United States Department of Labor
Employees' Compensation Appeals Board

T.S., Appellant	)	
	)	**Docket No. 09-551**
and	)	**Issued: December 28, 2009**
DEPARTMENT OF THE TREASURY, U.S. MINT, Denver, CO, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 19, 2008 appellant filed a timely appeal from a March 4, 2008 merit decision of the Office of Workers' Compensation Programs reducing his compensation benefits based on his wage-earning capacity, a June 26, 2008 decision, a November 20, 2008 merit decision terminating medical benefits and a December 4, 2008 decision affirming the wage-earning capacity determination. The Board has jurisdiction of the merits of this case pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's medical benefits for his back strain, aggravation of osteoarthritis, neck sprain and psychogenic pain disorder; and (2) whether the Office properly reduced his compensation based on its finding that he had the capacity to earn wages as a cashier II.

FACTUAL HISTORY

On March 29, 2000 appellant, then a 47-year-old machine tool operator, filed an occupational disease claim alleging that he sustained a back condition due to factors of his federal employment. The Office accepted his claim for back and neck sprain/strain, permanent aggravation of osteoarthritis, a fractured right wrist carpal bone, left wrist sprain and psychogenic pain. Appellant performed his usual work duties until March 30, 2000, when he was terminated during his probationary period.

By decision dated March 28, 2000, the Office denied appellant's claim for compensation beginning March 30, 2000. On May 16, 2001 an Office hearing representative set aside the March 28, 2000 decision. He instructed the Office to refer appellant for a second opinion examination to determine whether he was unable to work beginning March 30, 2000 due to his February 26, 2000 work injury.[1]

On April 8, 2002 appellant filed a claim for compensation beginning March 30, 2000.[2] By letter dated April 30, 2002, the Office noted that on July 15, 2001 he fell injuring his right arm and neck after a back spasm. Following development of the medical record, it accepted an aggravation of lumbar degenerative disc disease and paid him wage-loss compensation retroactive to March 30, 2000. On October 14, 2003 the Office expanded acceptance of the claim to include a right wrist fracture and left wrist strain.[3] Based on the July 23, 2004 report of John Mark Disorbio, Ph.D., a clinical psychologist, it accepted psychogenic pain.

In March 2007, the Office referred appellant to Dr. Alfred C. Lotman, a Board-certified orthopedic surgeon, and Dr. Randolph Pock, a Board-certified psychiatrist, for second opinion evaluations. On March 28, 2007 Dr. Lotman diagnosed status post lumbosacral sprain/strain, status post subsequent right Colles fracture and status post subsequent cervical strain/sprain. In response to whether appellant had residuals of his accepted work injuries, he found no objective evidence of corroborating appellant's complaints of low back pain and "some contradictory objective findings on clinical exam[ination]." Dr. Lotman further noted that sprains/strains resolved within three to six months. He found that appellant had residuals only of the right wrist fracture due to loss of motion. In a work restriction evaluation, Dr. Lotman found that appellant could work eight hours per day with restrictions on sitting, walking and standing two hours per day and restrictions on pushing, pulling and lifting up to 15 pounds on the right side only. He determined that appellant could twist for two hours per day and bending and stoop for one hour per day.

In a report dated April 3, 2007, Dr. Pock indicated that he was unable to make a psychiatric diagnosis as appellant denied a psychological pain condition and attributed his

[1] The hearing representative noted that appellant was terminated for cause.

[2] By decision dated January 2, 2003, the Board affirmed an August 28, 2001 decision granting an attorney's fee. Docket No. 02-123 (issued January 2, 2003).

[3] On April 24, 2002 the Social Security Administration determined that appellant was totally disabled.

symptoms to other factors. He recommended no further psychological treatment as appellant reported that he found no benefit in receiving treatment from Dr. Disorbio.

On May 11, 2007 the Office notified appellant of its proposed termination of his compensation and medical benefits for the conditions of back strain, an aggravation of osteoarthritis, neck sprain and psychogenic pain.

In a report dated May 15, 2007, Dr. Christopher B. Ryan, an attending Board-certified physiatrist, stated:

> "Looking over Dr. Lotman's report, there really is not anything to criticize about it. Strictly speaking, as [appellant's] condition has been accepted for lumbar and cervical sprains, and considering the parameters imposed by the statement of accepted facts, he has reached the usual inevitable conclusions, that such a condition generally resolves in three to six months. [His] condition is one of chronic pain. There are no objective findings in such a condition."

