

office furniture in the performance of duty. The Office accepted his claim for low back strain and herniated discs at L3-4 and L4-5. Appellant received compensation for temporary total disability on the periodic rolls.

On July 11, 2007 the Office reduced appellant's compensation, effective that date, to reflect his capacity to earn wages in the constructed position of contract clerk, a sedentary job. It found that the weight of the medical opinion evidence rested with Dr. William D. Smith, a Board-certified orthopedic surgeon and Office referral physician.

On October 19, 2007 an Office hearing representative found a conflict in medical opinion arose between Dr. Smith and Dr. Sidney Schultz, an attending Board-certified orthopedic surgeon, on whether the position of contract clerk was medically suitable to appellant's disabled condition. In a June 29, 2007 report, Dr. Schultz found appellant permanently and totally disabled from performing any type of gainful employment. The hearing representative set aside the July 11, 2007 decision and remanded the case for further development of the medical evidence. As the Office met its burden of proof at the time it issued its decision to reduce compensation, appellant was not entitled to reinstatement of his compensation benefits.

The Office referred appellant, together with the record and a statement of accepted facts, to Dr. Sami R. Framjee, a Board-certified orthopedic surgeon, for an impartial medical evaluation. Dr. Framjee examined appellant on January 9, 2008 and concluded that appellant's symptoms were indicative of low back pain with some radiculitis but no true radiculopathy. "In order to better delineate the patient's clinical picture, an MRI [magnetic resonance imaging] scan of the lumbar spine is indicated." He added: "I strongly feel that an MRI scan will be extremely helpful to determine the patient's current medical picture."

Dr. Framjee attributed appellant's physical limitations to obesity and poor physical conditioning unrelated to any employment injury. Asked to review the job description for the selected position of contract clerk and to indicate if appellant was capable of performing the duties as described, he responded: "I have reviewed the description of the special agent duties. It is my opinion that at the present time the above[-]mentioned patient is unable to be gainfully employed as a special agent, however, it is my opinion the above-mentioned patient could work at a sedentary desk job but not lifting more than 10 [to] 20 pounds." He completed the physical limitations section of a work capacity evaluation.²

On February 5, 2008 the Office requested clarification. It explained that the duties of a special agent was not an issue, and that the Office wanted Dr. Framjee to clarify his opinion on the duties of the contract clerk position.

On June 9, 2008 Dr. Framjee reported that an April 2, 2008 MRI scan revealed the presence of multilevel lumbar spondylosis, primarily at L4-5 but also suggested that he had severe central canal stenosis. He reevaluated appellant's history and physical examination, as performed on April 2, 2008. Dr. Framjee stated that it was his initial impression that appellant's symptoms were indicative of pseudoclaudication in the lower extremities that was suggesting

² Limitations included sitting for eight hours intermittently, walking intermittently for 30 minutes, and standing intermittently to stretch. Dr. Framjee imposed no restriction on operating a motor vehicle to or from work.

spinal stenosis. Dr. Framjee advised: “My plans are to reexamine the patient and determine if his clinical picture correlates with the MRI scan findings. I will thereafter send you a supplemental report with my final opinion.” He completed a work capacity evaluation stating: “Patient at the present time can work at sedate desk job only.”

On August 14, 2008 the Office reduced appellant’s compensation to reflect his capacity to earn wages in the constructed position of contract clerk. On the following day, it received a copy of Dr. Framjee’s April 2, 2008 report. Dr. Framjee obtained an MRI scan on April 2, 2008 and examined appellant that same day. He complained of severe low back pain and pseudoclaudication in both lower extremities with numbness and tingling on the left. Dr. Framjee found that his symptoms were clearly suggestive of spinal stenosis, and the MRI scan confirmed that diagnosis. “If the patient’s symptoms are unbearable, then the procedure of choice would be a lumbar decompression at the L4-L5 level with stabilization.” In the meantime, he stated that appellant remained temporarily totally disabled.

The Office again asked Dr. Framjee for clarification. On September 15, 2008 Dr. Framjee responded that appellant was unable to return to his date-of-injury job as a special agent but could work at a sedate desk job lifting no more than 10 to 20 pounds, as he previously found. He explained that the accepted disc pathology was a contributing factor to appellant’s spinal stenosis at the L4-5 level.

Appellant requested reconsideration, which the Office denied. The Board subsequently remanded the case for a merit review.

In a decision dated February 5, 2010, the Office reviewed the merits of appellant’s claim and reaffirmed the reduction of appellant’s compensation to reflect his capacity to earn wages as a contract clerk. It found that, while Dr. Framjee advised that appellant was totally disabled in an April 2, 2008 report, he reported that appellant was capable of working limited duty with a diagnosis of spinal stenosis.

On appeal, appellant contends that the Office did not meet its burden of proof. He also argues that the constructed position is not suitable, as Dr. Framjee found him temporarily totally disabled after reviewing the April 2, 2007 MRI scan.

