

FACTUAL HISTORY

On November 7, 2003 appellant sustained an injury to his shoulder and arm while removing a fence and carrying fence rails to a truck. The Office accepted his claim for right shoulder tendinitis, herniated disc at C5-6, brachial neuritis and right brachial plexopathy.¹

On February 23, 2004 Dr. Vasantha A.R. Kumar, appellant's treating Board-certified family practitioner, diagnosed right small C5-6 disc herniation and possible brachial plexus injury that may explain his muscle weakness.

By letter dated March 3, 2004, the Office referred appellant to Dr. Robert Allen Smith, a Board-certified orthopedic surgeon, for a second opinion. In a March 26, 2004 report, Dr. Smith diagnosed a herniated disc at C5-6 with radiculopathy in the C6 distribution of the right upper extremity with associated tendinitis of the shoulder. He found that these conditions were related to appellant's work injury of December 17, 2002 and was aggravated in November 2003 on a permanent basis. Dr. Smith recommended further treatment and testing, but noted that appellant at the present time could work light duty. He advised that appellant had not reached maximum medical improvement.

In an April 26, 2004 report, Dr. Kumar examined appellant and reviewed Dr. Smith's report. He diagnosed a small C5-6 disc herniation, some degenerative disc changes and disc bulges at C6-7, brachial plexus involvement on the right side and possible shoulder joint rotator cuff injury from the fall. Dr. Kumar agreed with most of Dr. Smith's report, but noted that Dr. Smith did not include the brachial plexus.

In a May 18, 2004 report, Dr. Michael G. Radley, a Board-certified neurosurgeon, diagnosed a right shoulder injury, intermittent right arm radicular pain and probable brachial plexopathy on the right. He did not believe that a C5-6 spinal fusion would strongly improve appellant's symptoms and recommended further treatment by peripheral nerve surgeons. Dr. Radley concurred with Dr. Kumar that it was unlikely that surgery would bring significant benefit.

On June 1, 2004 Dr. Kumar advised that there was weakness of the serratus muscle and winging of the scapula and loss of right biceps reflex and weak biceps. He agreed that appellant could do limited work as described by Dr. Smith.

In an August 19, 2004 report, Dr. Kevin R. Scott, saw appellant pursuant to Dr. Kumar's referral. He examined appellant and reviewed his clinical laboratory imaging and electrodiagnostic testing and diagnosed chronic C5 and C6 cervical radiculopathy affecting the right arm. Dr. Scott recommended physical therapy and symptomatic treatment. He increased appellant's medication and restricted lifting to no greater than 20 pounds and no heavy repetitive activity.

¹ Appellant previously filed a claim for a work injury that occurred on December 17, 2002; this claim was approved for right rotator cuff strain.

By letter dated September 24, 2004, the Office referred appellant to Dr. Ivan L. Miller, a Board-certified orthopedic surgeon, for an impartial medical examination. It found a conflict as Dr. Smith diagnosed a herniated disc at C5-6 and recommended cervical discectomy and fusion. The attending physician, Dr. Kumar, disagreed with the recommended surgery and referred the claim for further evaluation to Dr. Radley, an orthopedic specialist, and to Dr. Scott, a neurologist. The Office asked Dr. Miller to resolve the issue of extent of impairment residual to the work-related injury or employment condition.

In a November 3, 2004 report, Dr. Miller opined that appellant's main problem consisted of right brachial plexopathy with a small herniated nucleus pulposus to the right side. He found that the brachial plexopathy was causally related to appellant's work injury and caused a significant disability. Appellant had a right brachial plexopathy, which may have arisen from a stretch injury and was neurogenic in origin. Dr. Miller did not find that the C5-6 disc herniation was attributing much to appellant's present symptomatology or physical findings. He agreed with Dr. Kumar that these findings were highly atypical for a C5-6 disc herniation but were most consistent with brachial plexopathy. Mr. Miller noted that this was supported by the myelogram, which did not demonstrate any significant nerve root impingement at the C5-6 disc herniation. Dr. Miller recommended that appellant continue treatment with Dr. Kumar and that the proposed C5-6 discectomy and fusion would not be of benefit. Dr. Miller advised that appellant was capable of a light-duty work status. Appellant was unable to reach above his shoulder, was limited to one hour of reaching, four hours of pushing/pulling up to 30 pounds and was limited to lifting 20 pounds. Appellant was prohibited from climbing.

Appellant began vocational rehabilitation on February 14, 2005. The vocational rehabilitation counselor researched various job classifications. One of these positions was that of a photographer (photojournalist). This position description was listed as photographs newsworthy events, locations, people or other illustrative or educational material for publication or telecast; travels to locations; and develops negatives and prints. The vocational counselor noted that appellant had been a freelance photographer for business and civic groups and will qualify for certain occupations within this field. Under specific vocational preparation (SVP), the specialist circled the box indicating that the position required 2 to 4 years of vocational preparation. She noted, "[Injured worker] has been a freelance photographer for business and civic groups and will qualify for certain occupations within this field." The vocational counselor noted that the projected growth of photography occupation for the year 2000 to 2010 is positive 16.7 percent.

