United States Department of Labor
Employees' Compensation Appeals Board

R.D., Appellant	)	
and	)	**Docket No. 07-2128**
	)	**Issued: April 22, 2008**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Fort Wayne, IN, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On August 15, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' wage-earning capacity decision dated October 16, 2006. He also appealed a July 23, 2007 decision which denied modification of the wage-earning capacity decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether the Office met its burden of proof in reducing appellant's compensation based on its determination that the constructed position of cashier II represented his wage-earning capacity; and (2) whether the Office properly denied modification of appellant's loss of wage-earning capacity determination.

FACTUAL HISTORY

On March 25, 2004 appellant, then a 38-year-old transportation security screener, filed a traumatic injury claim alleging that on the same date he was lifting a bag onto a table and injured his low back. The Office accepted his claim for lumbar strain, temporary aggravation of degenerative disc disease resolved April 29, 2004 and expanded his claim to include annular tear at L4-5 and lumbar radiculopathy. Appellant stopped working on October 25, 2004. He received appropriate compensation benefits for all periods of disability.

Appellant came under the treatment of Dr. David J. Lutz, a Board-certified physiatrist, who, in reports dated April 29 to June 10, 2004, provided a history of appellant's work-related injury and diagnosed low back pain, left lower extremity paresthesia, bilateral upper extremity paresthesias, multilevel mild cervical degenerative disc disease, lumbar degenerative disc disease, mild thoracic degenerative changes and electrodiagnostic evidence of mild chronic left L5-S1 radiculopathy and moderate bilateral ulnar neuropathies at the elbows. Dr. Lutz noted that appellant had a prior history of low back pain while lifting fish boxes in August 2003 and opined that the lifting incident of March 25, 2005 exacerbated his preexisting back condition. In July 12 and August 9, 2004 reports, he noted appellant's continued low back symptoms and recommended physical therapy, epidural steroid injections and nonoperative spinal disc decompression treatments. In a December 17, 2004 duty status report, Dr. Lutz diagnosed low back pain and advised that appellant could work light duty subject to several restrictions including lifting limited to 10 pounds. An April 22, 2004 magnetic resonance imaging (MRI) scan revealed mild degenerative changes, multiple tiny healed intravertebral disc herniations and small posterior disc protrusion at the T6-7 level. An electromyogram (EMG) dated May 17, 2004 revealed some bilateral arm and left leg abnormalities, including evidence of moderate demyelinating bilateral ulnar neuropathies at the elbows consistent with cubital tunnel syndrome and mild left chronic L5-S1 radiculopathy.

On December 28, 2004 the Office referred appellant to Dr. Charles R. Kershner, a Board-certified orthopedic surgeon, for a second opinion regarding whether appellant had residuals of his accepted conditions and whether he could return to work. In a January 13, 2005 report, Dr. Kershner reviewed appellant's history and examined appellant. He noted findings upon physical examination of negative toe and heel walking, normal symmetry of the spine, right and left lateral bending to five degrees, good strength of dorsiflexors, negative straight leg raises and full range of motion of the upper extremities. Dr. Kershner diagnosed temporary aggravation of a preexisting degenerative disc disease on April 29, 2004, resolved without permanent impairment but continuing limitations due to his preexisting condition. He opined that appellant's work-related condition did not impose any disability in terms of appellant's ability to work; however, appellant's unrelated work condition of multiple disc degeneration, did constitute a significant limitation on his ability to work. Dr. Kershner noted that the nonwork-related multiple level disc degeneration and possible arachnoiditis was the cause of appellant being unable to return to his former job.

Appellant submitted a February 8, 2005 report from Dr. Lutz noting appellant's complaints of chronic low back pain and intermittent left leg pain. Dr. Lutz diagnosed chronic low back pain, cervicogenic myofascial pain with mild cervical degenerative disc disease, lumbar degenerative disc disease and mild chronic left L5-S1 radiculopathy. He recommended a

functional capacity evaluation. Appellant submitted a June 1, 2005 functional capacity evaluation, which noted that he could perform sedentary work with occasional lifting to 10 pounds, frequent lifting of negligible amounts and no constant lifting. He later submitted a report from releasing appellant to sedentary work in conformance with the functional capacity evaluation.