Dr. Ryan recommended no further treatment except medical management.

On May 17, 2007 Dr. Lotman clarified appellant's work restrictions. He advised that appellant could work eight hours per day alternating between sitting, walking and standing up to two hours at a time.

On May 17, 2007 Dr. Disorbio reviewed Dr. Pock's finding that appellant required no further psychiatric treatment. He recommended a possible home pain program. On May 29, 2007 Dr. Disorbio opined that appellant "most likely, has completed his care…."

On June 8, 2007 appellant, through his attorney, challenged the termination of his medical benefits. He argued that the record contained conflicts regarding whether appellant required further treatment for his accepted work injuries due to his orthopedic and psychiatrist conditions.

By decision dated June 14, 2007, the Office terminated appellant's compensation and medical benefits for the conditions of back and neck sprain, osteoarthritis and psychogenic pain effective June 14, 2007. It found that he was entitled to wage-loss compensation and medical treatment for his right wrist fracture. On July 13, 2007 appellant requested an oral hearing on the June 14, 2007 termination decision.

The Office referred appellant for vocational rehabilitation. In a report dated August 2, 2007, the rehabilitation counselor noted that appellant could work at a sedentary level and advised that some cashier II positions were at a light level and some were sedentary. On September 17, 2007 she found that the position of cashier was within appellant's restrictions, vocationally suitable and reasonably available within his geographical area.

On September 27, 2007 appellant accepted private employment working 10 hours per week as a cashier. The Office removed him from the periodic rolls effective September 8, 2007 to prevent an overpayment.

On November 7, 2007 the rehabilitation counselor noted that appellant refused additional vocational rehabilitation services after he accepted a 10-hour per week position as a cashier. In a November 25, 2007 labor market survey, she identified the position of cashier II as requiring light work with occasional lifting under 20 pounds and frequently lifting under 10 pounds. The rehabilitation counselor supplied earnings information from employer contract and again found that the position of cashier II was reasonably available within his geographical location and noted that he had taken a part-time job as a cashier. She noted that the specific vocational preparation for the position was a short demonstration of up to 30 days. On October 4, 2007 the rehabilitation counselor found that there were sufficient positions as a cashier II that required only sedentary work available within the appropriate geographical location. She determined that the position was unskilled and did not require training. On November 25, 2007 the rehabilitation counselor noted that appellant was only restricted in his ability to lifting, carry and pull with his right upper extremity and could perform all required lifting with his left upper extremity. She related that she had contacted "a significant number of employers who hire individuals such as [appellant] for these jobs confirming the job duties do match the injured worker's restrictions."

On November 28, 2007 an Office rehabilitation specialist determined that appellant's actual earnings did not fairly and reasonably represent his wage-earning capacity as he was capable of working full time.

In a report dated November 28, 2007, Dr. Ryan diagnosed a permanent aggravation of preexisting lumbar spondylosis, or lumbar degenerative joint and disc disease. He disagreed with Dr. Lotman's opinion that appellant could currently work 40 hours per week and noted that his finding may have been based on his belief that the accepted condition was only lumbar strain. Dr. Ryan opined that appellant could work part time in his present position gradually increasing his hours to full time.

On December 11, 2007 the Office notified appellant of its proposed reduction in his compensation based on its determination that he could earn wages as a cashier II. On January 9, 2008 appellant's attorney argued that Dr. Lotman based his finding that appellant could work 40 hours per week on an inaccurate diagnosis of lumbar sprain.

In a report dated January 9, 2008, Dr. Robert I. Kawasaki, a Board-certified physiatrist, noted that appellant related a history of an injury at work in February 2000 and falls in 2002 and 2005. Appellant was in a motor vehicle accident in 2004. Dr. Kawasaki diagnosed multilevel spondylosis with degenerative disc changes and potential nerve root impingement.

By decision dated March 4, 2008, the Office finalized its proposed reduction of appellant's compensation effective that date. On March 10, 2008 appellant requested an oral hearing.

By decision dated June 26, 2008, a hearing representative affirmed in part and set aside in part the June 14, 2007 termination decision. She found that appellant had no further residuals of his back and neck strain but that a conflict existed regarding the extent of any disability due to the aggravation of his preexisting lumbar degenerative disc disease.

On July 28, 2008 appellant's attorney withdrew his request for an oral hearing on the March 4, 2008 decision and requested a review of the written record. He asserted that the record contained a conflict regarding the number of hours that appellant could work. Counsel asked that the decision be held in abeyance pending the impartial medical examination.