On February 21, 2005 Dr. Kumar completed a fitness-for-duty evaluation. He indicated that appellant could lift and carry 35 pounds intermittently. Dr. Kumar stated that appellant could not operate power tools but could operate motor vehicles.

In a May 18, 2005 report, the vocational rehabilitation counselor noted that appellant had worked as a freelance photographer. In the section of the report that discussed his interests, the counselor noted that appellant indicated that he would like to arrange and photograph commercial displays and do the steps necessary to develop film and make prints with a moderate interest in touching up film negatives.

In an August 22, 2005 report, Dr. Kumar opined that appellant would not be able to resume full duty without restrictions. He did not expect any major improvements in appellant's neurological status. Dr. Kumar noted that the physical restrictions of February 2005 were still good and were permanent.

On October 18, 2006 the Office referred appellant to Dr. Daniel P. Hely, a Board-certified orthopedic surgeon, for an impartial medical examination. The issue to be resolved was the cause and extent of impairment residual to the work injury or employment condition. In a report dated December 6, 2006, Dr. Hely noted that appellant's diagnosis was brachial plexus injury causally related to his work injuries of December 2002 and November 2003. He noted objective findings of weakness in the latissimus dorsi, tenderness on palpitation at the posterior aspect of the shoulder and symptoms of pain in the right shoulder consistent with these findings. Dr. Hely noted that appellant still had residuals from his work-related injuries, but that he continued to improve. He recommended no additional treatment other than ongoing exercises to strengthen the right shoulder. Dr. Hely stated, "The enclosed job descriptions of sales person, photographer and van driver are all clearly within [appellant's] abilities and I recommend that he be started in one of these positions immediately." He also noted appellant's physical limitations, noting that he was capable of lifting more than 40 or 50 pounds intermittently. Dr. Hely noted that appellant was not capable "as yet" of overhead activities and lifting for long time periods, but anticipated steady improvements. On the work capacity evaluation, he indicated that appellant could lift 40 pounds for 1 to 2 hours.

In a February 12, 2007 report, the vocational rehabilitation counselor indicated that she contacted a descriptive statistical analyst for the Pennsylvania Department of Labor and Industry and she found that the average entry salary of a photographer (photojournalist) in the Chambersburg, Pennsylvania area was \$18,574.40 per year. She noted that this position existed in significant numbers in that area to make it reasonably available to appellant. She also noted that positions were available as a salesperson and van driver for a lower salary.

On March 9, 2007 the Office proposed reducing appellant's compensation on the basis that he was partially disabled and had the capacity to earn wages as a photographer (photojournalist) at a rate of \$357.20 per week. The physical requirements of this position were found not to exceed appellant's accepted work tolerance limitations.

By letter dated April 6, 2007 appellant, through counsel, disagreed that he had the capacity to earn wages of \$357.20 a week as a photojournalist. He contended that there were insufficient photographer positions available in the central Pennsylvania labor market and that the employing establishment had not advised appellant of any accommodations to his physical requirements and limitations. Appellant submitted a March 29, 2007 report by Terry P. Leslie, who is a Diplomate of the American Board of Vocational Experts, a certified rehabilitation counselor and a licensed professional counselor. Mr. Leslie had reviewed appellant's case and that he knew of no one in the Harrisburg Statistical area, a larger market than that considered by the Office's counselor, that were hiring photographers on a full-time basis. He noted that these positions were typically part time and paid a fee for each picture. Others were self-employed with their own studios. Mr. Leslie did not believe that earning capacity had been established.

In a decision dated April 13, 2007, the Office finalized the proposed reduction in compensation, effective May 13, 2007 based on appellant's capacity to earn wages as a photographer (photojournalist).

By letter dated May 22, 2007, appellant, through counsel, requested reconsideration. In an April 23, 2007 letter, Mr. Leslie recommended that the wage-earning capacity documents be reviewed by another claims examiner or one of their superiors. He contended that appellant did not have the SVP to work as a photographer, that these positions were not available in his geographic area, that the other vocational counselor did not use the correct figures.

By decision dated February 7, 2008, the Office denied appellant's modification of the wage-earning capacity determination.

By letter dated May 9, 2008, appellant, through counsel, requested reconsideration of the February 7, 2008 decision. Appellant's attorney contended that there was no evidence that the employing establishment ever determined whether restricted or limited-duty work was available for appellant or whether existing jobs could be modified. Furthermore, appellant's attorney contends that the Office disregarded the fact that appellant was not vocationally qualified for full-time employment as a photojournalist. Accordingly, he argued that the decision to reduce appellant's compensation benefits was in error and should be vacated.

By decision dated May 29, 2008, the Office denied appellant's request for reconsideration as it found that the evidence submitted was duplicative and repetitious.

LEGAL PRECEDENT

Once the wage-earning capacity of an injured employee 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.² The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.³

ANALYSIS

Appellant does not contend that there has been a material change in the nature and extent of his injury-related condition or that he has been retrained or otherwise vocationally rehabilitated. The issue is whether the original wage-earning capacity determination was erroneous.

