

stepped on the wheels of his chair and fell onto his back. The Office accepted his claim for a neck strain, lumbar strain and aggravations of cervical spondylosis and lumbar degenerative disc disease. Effective July 8, 2006, appellant was placed on the periodic compensation rolls in receipt of compensation for temporary total disability. On July 10, 2006 he underwent a lumbar fusion. Appellant did not return to work.

In a May 16, 2007 report, Dr. Eric M. Gabriel, an attending neurosurgeon, diagnosed lumbar stenosis and failed back syndrome. He found that appellant was totally disabled.

In reports dated December 5, 2007 and April 18, 2008, Dr. Steven J. Lancaster, a Board-certified orthopedic surgeon and Office referral physician, reviewed the medical history and provided findings on physical examination. He found that appellant was capable of performing a full-time sedentary position.

On April 4, 2008 the Office referred appellant to Rick Robinson, a certified vocational rehabilitation counselor. It noted that the employing establishment would not provide a position within his physical restrictions because he had been terminated for cause. In an individual rehabilitation placement plan and job search plan and agreement, appellant agreed to spend four hours each day in job search activities. Mr. Robinson assisted him in the development of job seeking skills and the identification of suitable positions. On June 18, 2008 he advised appellant of two available clerical positions in appellant's locale that were appropriate based on his work skills and physical limitations.

In reports dated June 19 and November 15, 2008, Dr. Perry J. Cole, an anesthesiologist, diagnosed failed back syndrome of the lumbar spine with lower extremity radiculopathy and degenerative disc disease of the cervical and lumbar spine. He noted that appellant had significant pain in his lumbar spine radiating to his legs. Dr. Cole opined that appellant was totally disabled but recommended a functional capacity evaluation.

Due to the conflict in medical opinion between appellant's treating physicians, Drs. Gabriel and Cole and Dr. Lancaster, the Office referred appellant to Dr. Robert O. Pohl, a Board-certified orthopedic surgeon, for an independent medical examination and opinion as to the nature and extent of any disability causally related to his accepted back and neck conditions.

In an August 13, 2008 report, Dr. Pohl reviewed the medical history and provided findings on physical examination. Appellant's gait was normal. His lumbar spine extension was 10 degrees. Appellant could flex his chin to his chest and had 70 degrees of right and left rotation. There was some posterior cervical pain with motion. Both shoulders had 160 degrees of flexion/abduction. Dorsolumbar spine flexion permitted fingertip reach within 24 inches of the floor. Appellant had 10 degrees of extension, 20 degrees of right lumbar rotation and 30 degrees of left lumbar rotation with low back pain. There was thigh pain with sitting straight leg raising. Reflex and motor strength of his lower extremities was normal. Dr. Pohl diagnosed lumbar pain syndrome, post L5-S1 surgical fusion and cervical degenerative disc disease. He found that appellant could perform the sedentary positions of reception clerk or information clerk with lifting up to 10 pounds occasionally. Dr. Pohl noted that intermittent standing and walking would be helpful and sitting should be limited to 30 minutes at a time.

In an October 30, 2008 letter to Mr. Robinson, Gregory Price, an Office rehabilitation specialist, noted that appellant's vocational rehabilitation case had been in interrupted status since July 10, 2008. Following review of new medical evidence, the Office determined that appellant was able to work as a receptionist or receptionist clerk. Mr. Price noted that appellant had not actively cooperated in job search activities in the past. He asked Mr. Robinson to ascertain whether he would sign a new agreement to engage in a job search. If so, the Office would allot appellant 90 days for a job search before making a wage-earning capacity determination. On November 17, 2008 appellant signed a new individual rehabilitation placement plan. On November 28, 2008 Mr. Robinson advised appellant of three receptionist positions that were available in appellant's area.

On November 10, 2008 appellant underwent a functional capacity evaluation. The therapist who performed the evaluation found that his functional capacity was consistent with sedentary duty. Appellant might have difficulty working a full day, however, due to his claim that he had to lie down intermittently for four to five hours due to pain.

On February 9, 2009 Mr. Price advised that appellant's rehabilitation case was closed following 90 days of job placement services. He noted that appellant did not actively participate in the job search efforts. Mr. Price noted that appellant had 20 years of sedentary clerical experience with the employing establishment as a customer service representative and was capable of earning in excess of entry level wages for semi-skilled sedentary clerical occupations such as receptionist. He advised that appellant was capable of earning \$11.13 per hour or \$445.20 per week as a receptionist based on state labor market statistics data.

On February 20, 2009 the Office advised appellant that it proposed to reduce his wage-loss compensation based on his wage-earning capacity as a receptionist or receptionist clerk, with job duties and physical requirements described in the Department of Labor, *Dictionary of Occupational Titles (DOT)*, at the rate of \$445.20 per week. These positions were within the physical limitations specified by Dr. Pohl. The vocational rehabilitation counselor reported that appellant was employable in these positions based on his experience, education, medical restrictions and a labor market survey.

By decision dated March 27, 2009, the Office reduced appellant's wage-loss compensation effective April 12, 2009 based on his capacity to earn wages as a receptionist or receptionist clerk. These positions were medically and vocationally suitable and 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 that was held on July 27, 2009. In reports dated July 28, 2008 and June 10 and August 27, 2009, Dr. Syed S. Hussain, a family practitioner, provided findings on physical examination and diagnosed neck and low back pain and pain in the upper and lower extremities. Based on Dr. Hussain physical examination of appellant and the November 2008 functional capacity test, appellant opined that he could not perform any sedentary work due to permanent cervical and lumbar spine injuries.