On June 16, 2005 the Office found that a conflict of medical opinion existed between Dr. Lutz, appellant's treating physician, who indicated that appellant sustained residuals of his work-related lumbar strain, temporary aggravation of degenerative disc disease, annular tear at L4-5 and lumbar radiculopathy and could work light duty with a lifting restriction and Dr. Kershner, an Office referral physician, who determined that appellant did not have residuals of his accepted conditions and could return to work subject to restrictions for his nonwork-related multiple level disc degeneration and possible arachnoiditis.

To resolve the conflict the Office referred appellant to Dr. Kevin G. Drew, a Board-certified orthopedic surgeon. In a July 1, 2005 report, Dr. Drew noted reviewing the records provided him and examined appellant. He noted a history of appellant's work-related injury. Dr. Drew diagnosed left L4 radiculopathy, annular tear at L4-5, bulging discs at L3-3, L3-4, L4-5 and L5-S1 which were likely preexisting, nonwork-related rheumatoid arthritis and myofascial pain syndrome. He noted that the physical examination revealed limited range of motion in forward flexion, extension, lateral bending and positive straight leg raise. Dr. Drew opined that the annular tear at L4-5 was most likely the result of the lifting and twisting incident of March 25, 2004. He further indicated that appellant's work restrictions were due to the injury of March 25, 2004, specifically the left L4 radiculopathy from an annual tear. Dr. Drew noted: in a work capacity evaluation appellant could return to work eight hours per day with permanent restrictions of no twisting, pushing, pulling and lifting limited to 10 to 20 pounds; squatting limited to three to four times a day; and breaks of five minutes every two to three hours. He noted that the work restrictions were related to the accepted work injury.

On August 5, 2005 appellant was referred for vocational rehabilitation. In a November 14, 2005 rehabilitation plan, the rehabilitation counselor recommended a 60-day job placement plan and noted that appellant could perform light exertional work with the ability to sit, stand or walk up to eight hours with a lifting restriction of 20 pounds. Appellant indicated that he had post-high school education; he worked in heating and air conditioning service, and as an auditor for a telecommunication company. The counselor noted that academic testing revealed high school performance in oral reading. He noted that appellant did not believe he was able to perform any work. A rehabilitation plan was prepared and approved by the rehabilitation counselor and appellant with the objective of obtaining a position of cashier II or a production assembler. The counselor stated that based on Dr. Drew's restrictions the following positions would be suitable: assembler, production with average weekly wages of $400.00 and a cashier II with an average weekly wage of $320.00. The rehabilitation counselor noted that these positions were reasonably available in appellant's commuting area and attached job classification for a cashier II and a production assembler. He noted that appellant indicated that he would be relocating to Grand Rapids, Michigan.

Appellant submitted January 10 and April 10, 2006 reports from Dr. Eugene M. Tay, a Board-certified orthopedist, who treated appellant when he relocated to Michigan. Dr. Tay noted

a history of appellant's work injury and diagnosed degenerative disc disease with chronic low back pain, rheumatoid arthritis with recent flare up and insomnia. An April 10, 2006 lumbar spine x-ray revealed minor degenerative changes at L4-5. An April 10, 2006 lumbar spine MRI scan revealed degenerative disc changes, no disc protrusion, canal stenosis or neural compression is noted. Also submitted were reports from Dr. James R. Ellis, a Board-certified orthopedist, dated May 18 and June 1, 2006, who treated appellant for back pain since March 25, 2004. He diagnosed chronic, predominately axial back pain with some radicular pain down the left leg, arachnoiditis with no history of myelography, rheumatoid arthritis, hiatal hernia, recovering alcoholism and rule of sacroiliac joint syndrome versus facet arthrosis. Dr. Ellis recommended a back brace, facet blocks and chronic pharmacologic pain management.