The vocational rehabilitation counselor appointed by the Office found that appellant was capable of employment in three professions: salesperson, van driver and photographer (photojournalist). In making a determination with regard to wage-earning capacity, it evaluated the highest paying position, that of photographer (photojournalist). The vocational rehabilitation

² *Tamra McCauley*, 51 ECAB 375, 377 (2000).

³ *Id.*

counselor noted that she contacted a descriptive statistical analyst for the Pennsylvania Department of Labor and Industry and determined that the average entry salary of a photographer (photojournalist) in the Chambersburg, Pennsylvania area was \$18,584.40 per year. She noted that this position existed in significant numbers to make it reasonably available to appellant. Appellant disagreed with the determination that this position was reasonably available and submitted his own vocational evidence. In a March 29, 2007 letter, Mr. Leslie, a certified vocational counselor, who is a Diplomate of American Board of Vocational Experts and a licensed professional counselor, reviewed appellant's case and stated that he knew of no one in the Harrisburg Statistical area, a larger area than considered by the Office's vocational specialist, that was hiring photographers on a full-time basis. Mr. Leslie noted that these positions were typically part time and paid a fee for each picture taken and that others were self-employed with their own studios.

The Board finds that the Office erroneously found that appellant's wage-earning capacity was represented by the position of photographer (photojournalist). 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 or 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 labor market, that fits the employee's capabilities with regard to his physical limitation, education, age and prior experience.⁴ A rehabilitation specialist is an expert in the field of vocational rehabilitation and the claims examiner may rely on his or her opinion as to whether the job is reasonably available and vocationally suitable;⁵ however, the evidence in the record is not sufficient to establish that appellant has the proper prior experience to successfully compete for a job as a photographer/photojournalist. The position description for photographer (photojournalist), as listed by the Office's vocational counselor, indicated that appellant needed two to four years of vocational preparation. The vocational counselor noted that appellant had worked as a freelance photographer and would qualify for "certain occupations within this field." There is no insufficient evidence as to how much experience appellant had as a photographer other than a brief mention that he had performed some freelance work. The counselor clearly stated that he would qualify for certain occupations within this field, but did not indicate making additional findings. The record does not establish that appellant had the necessary qualifications for employment as a photographer (photojournalist) pursuant to the Office's regulations.⁶

There is also a dispute as to whether work as a photographer is reasonably available to appellant in his commuting area. The vocational rehabilitation counselor retained by the Office contacted the descriptive statistical analyst for the Pennsylvania Department of Labor and Industry to find that this position was available in significant numbers in the Chambersburg, Pennsylvania Metropolitan Area. That determination was challenged by appellant's vocational specialist, who disagreed with the contention that there were sufficient photographer positions

⁴ *Francisco Bermudez*, 51 ECAB 506 (2000); *James A. Birt*, 51 ECAB 291 (2000).

⁵ *Dorothy Jett*, 52 ECAB 246 (2001).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining: WEC Based on a Constructed Position*, Chapter 2.804.8(a)(5).

available in the central Pennsylvania market. Although the Board will generally give great weight to the Office's vocational rehabilitation counselor, the Board finds that appellant has submitted sufficient evidence to require further development as to whether the selected position was reasonably available within appellant's commuting area.

The Board finds that this case is distinguishable from *Dorothy Lams*,⁷ where an Office vocational specialist found that there were over 8,000 positions available in the relevant labor market for the employee as an information clerk. Claimant's vocational expert indicated that the job availability was more limited, 224 positions, but did not cite any source of her information other than a computerized evaluation tool. In the instant case, Mr. Leslie specifically addressed the availability of positions as a photojournalist in appellant's commuting area and stated that these positions were not reasonably available.

Mr. Leslie, noted that appellant resided in Chambersburg, Pennsylvania which is in Franklin County. He stated that the most recent statistical data showed that there were 50 people employed in the general category of photographers in the Harrisburg area, which is the most recent survey data by the Bureau of Labor statistics for the Department of Labor. There was no data indicating how many people were employed in this occupation in the Chambersburg area. He noted that the statistical information completed by the State of Pennsylvania did not represent appellant's rural area. Mr. Leslie noted that the Office's counselor did not contact any employers who would hire photographers. He also noted that he did not know of any employers in appellant's labor market who hire photographers on a full-time basis; rather these positions are typically part time or are paid a fee for each picture they take. Mr. Leslie noted other photographers have their own studios.

The Board finds that the Office vocational rehabilitation counselor's statement that positions as a photojournalist were available in sufficient numbers within her commuting area is sufficiently rebutted by the report of Mr. Leslie. The Office's decision finding that appellant's wage-earning capacity was established by the position of photographer (photojournalist) was erroneous. It improperly denied modification of the wage-earning capacity determination.

CONCLUSION

The Board finds that the Office improperly denied modification of appellant's wage-earning capacity for the constructed position of photojournalist.

⁷ 47 ECAB 584 (1996).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 7, 2008 is reversed. In light of the disposition of this issue, the issue of whether the Office properly denied reconsideration in its May 29, 2008 decision is moot.

Issued: September 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