On August 8, 2008 Dr. Jeffrey Sabin, a Board-certified orthopedic surgeon, listed findings on examination and diagnosed left back and leg pain of unknown etiology.[4] On August 14, 2008 he diagnosed degenerative changes at L5-S1 and L4-5 by history developed slowly. Dr. Sabin noted that appellant did not relate a work injury but found based on his review of evidence that it was apparently "a work-related situation." He diagnosed degenerative spondylosis that may be work related. Dr. Sabin found that there were "simply no objective indicators to directly determine that [appellant] cannot work 40 hours a week…." He noted that he might require restrictions against twisting, bending and stooping due to his degenerative back condition.

On September 4, 2008 the Office referred appellant to Dr. John Douthit, a Board-certified orthopedic surgeon, for an impartial medical examination.[5] In a report dated October 20, 2008, Dr. Douthit discussed appellant's history of injury and current complaints. He reviewed the medical evidence of record, including the results of diagnostic studies and listed detailed findings on examination. Dr. Douthit found that appellant's injury may have mildly accelerated preexisting degenerative disc disease but that the progression was mostly due to aging and deconditioning. He stated:

> "As evidence of this his first MRI [scan] [study] already had significant chronic changes and his MRI [scan] [study] of 2007 only showed the natural progression of this disease. In the 2007 MRI [study] there was significant progression despite the fact that he had [not] stressed his back from work in seven years. Detracting also from the argument for causation is a history of a back injury and aggravation while working at Coors prior to his employment at the [employing establishment]. In conclusion however, as federal guidelines do not allow apportionment for preexisting impairment, the work injury must therefore be accepted as the cause of his current impairment and work restrictions."

Dr. Douthit found that appellant could not perform his date-of-injury job because of his disc disease but that there was "no reasonable argument that he cannot work now full time in a lighter capacity within the restrictions that have been advised." He stated, "I find his complaint and excuse for not working that his left leg "goes out" and left thigh pain with standing and walking are without substantiation by objective findings and consider this to be either factitious or psychological. There are no objective findings to support this claim." Dr. Douthit concluded that appellant would not benefit from further treatment but would benefit from weight loss and

[4] The Office initially referred appellant to Dr. Sabin but cancelled this appointment after finding out that he had examined appellant as an attending physician after it scheduled the appointment.

[5] On October 18, 2008 his attorney objected to the selection to the impartial medical examiner. Counsel contended that the Office bypassed physicians geographically closer in selecting Dr. Douthit. He submitted a list of qualified specialists within appellant's zip code. On October 22, 2008 the Office provided the attorney with documentation of its selection of Dr. Douthit using the Physician's Directory System.

exercise. In a work restriction evaluation, he determined that appellant could walk and stand for two hours per day during an eight-hour day and push, lift and pull up to 20 pounds for eight hours per day.

By decision dated November 20, 2008, the Office modified its June 14, 2007 termination decision to reflect that appellant sustained a permanent aggravation of preexisting degenerative disc disease. It found that he could work full time with restrictions in accordance with Dr. Douthit's assessment. The Office concluded that appellant did not require any further medical treatment for the permanent aggravation of preexisting degenerative disc disease but that his case remained open for compensation and medical treatment for the right wrist fracture.

Following a review of the written record, by decision dated December 4, 2008, a hearing representative affirmed the March 4, 2008 wage-earning capacity determination.

LEGAL PRECEDENT -- ISSUE 1

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.[6] To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.[7]

Section 8123(a) provides that, 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.[8] The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[9] In situations where there exist 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 upon a proper factual background, must be given special weight.[10]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained back and neck strain due to factors of his federal employment. It subsequently expanded acceptance to include a permanent aggravation of osteoarthritis, a fractured right wrist carpal bone, left wrist sprain and psychogenic pain. The

[6] *Pamela K. Guesford*, 53 ECAB 727 (2002).

[7] *Id*.

[8] 5 U.S.C. § 8123(a).

[9] 20 C.F.R. § 10.321.

[10] *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

Office terminated appellant's medical benefits for the back and neck strain, aggravation of osteoarthritis, left wrist sprain and psychogenic pain condition.