In vocational rehabilitation reports dated April 19 and May 12, 2006, the rehabilitation counselor noted that appellant's case was reassigned to a counselor in Michigan who met with appellant on April 28, 2006. In an August 8, 2006 closure memorandum, the rehabilitation counselor advised that an updated labor market survey revealed the market was favorable for a cashier II and production assembler, and that the positions were readily available in sufficient numbers both full and part time in appellant's commuting area. The rehabilitation counselor provided a job description for the position of assembler, production and cashier II. The average weekly wage of a cashier II, DOT # 211.462.010 was $342.00 and of an assembler, production, DOT # 706.687.010 was $536.80. Also submitted was a job classification for a cashier II and assembler, production dated August 8, 2006. In an August 31, 2006 closure report, the rehabilitation counselor noted starting a job search in Michigan on July 21, 2006. He reported identifying employers with suitable jobs for appellant but appellant did not obtain employment. The rehabilitation counselor noted that there were nine positions identified which matched appellant's qualifications and medical restrictions, specifically the job title of assembler production and cashier II. The counselor further noted that the position was consistent with the medical restrictions provide by Dr. Drew on July 1, 2005.

On September 11, 2006 the Office issued a proposed reduction of compensation on the grounds that the evidence established that appellant was no longer totally disabled, but rather partially disabled, and had the capacity to earn wages as a cashier II, at the rate of $342.00 per week. The Office noted that this position was in compliance with Dr. Drew's restrictions. The Office referenced the rehabilitation counselor's report which determined that appellant would be employable as a cashier II which reasonably represent his wage-earning capacity.

By decision dated October 16, 2006, the Office adjusted appellant's compensation benefits to reflect his wage-earning capacity as a cashier II. The wage-earning capacity determination took into consideration such factors as appellant's disability, training, experience, age and the availability of such work in the commuting area in which he lived.

Appellant requested an oral hearing which was held on March 21, 2007. He submitted reports from Dr. Tay dated March 13 and 19, 2007, who noted that, because of appellant's chronic medical condition and nature of his narcotic prescription medications with their associated side effects, he did not believe appellant could perform any kind of work including that as a cashier. In an April 19, 2007 report, Dr. Tay noted that appellant reported that he was not able to continuously sit or stand for 30 minutes at a time due to back pain and Dr. Tay indicated that the job of cashier generally requires the employee to perform these actions for

longer than 30 minutes continuously. He noted that appellant's medications, including Oxycontin and Norco, caused side effects and stated that appellant complained of drowsiness, confusion, nausea, loss of appetite and weight loss. Dr. Tay advised that he could not cite more specific or objective findings of appellant's disability because he was a family physician and directed appellant to seek further information regarding his disability from the specialist who treated him in Indiana.

In a decision dated July 23, 2007, the hearing representative affirmed the decision of the Office dated October 16, 2006.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[1]

Under section 8115(a) of the Federal Employees' Compensation Act,[2] titled "Determination of Wage-Earning Capacity" states in pertinent part: "In determining compensation for partial disability, the wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity." Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.[3] 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.[4] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[5] The job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives.[6] In determining an employee's wage-earning capacity, the Office may not select a makeshift or odd lot position or one not reasonably available on the open labor market.[7]

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

[1] *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

[2] 5 U.S.C. § 8115.

[3] *Hubert F. Myatt*, 32 ECAB 1994 (1981); *Lee R. Sires*, 23 ECAB 12 (1971).

[4] *See Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

[5] *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

[6] *Id*.

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

by the Office or to an Office wage-earning capacity specialist for selection of a position, listed in the Department of Labor, *Dictionary of Occupational Titles* or otherwise available in the open labor market, that fits that employee's capabilities with regard to his physical limitation, 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.[8] Finally, application of the principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.[9]

Section 8123(a) of the Federal Employees' Compensation Act provides that, when there is a disagreement between a physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.[10] The opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[11]

ANALYSIS -- ISSUE 1

The Office reviewed the medical evidence and determined that a conflict in medical opinion existed between appellant's attending physician, Dr. Lutz, a Board-certified orthopedist, and the Office referral physician, Dr. Kirshner, a Board-certified orthopedist, regarding whether appellant had residuals of his accepted condition and whether he was totally disabled from work. Consequently, the Office properly referred appellant to Dr. Drew to resolve the conflict.

