivary glands and adult onset diabetes, compensated. He advised that appellant could frequently lift 10 pounds, that he could stand/walk and sit 30 minutes continuously, for a total of 6 hours in a workday, could not climb and could occasionally stoop, crouch, kneel and crawl. Reaching and handling were limited due to the weakness of grip in the right hand. In a September 29, 2005 report, Dr. Reveal reiterated his conclusion that appellant was totally disabled from all work due to his arthritis and pain.

At the hearing, held on November 22, 2006, appellant testified regarding his health history and the vocational rehabilitation process. His attorney contended that the Office improperly reduced appellant's compensation because he had insufficient training for the billing clerk position and did not have the physical capacity to perform the position.

By decision dated February 7, 2007, an Office hearing representative affirmed the March 20, 2006 decision.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.³ 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.⁴

Section 8115 of the Federal Employees' Compensation Act⁵ and Office regulation 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.⁶

³ *James M. Frasher*, 53 ECAB 794 (2002).

⁴ 20 C.F.R. §§ 10.402, 10.403; *John D. Jackson*, 55 ECAB 465 (2004).

⁵ 5 U.S.C. §§ 8101-8193.

⁶ 5 U.S.C. § 8115; 20 C.F.R. § 10.520; *John D. Jackson*, *supra* note 4.

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.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 a vocational rehabilitation counselor authorized by the Office for selection of a position listed in the Department of Labor's DOT 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.⁹ Finally, application of the principles set forth in *Albert C. Shadrick*¹⁰ will result in the percentage of the employee's loss of wage-earning capacity.¹¹

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. 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.¹²

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.¹³

ANALYSIS

The Board finds that the Office did not properly reduce appellant's compensation based on his ability to earn wages in the selected position of part-time billing clerk. The medical evidence, as represented by the July 1, 2004 report of Dr. McGrail, the referee physician, established that appellant was no longer totally disabled. The Office referred him for vocational

⁷ *William H. Woods*, 51 ECAB 619 (2000).

⁸ *John D. Jackson*, *supra* note 4.

⁹ *James M. Frasher*, *supra* note 3.

¹⁰ 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.403.

¹¹ *James M. Frasher*, *supra* note 3.

¹² *John D. Jackson*, *supra* note 4.

¹³ *Manuel Gill*, 52 ECAB 282 (2001).

rehabilitation counseling in August 2004. Appellant then underwent computer training, which he completed in July 2005. Because he was unable to secure employment, the vocational rehabilitation counselor identified two positions, billing clerk and storage facility clerk, that she felt fit his capabilities. The Office determined that he had the capacity to earn wages as a part-time billing clerk.

The Board notes that the position description for billing clerk used by the Office is not that found in the 1991 edition of the DOT, the most recent edition of the publication. The position description found in the 1991 edition of the DOT provides that a 214.382-014 billing typist (clerical):

“Compiles data and types invoices and bills: Reads computer files or gathers records, such as purchase orders, sales tickets and charge slips, to compile needed data. Enters information into computer or computes amounts due, using calculator. Types invoices, listing items sold, amounts due, credit terms and dates of shipment, using typewriter or computer. Types bills of lading and lists weight and serial number of items sold, using specification book. May type shipping labels. May type credit memorandums [sic] to indicate returned or incorrectly billed merchandise. May type credit forms for customers or finance companies. May post transactions to accounting records, such as work sheet, ledger or computer files. May be designated according to type of billing done, such as Bill-Of-Lading Clerk (clerical); C.O.D. Biller (clerical) and Mail-Order Biller (retail trade; wholesale trade).”¹⁴

The strength requirement is that of sedentary work which is defined as “exerting up to 10 pounds of force occasionally and/or a negligible amount of force frequently and/or a negligible amount of force constantly to lift, carry, push, pull or otherwise move objects. Sedentary work involves sitting most of the time but could involve walking or standing for brief periods.”¹⁵ The description for the position of billing clerk used by the Office in determining appellant’s wage-earning capacity was based on an earlier definition and did not include a strength level but indicated that frequent reaching was required.¹⁶

The Office reduced appellant’s compensation based on the July 1, 2004 report of Dr. McGrail. However, Dr. McGrail initially advised that appellant could not work and provided a total restriction as to his physical activities. Following an Office inquiry, on July 1, 2004, Dr. McGrail advised that appellant could return to four hours a day of limited duty with ergonomic modifications. However, he clearly indicated that appellant still had an employment-related aggravation of his underlying arthritic condition. When Dr. McGrail reported on July 1, 2004 that appellant could perform a sedentary job for four hours a day, he merely provided a 10-pound weight restriction. He did not elaborate on the physical restrictions as found in his May 10, 2004 work capacity evaluation, in which he advised that appellant could not work and

¹⁴ DOT, 4th ed. revised (1991), section 214.382-014.

¹⁵ *Id.*

¹⁶ *Supra* note 2.

indicated that he was restricted in all activities. As stated above, the job classification used by the Office for the selected position of billing clerk indicated that frequent reaching is required.

The Board finds that Dr. McGrail's opinion is not well reasoned as to appellant's physical capacity for modified sedentary duty. His reports lacks supportive medical reasoning explaining why he found that appellant could perform limited-duty work when he previously opined that appellant was totally disabled.¹⁷ Dr. McGrail recommended that appellant not work because it would aggravate his preexisting arthritic condition. Since the billing clerk position requires frequent reaching, the Office should have asked him if appellant was capable of this task. It is well established that in determining a loss of wage-earning capacity, where the residuals of an injury prevent an employee from performing his regular duties, the Office must take into consideration, in addition to the work-related impairments, the impairments that preexisted the injury.¹⁸ Due to the lack of medical reasoning on the issue of appellant's work capabilities, Dr. McGrail's opinion report is not sufficient to constitute the special weight of evidence in this case. The record contains an unresolved conflict of medical opinion evidence.¹⁹

The Office failed to meet its burden of proof to establish that appellant has the appropriate strength to perform the selected position of part-time billing clerk. Accordingly, the Office failed to establish that this position represents his wage-earning capacity and failed to properly reduce his compensation benefits.²⁰

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 selected position of part-time billing clerk.

¹⁷ See *Elaine Sneed*, 57 ECAB ____ (Docket No. 04-2039, issued March 7, 2005).

¹⁸ *James Henderson, Jr.*, 51 ECAB 268 (2000).

¹⁹ See *Willa M. Frazier*, 55 ECAB 379 (2004).

²⁰ The Board also notes that Dr. McGrail's report of July 1, 2004 was issued more than 20 months prior to final reduction in compensation on March 20, 2006. Compare *Gayton C. Costa*, 53 ECAB 443 (2002) In his March 25, 2006 report, more contemporaneous with the reduction in compensation, Dr. Smith advised that appellant's reaching and handling were limited due to weakness in appellant's right hand. When comparing the physical findings in Dr. Smith's report with those of Dr. McGrail, it would appear that appellant's underlying arthritic condition has continued to worsen.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 7, 2007 be hereby reversed.

Issued: October 11, 2007
Washington, DC

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

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

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