In a report dated March 28, 2007, Dr. Lotman, an Office referral physician, found that appellant had no objective evidence of his low back or neck sprain. Regarding the question of whether appellant had any further residuals of his back sprain, osteoarthritis, fractured carpal bone, left wrist sprain and neck sprain, he noted that appellant complained only of pain in his low back. Dr. Lotman found some loss of motion in the right wrist but no other objective findings supporting residuals of any work-related condition. On May 15, 2007 Dr. Ryan reviewed and concurred with Dr. Lotman's finding that appellant's cervical and lumbar sprains had resolved, noting that sprains resolved within three to six months. The Board finds that the Office properly terminated appellant's medical benefits for the conditions of back and neck strain/sprain and left wrist sprain based on the reports of Drs. Lotman and Ryan.[11]

On April 3, 2007 Dr. Pock asserted that he was unable to diagnose any psychiatric condition. He noted that appellant denied a psychological pain condition and specifically attributed any symptoms to other conditions. Dr. Pock found that appellant did not need further medical treatment as appellant found his current treatment unhelpful. In a report dated May 29, 2007, Dr. Disorbio, appellant's attending psychologist, found that appellant had completed his care. The Office, consequently, met its burden of proof to terminate medical benefits for the accepted condition of psychogenic pain.

The Office determined that a conflict existed between Dr. Lotman and Dr. Ryan regarding whether appellant had further residuals of his accepted aggravation of osteoarthritis. It referred him to Dr. Douthit for an impartial medical examination.[12] When a case is referred to an impartial medical examiner for the purpose of resolving a conflict, the opinion of such specialist, is sufficiently well rationalized and based on a prior factual and medical background, must be given special weight.[13] In a report dated October 20, 2008, Dr. Douthit opined that appellant's work injury permanently aggravated his degenerative disc disease. He found that the majority of appellant's degenerative disc disease resulted from natural aging and deconditioning. Dr. Douthit concluded that appellant did not require any further medical treatment but would benefit from exercise and weight loss. The Board finds that his opinion is rationalized and based on a complete and accurate factual background; consequently, he is entitled to special weight as the

[11] While Dr. Lotman did not specifically find that appellant's left wrist sprain resolved, he noted that appellant had no continued complaints except for pain and loss of motion in the back.

[12] Appellant's attorney objected to the selection of Dr. Douthit, arguing that the Office had bypassed specialists closer to his geographical location. On October 22, 2008 the Office provided the attorney with documentation showing how it selected Dr. Douthit using the Physician's Directory System.

[13] *R.H.*, 59 ECAB ___ (Docket No. 07-2124, issued March 7, 2008); *I.J.*, 59 ECAB ___ (Docket No. 07-2362, issued March 11, 2008).

impartial medical examiner.[14] The Office thus met its burden of proof to terminate appellant's medical benefits for the accepted permanent aggravation of degenerative disc disease.

On appeal appellant contends that Dr. Douthit's report is conflicting regarding whether he can work eight hours per day. He asserts that he requires medication for his neck and back pain. As noted, however, the opinion of Dr. Douthit, as the impartial medical examiner, represents the weight of the evidence and establishes that appellant has no further need for medical treatment for his condition of a permanent aggravation of degenerative disc disease.

LEGAL PRECEDENT -- ISSUE 2

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.[15] Under section 8115(a), 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 or circumstances which may affect wage-earning capacity in his or her disabled condition.[16]

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 and prior experience.[17] 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. Finally, application of the principles set forth in *Albert C. Shadrick*[18] will result in the percentage of the employee's loss of wage-earning capacity.

ANALYSIS -- ISSUE 2

Appellant received compensation for total disability beginning March 30, 2000. In 2007 the Office referred him for vocational rehabilitation. In 2007 reports, Dr. Lotman, Dr. Pock and Dr. Ryan found that appellant was no longer totally disabled from employment. The Board thus finds that the Office properly relied upon the medical evidence in referring appellant for

[14] *Id*.

[15] *T.O.*, 58 ECAB ___ (Docket No. 06-1458, issued February 20, 2007).

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

[17] *James A. Birt*, 51 ECAB 291 (2000).

[18] 5 ECAB 376 (1953); codified by regulation at 20 C.F.R. § 10.403.

vocational rehabilitation as he was no longer totally disabled due to residuals of his employment injury.