In his July 1, 2005 report, Dr. Drew indicated that he reviewed the entire case record and statement of accepted facts. He examined appellant thoroughly and related his clinical findings. Dr. Drew diagnosed left L4 radiculopathy, annular tear at L4-5, bulging discs at L3-3, L3-4, L4-5 and L5-S1 which are likely preexisting, nonwork-related rheumatoid arthritis and myofascial pain syndrome. He opined that the annular tear at L4-5 was due to the axial load and twisting incident of March 25, 2004. In a work capacity evaluation, Dr. Drew noted that appellant could return to work eight hours per day with permanent restrictions of no twisting; pushing, pulling and lifting limited to 10 to 20 pounds; squatting limited to three to four times a day and breaks of five minutes every two to three hours. He noted that the work restrictions were related to the accepted work injury. Dr. Drew did not make any finding that appellant remained totally disabled or unable to do any work due to residuals of his accepted conditions.

The Board finds that, under the circumstances of this case, the opinion of Dr. Drew is sufficiently well rationalized and based upon a proper factual background such that it is entitled to special weight and establishes that appellant could work a light-duty position as a cashier II subject to the restrictions set forth above. Dr. Drew reviewed the entire case record and statement of accepted facts and had examined appellant. His opinion as set forth in his report of

[8] *Karen L. Lonon-Jones*, 50 ECAB 293, 297 (1999).

[9] *Id. See Shadrick* at 5 ECAB 376 (1953).

[10] 5 U.S.C. § 8123(a); *Roger W. Griffith*, 51 ECAB 491, 504 (2000); *Joseph D. Lee*, 42 ECAB 172 (1990).

[11] *Solomon Polen*, 51 ECAB 341, 343 (2000).

July 1, 2005 is found to be probative evidence and reliable. The Board finds that Dr. Drew's opinion represents the weight of the medical evidence. He clearly opined that appellant could return to work subject to the restrictions set forth in his work restriction report of July 1, 2005. The Board finds that Dr. Drew's opinion with respect to appellant's work limitations is based on a proper factual background and is sufficient to establish that the position of cashier II is medically suitable to his work restrictions.[12]

Appellant submitted reports from Dr. Tay dated January 10 and April 10, 2006, who noted a history of injury and diagnosed intractable low back pain, acute and chronic, history of degenerative disc disease, mild disc herniation and rheumatoid arthritis. Other reports from Dr. Ellis dated May 18 and June 1, 2006, noted appellant's treatment for axial back pain and diagnosed chronic, predominately axial back pain with some radicular pain down the left leg, arachnoiditis with no history of myelography, rheumatoid arthritis, hiatal hernia, recovering alcoholism and rule of sacroiliac joint syndrome versus facet arthrosis. However, neither physician found that appellant remained totally disabled or unable to do any work due to residuals of his accepted injuries.

In a November 14, 2005 report, the Office rehabilitation counselor determined that appellant was able to perform the position of a cashier II or a production assembler. Upon appellant's relocation to Michigan, his case was reassigned to a rehabilitation counselor in Michigan who met with appellant on April 28, 2006. The vocational counselor identified the two positions, including the cashier II position, listed in the Department of Labor, *Dictionary of Occupational Titles*, DOT No. 211.462.010 and provided the required information concerning the position description, the availability of the position within appellant's commuting area and pay ranges within the geographical area, as confirmed by state officials. He determined that the cashier II position was in accord with appellant's background, education and experience. The rehabilitation counselor noted that the labor market survey revealed the market was favorable as the cashier II position was readily available in sufficient numbers both full and part time in appellant's commuting area. He stated that the average weekly wage of a cashier II was $342.00 with hiring occurring regularly. The rehabilitation counselor further noted that the position was consistent with appellant's medical restrictions. He provided a job description for the cashier II position. In an August 31, 2006 closure report, the rehabilitation counselor identified nine positions which matched appellant's qualifications and medical restrictions, including that of cashier II. He advised that an updated labor market survey revealed that the market remained favorable but that appellant did not find employment. As noted, the restrictions listed by Dr. Drew are consistent with the duties of the constructed position as a cashier II.