By decision dated September 30, 2009, an Office hearing representative affirmed the March 27, 2009 decision.²

LEGAL PRECEDENT

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury, it has the burden of justifying a subsequent reduction of compensation benefits.³ Under section 8115(a) of the Act,⁴ 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 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 his or her injury, the degree of physical impairment, his or her usual employment, age, qualifications for other employment, the availability of suitable employment and other facts and circumstances which may affect wage-earning capacity in his or her disabled condition.⁵ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.⁶ 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.⁷

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 or vocational rehabilitation counselor authorized by the Office for selection of a position, listed in the Department of Labor, *DOT* or otherwise available in the open labor market, that fits the 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.⁸ Finally, application of the principles set forth in *Albert C. Shadrick*,⁹ will result in determination of the employee's loss of wage-earning capacity.¹⁰

² Subsequent to the September 30, 2009 Office decision, additional evidence was associated with the file. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c). The Board may not consider this evidence for the first time on appeal.

³ *Sherman Preston*, 56 ECAB 607 (2005).

⁴ 5 U.S.C. §§ 8101-8193.

⁵ *See Mary E. Marshall*, 56 ECAB 420 (2005); *James Smith*, 53 ECAB 188 (2001).

⁶ *Id.*

⁷ *Id.*

⁸ *Sherman Preston*, *supra* note 3.

⁹ 5 ECAB 376 (1953).

¹⁰ *Id.*; *see also* 20 C.F.R. § 10.403.

ANALYSIS

The Office accepted that appellant sustained a neck strain, lumbar strain and aggravations of cervical spondylosis and lumbar degenerative disc disease, when he fell unto his back on November 21, 2005. While appellant's treating physicians, Drs. Gabriel and Cole, continued to opine that appellant remained totally disabled, the Office's second opinion physician, Dr. Lancaster opined in his December 5, 2007 and April 18, 2008 reports that appellant could return to full-time sedentary work. The Office therefore properly referred appellant to Dr. Pohl, an impartial medical specialist to determine appellant's disability status.¹¹

After an extensive physical examination, Dr. Pohl found appellant able to perform sedentary work, with restrictions of lifting up to 10 pounds occasionally and intermittent standing and walking, with sitting for 30 minutes at a time. As Dr. Pohl's report was well rationalized, it is entitled to great weight. The Office thereafter again referred appellant for vocational rehabilitation counseling. The vocational rehabilitation counselor determined that appellant was qualified to perform the positions of receptionist or receptionist clerk. He determined that the position was available in sufficient numbers so as to make it reasonably available within appellant's commuting area and that the salary of the position was \$445.20 per week.

The Office found the selected positions of receptionist and receptionist clerk as medically and vocationally appropriate. It reduced appellant's wage-loss compensation effective April 12, 2009 based on his capacity to earn wages in the selected position.

The Board finds that the Office considered the proper factors set forth in 5 U.S.C. § 8115(a), such as the nature of appellant's injury, degree of physical impairment, usual employment, age, qualifications for other employment, the availability of suitable employment and other factors or circumstances that might affect his wage-earning capacity in his disabled condition, in determining that the position of receptionist or receptionist clerk represented his wage-earning capacity. Dr. Pohl found that appellant could perform full-time sedentary work. As appellant had previously been employed as an IRS customer service representative, the evidence of record establishes that he had the requisite skills to perform the position of receptionist or receptionist clerk. The Office also properly determined, based upon the vocational counselor's report that the position of receptionist was a position that was reasonably available within the general labor market of his commuting area.

The Office properly calculated appellant's loss of wage-earning capacity by using his date-of-injury pay rate, his current pay rate for his job and the pay rate for the selected positions. Accordingly, it met its burden of proof to establish that the position of receptionist or receptionist

¹¹ 5 U.S.C. § 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. 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. *R.H.*, 59 ECAB 382 (2008).

clerk reflected his wage-earning capacity effective April 12, 2009, the date it reduced his wage-loss compensation benefits.

The evidence appellant submitted for consideration by the Office hearing representative is of limited probative value. Dr. Hussain provided findings on physical examination and diagnosed neck and low back pain and pain in the upper and lower extremities. Based on the physical examination and the functional capacity test, he opined that appellant could not perform any sedentary work due to permanent cervical and lumbar spine injuries. Dr. Hussain did not provide specific diagnoses, however, noting only cervical and lumbar “pain.” Further, he did not specifically address the duties of the selected positions or provide a rationalized explanation as to why appellant could not perform those positions. Due to these deficiencies, Dr. Hussain’s reports are not sufficient to warrant modification of the Office’s wage-earning capacity decision.

On appeal, appellant contends that Dr. Pohl’s report established that appellant could not perform sedentary work. The record establishes that the selected positions of receptionist and receptionist clerk comply with the physical restrictions he prescribed. The positions are sedentary and required occasional lifting of no more than 10 pounds. The record does not establish that these positions precluded sitting and standing activities as prescribed by Dr. Pohl. Appellant further contends that the functional capacity test established that he was not capable of performing even sedentary work. The therapist who performed the evaluation found that appellant’s functional capacity was consistent with sedentary duty. He noted that appellant might have difficulty working a full day, however, due to appellant’s own claim that he had to lie down intermittently for four to five hours due to pain. Appellant’s personal opinion as to his own disability is not probative as medical evidence on the issue of his ability to perform the selected positions. The medical evidence of record does not establish that he is in fact disabled by the necessity that he lie down every four to five hours.

CONCLUSION

The Board finds that in this case the Office properly calculated appellant’s loss of wage-earning capacity based on his ability to earn the wages of a receptionist or receptionist clerk.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 30, 2009 is affirmed.

Issued: March 28, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board