Appellant's vocational rehabilitation counselor determined that he was able to perform the selected position of cashier. She noted that he had lifting restrictions of no more than 15 pounds on the right side only and could perform all lifting with his left upper extremity. The rehabilitation counselor found that based on her research the position existed in sufficient numbers within appellant's restrictions such that it was reasonably available within his commuting area. A review of the evidence reveals that appellant is physically capable of performing the cashier position. The position is classified as light and requires occasional lifting up to 20 pounds and frequent lifting up to 10 pounds. In a report dated March 28, 2007, Dr. Lotman found that appellant could work for eight hours per day with restrictions on the right side only of lifting, pushing and pulling over 15 pounds and sitting, and walking and standing two hours per day intermittently. He found no lifting restrictions on the left side. On April 3, 2007 Dr. Pock found that appellant had no psychiatric condition. In a report dated November 28, 2007, Dr. Ryan asserted that appellant could only work part time in his current position as a cashier and then gradually increase his hours to full time.[19] He attributed appellant's partial disability to his absence from the workplace for many years and inability to exercise. Dr. Ryan did not explain how appellant's accepted work injury continued to cause partial disability other than to note a lack of conditioning. The Board finds that Dr. Lotman's opinion represents the weight of the evidence and establishes that appellant had the capacity to perform the duties of a cashier II for eight hours per day.

The Office considered that appellant had actual earnings as a part-time cashier. It found, however, that his actual earnings did not fairly and reasonably represent his wage-earning capacity as the medical evidence established that he could work full time with restrictions. While appellant alleged that he was unable to work full time, he did not submit rationalized medical evidence supporting his contention. In a report dated January 9, 2008, Dr. Kawasaki discussed his history of a work injury in 2000 and subsequent falls in 2002 and 2005. He diagnosed multilevel spondylosis with degenerative disc changes and potential nerve root impingement. Dr. Kawasaki did not address appellant's work restrictions or causation and thus his opinion is of little probative value.[20]

The Office properly relied on the opinion of the rehabilitation counselor that appellant was vocationally capable of performing the cashier position. In assessing the claimant's ability to perform the selected position, it must consider not only physical limitations but also take into account work experience, age, mental capacity and educational background. The rehabilitation counselor determined that appellant had the skills necessary to perform the position of cashier II as was an unskilled position requiring only a short demonstration period of up to 30 days. She further found that the position was reasonably available within the appropriate geographical area.

[19] An Office hearing representative subsequently determined that conflict existed between Dr. Lotman and Dr. Ryan and referred him to Dr. Douthit for an impartial medical examination. On October 20, 2008 Dr. Douthit found that appellant could work full time with restrictions of walking and standing of two hours per day and pushing, pulling and lifting up to 20 pounds for eight hours per day.

[20] *K.W.*, 59 ECAB ___ (Docket No. 07-1669, issued December 13, 2007).

As the rehabilitation counselor is an expert in the field of vocational rehabilitation, however, the Office may rely of his or her opinion in determining whether the job is vocationally suitable and reasonably available.[21] The Board finds that the Office considered the proper factors, including the availability of suitable employment, his physical limitations and employment qualifications in determining that the position of cashier II represented his wage-earning capacity. The Office further properly determined appellant's loss of wage-earning capacity in accordance with the formula developed in *Shadrick* and codified at 20 C.F.R. § 10.403.[22] It, therefore, properly found that the position of cashier II reflected his wage-earning capacity effective March 4, 2008.

On appeal appellant asserts that the Office failed to consider Dr. Sabin's reports. In a report dated August 14, 2008, Dr. Sabin found that appellant could work 40 hours per week with restrictions on bending and stooping. His opinion is thus insufficient to establish that appellant was unable to work as a cashier II.

Appellant also requested that Dr. Kawaskai be designated as his attending physician. The Board's jurisdiction, however, extends only to reviewing final decisions of the Office.[23]

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation for medical benefits for his back strain, aggravation of osteoarthritis, neck sprain and psychogenic pain disorder. The Board further finds that the Office properly reduced his compensation based on its finding that he had the capacity to earn wages as a cashier II.

[21] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(b)(2) (December 1993).

[22] *See supra* note 18. The Office divided appellant's employment capacity to earn wages of $300.00 a week by his current pay rate of the position held when injured of $860.08 per week to find a 35 percent wage-earning capacity. It multiplied the pay rate at the time disability began of $675.06 by the 35 percent wage-earning capacity percentage. The resulting amount of $236.27 was subtracted from appellant's date-of-disability pay rate of $675.06 which provided a loss of wage-earning capacity of $438.79 per week. The Office then multiplied this amount by the appropriate compensation rate of three-fourths which yielded $329.09. It found that cost-of-living adjustments increased this amount to $380.75, or $1,523.00 every four weeks.

[23] 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 4, November 20, June 26 and March 4, 2008 are affirmed.

Issued: December 28, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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