Where vocational rehabilitation is unsuccessful, the rehabilitation counselor will prepare a final report, which lists two or three jobs which are medically and vocationally suitable for the employee and proceed with information from a labor market survey to determine the availability and wage rate of the position.[13]

[12] *See generally Melvina Jackson*, 38 ECAB 443, 450 (1987) (discussing the factors that bear on the probative value of medical opinions).

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(b) (December 1995); *see also Dorothy Jett*, 52 ECAB 246 (2001).

The Board finds that the Office considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment, and age and employment qualifications, in determining that the position of cashier II represented appellant's wage-earning capacity. The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of cashier II and that such a position was reasonably available within the general labor market of appellant's commuting area. The Office properly determined that the position of cashier II reflected appellant's wage-earning capacity effective October 16, 2006. Because the Office followed proper procedures in determining appellant's loss of wage-earning capacity, the Office properly reduced appellant's compensation.

LEGAL PRECEDENT -- ISSUE 2

Once the loss of wage-earning capacity is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.[14] The burden of proof is on the party attempting to show modification of the award.[15]

ANALYSIS -- ISSUE 2

After the Office properly found that appellant could perform the duties of a cashier II, the pertinent medical issue is whether there had been any change in his condition that would render him unable to perform those duties.[16] For a physician's opinion to be relevant on this issue, the physician must address the duties of the constructed position.[17] However, medical evidence submitted by appellant after the loss of wage-earning capacity determination did not sufficiently explain why the duties of the position of cashier II were unsuitable.

Appellant submitted a report from Dr. Tay dated March 19, 2007 who noted that, because of appellant's chronic medical condition and the nature of his narcotic prescription medications with their associated side effects, he did not believe appellant was able to perform any kind of work including that as a cashier. However, Dr. Tay did not provide sufficient medical rationale[18] explaining how any of appellant's injury-related conditions would disable appellant from a position of a cashier. He did not note any change in appellant's injury-related condition that would render him unable to perform the position of cashier. In a letter dated April 19, 2007, Dr. Tay indicated that appellant reported that he was not able to continuously sit or stand for 30 minutes and the job of cashier generally requires the employee to perform these actions for

[14] *George W. Coleman*, 38 ECAB 782, 788 (1987); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

[15] *Jack E. Rohrabaugh*, 38 ECAB 186, 190 (1986), *James D. Champlain*, 44 ECAB 438 (1986).

[16] *Phillip S. Deering*, 47 ECAB 692 (1996).

[17] *Id.*

[18] *See George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

longer than 30 minutes continuously. He noted that appellant complained of drowsiness, confusion, nausea, loss of appetite and weight loss. However, Dr. Tay appears merely to be repeating appellant's beliefs regarding his ability to perform the duties of a cashier without providing his own opinion regarding whether appellant could perform the position of cashier. To the extent that he is providing his own opinion, he failed to provide any detailed medical rationale explaining how any injury-related condition had changed to such an extent to disable appellant from a position of a cashier II. Therefore, these reports did not establish that appellant could not perform the duties of a cashier II.

The Board finds that there is no medical evidence which establishes a change in appellant's employment-related condition such that a modification of the Office's wage-earning capacity determination would be warranted. The evidence from Dr. Tay does not establish that the position of cashier II was unacceptable. Appellant also did not otherwise establish a basis for modification by submitting evidence establishing that he had been retrained or otherwise vocationally rehabilitated, or that the original determination was, in fact, erroneous. Consequently, he has failed to carry his burden of proof to establish modification of the wage-earning capacity determination.

CONCLUSION

The Board finds that the Office properly determined that the position of cashier II reflects appellant's wage-earning capacity effective October 16, 2006. The Board further finds that appellant did not submit sufficient medical evidence, following the Office's October 16, 2006 decision, to justify modification of the Office's loss of wage-earning capacity determination.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated July 23, 2007 and October 16, 2006 are affirmed.

Issued: April 22, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board