LEGAL PRECEDENT

The Federal Employees’ Compensation Act provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of his duty.³ “Disability” means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.⁴

In determining compensation for partial disability, the wage-earning capacity of an employee is determined by actual earnings, if actual earnings fairly and reasonably represent his

³ 5 U.S.C. § 8102(a).

⁴ 20 C.F.R. § 10.5(f).

wage-earning capacity. If the actual earnings of the employee do not fairly and reasonably represent his wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity as appears reasonable under the circumstances 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.⁵

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.⁶

If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.⁷ When 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.⁸

When the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from the specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting a defect in the original report. When the impartial medical specialist's statement of clarification or elaboration is not forthcoming or if the specialist is unable to clarify or elaborate on the original report or if the specialist's supplemental report is also vague, speculative, or lacks rationale, the Office must submit the case record together with a detailed statement of accepted facts to a second impartial specialist for a rationalized medical opinion on the issue in question.⁹ Unless this procedure is carried out by the Office, the intent of section 8123(a) will be circumvented when the impartial specialist's medical report is insufficient to resolve the conflict of medical evidence.¹⁰

ANALYSIS

The Office hearing representative found a conflict between Dr. Smith, the Office referral orthopedic surgeon, and Dr. Schultz, appellant's attending orthopedic surgeon, on whether the selected contract clerk position was medically suitable. Appellant argues that this conflict existed at the time the Office issued its July 11, 2007 decision to reduce his compensation. The Office received the last of Dr. Smith's reports into the record on September 9, 2006. It entered

⁵ 5 U.S.C. § 8115(a).

⁶ *Harold S. McGough*, 36 ECAB 332 (1984).

⁷ 5 U.S.C. § 8123(a).

⁸ *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

⁹ *See Nathan L. Harrell*, 41 ECAB 402 (1990).

¹⁰ *Harold Travis*, 30 ECAB 1071 (1979).

Dr. Schultz's report into the record on July 10, 2007. It was on the next day, July 11, 2007, that the Office issued its decision to reduce appellant's compensation.

The hearing representative explained that the Office had met its burden of proof on July 11, 2007, as the conflict arose subsequent to the wage-earning capacity determination. She found that appellant was not entitled to reinstatement of his compensation benefits. The Office did not support the reduction in his compensation because there existed, at the time of its decision, an unresolved conflict in medical opinion on whether the selected position was medically suitable.

The Office selected Dr. Framjee, a Board-certified orthopedic surgeon, to resolve this conflict, but his several reports do not adequately address the issue submitted. It does not appear that he ever reviewed the position description of the selected position, notwithstanding the Office's requests that he do so. When the Office asked him to address whether appellant was capable of performing the duties of a contract clerk as described, Dr. Framjee instead reviewed the description of appellant's position as a special agent and found that he was unable to be gainfully employed in that position. He did state that appellant could work at a sedentary desk job not lifting more than 10 to 20 pounds, but he strongly cautioned that an MRI scan was indicated to adequately determine appellant's current status.

Dr. Framjee obtained an MRI scan and had an opportunity to reexamine appellant. He concluded that appellant was temporarily totally disabled with a diagnosis of spinal stenosis. Two months later, however, Dr. Framjee appeared to change his mind. On June 9, 2008 he reevaluated the history and physical examination he reported on April 2, 2008. Dr. Framjee was of the opinion that appellant was not temporarily totally disabled but could return to work in a sedentary desk job. He did not explain the basis for this change in medical opinion but he again indicated that he was offering only an interim opinion. Dr. Framjee advised the Office that he planned to reexamine appellant once more to determine if the clinical picture correlated with the recent MRI scan findings: "I will thereafter send you a supplemental report with my final opinion."

Dr. Framjee never reexamined appellant or adequately clarified his April 2 and June 9, 2008 reports. When the Office asked for further clarification, he simply reported on September 15, 2008 that appellant was unable to return to his date-of-injury job as a special agent but could work at a desk job lifting no more than 10 to 20 pounds.

The Board finds that Dr. Framjee's reports are of diminished probative value and are insufficient to resolve the conflict between Dr. Smith and Dr. Schultz. His reports were not responsive to whether appellant had the capacity to perform the duties of the selected position. Dr. Framjee's report lacks sound medical rationale. His opinion is not entitled to special weight. The Board finds that the Office did not meet its burden of proof to reduce appellant's compensation. The Board therefore will reverse the Office's February 5, 2010 decision.

CONCLUSION

The Board finds that the Office improperly reduced appellant's compensation to reflect a capacity to earn wages in the constructed position of contract clerk. There remains a conflict in medical opinion.

ORDER

IT IS HEREBY ORDERED THAT the February 5, 2010 decision of the Office of Workers' Compensation Programs is reversed.

Issued: January 5, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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