

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THADDEUS J. SPEVACK and U.S. POSTAL SERVICE,
POST OFFICE, Harrisburg, PA

*Docket No. 00-1180; Submitted on the Record;
Issued April 3, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined appellant's wage-earning capacity as of May 13, 1992 in the constructed position of order clerk.

On August 5, 1985 appellant, then a 41-year-old mail processor, filed a claim for an injury sustained that day when he fell while in the performance of duty. Appellant stopped work and utilized continuation of pay until his return to modified duty on August 26, 1985. The Office accepted his claim for cervical and scapular strains.¹ Appellant stopped work on December 16, 1985 and underwent right shoulder surgery of the acromioclavicular joint. He received continuation of pay through January 8, 1986 and compensation for total disability until his return to limited duty on January 20, 1986. Appellant received compensation for 43 hours of intermittent disability for the period April 18, 1986 through January 6, 1987. On May 1, 1987 he received a schedule award for 11 percent impairment of his right upper extremity.² The record reveals the Office accepted aggravation of arthritis in the acromioclavicular joint and a herniated disc at T8-9. Following additional development of the claim, on November 6, 1987 appellant accepted a modified mail processor position. However, the record indicates that he subsequently stopped work at the employing establishment on November 23, 1987.³ Appellant retired from the employing establishment on December 26, 1990.

¹ The Office noted appellant had preexisting arthritis and degenerative disc disease at C5-6. Appellant was also in receipt of benefits from the Veterans Administration for a service connected emotional condition.

² The period of the award ran from January 7 to September 4, 1987.

³ On August 10, 1988 the employing establishment approved appellant's request for extended leave without pay in order to pursue education under a State of Pennsylvania vocational rehabilitation program. The leave without pay period extended until February 1990. Appellant subsequently notified the employing establishment of his decision to retire.

On January 2, 1992 appellant underwent surgical manipulation of the right shoulder for adhesive capsulitis and impingement. On February 17, 1992 appellant underwent surgery for repair of a right rotator cuff tear with acromioplasty of the right shoulder. The surgery was authorized by the Office.

By letter dated October 4, 1994, appellant requested an increased schedule award for impairment of his right upper extremity based on the additional surgeries performed since the 1987 award. Appellant also requested that he receive compensation under the Federal Employees' Compensation Act in lieu of retirement benefits from Office of Personnel Management (OPM). He was referred for examination to Dr. Bruce Goodman for evaluation of his right upper extremity impairment and opinion on continuing disability.

In an October 5, 1995 decision, the Office noted that appellant had voluntarily left his employment with the employing establishment in November 1987. The Office found that the modified mail processor position he had performed prior to stopping work fairly and reasonably represented his wage-earning capacity from January 20, 1986 until January 2, 1992, the date he underwent surgery for his shoulder condition. Appellant's request for compensation benefits for total disability was denied for the period January 20, 1986 through January 1, 1992. Beginning January 2, 1992 appellant underwent several surgeries and the Office found this constituted a material change in his work-related condition to support modification of his wage-earning capacity as of that date. Appellant was advised to submit medical evidence establishing total disability for work as of January 2, 1992. The Office advised that the case was not in posture for decision on the schedule award issue as the medical evidence did not establish that appellant had reached maximum medical improvement.

Appellant requested a hearing before an Office hearing representative, which was held on April 15, 1996. In an August 13, 1996 decision, the Office hearing representative affirmed the October 5, 1995 wage-earning capacity decision. The hearing representative found that the medical evidence of record did not establish total disability from performing the duties of the modified duty position for the period November 23, 1987, when appellant stopped work, until January 2, 1992. The hearing representative noted appellant did not contest the decision to deny an additional schedule award as maximum medical improvement had not been established.

Following return of the case record, on September 16, 1996 the Office advised appellant of his entitlement to compensation for the period January 2, 1992 through September 16, 1996. Since appellant was receiving retirement benefits from OPM, he was advised of the necessity to make an election between benefit payments.

In a November 29, 1996 letter, the employing establishment advised the Office that the medical records of Dr. Robert Lonegran addressed appellant's recovery from surgery and his release for full-time work on May 12, 1992. The employing establishment noted that Dr. Lonegran's reports were sufficient to support appellant's return to the modified-duty position that he left in 1987.

By decision dated January 15, 1997, the Office found that appellant had abandoned suitable work effective November 23, 1987 and that he was not entitled to monetary benefits for wage loss or a schedule award after that date. The Office vacated the September 16, 1996 letter,

which had advised appellant of his entitlement to compensation benefits effective January 2, 1992. Appellant was advised that he remained entitled to medical benefits for his accepted condition.

Appellant requested a hearing before an Office hearing representative. Following review of the record, the Office hearing representative issued an April 28, 1997 decision that vacated the January 15, 1997 decision. The hearing representative noted that the Office had not properly applied the penalty provision of section 8106(c) and reversed the termination decision. The case was remanded to the Office to process appellant's compensation claim for benefits effective January 2, 1992 through September 16, 1996 and for development on whether appellant was totally or partially disabled due to residuals of the 1985 employment injury.

On June 10, 1997 appellant submitted a CA-8 claim for compensation for the period January 2, 1992 through that date. He noted that he was currently receiving retirement benefits and requested an election of benefits.

By decision dated February 18, 1998, the Office found that the medical evidence did not support appellant's total disability for work beyond May 12, 1992. The decision noted that appellant brought a compensation claim in 1994 for disability benefits for the period November 1987 through December 1990. This claim was denied as the evidence failed to establish total disability from the modified-duty position he occupied prior to leaving federal employment. The Office found that the reports of appellant's attending physician at the time of the January 2, 1992 right shoulder surgery addressed appellant's post-surgery condition with a release to full-time limited duty as of May 12, 1992. The Office denied benefits after that date, noting that appellant would be given the opportunity to elect between compensation benefits and his OPM retirement annuity for the period January 2 to May 12, 1992.

Appellant requested a hearing before an Office hearing representative, which was held on October 28, 1998. In a May 28, 1999 decision, the Office hearing representative affirmed the February 18, 1998 decision that awarded benefits from January 2 to May 12, 1992. With regard to appellant's entitlement to compensation after May 12, 1992, the hearing representative remanded the case for development on appellant's wage-earning capacity as the evidence showed appellant had partial disability after that date.

On August 20, 1999 appellant requested reconsideration of the May 28, 1999 decision, contending that he was totally disabled after May 12, 1992.

By decision dated November 23, 1999, the Office found that appellant had the wage-earning capacity of a full-time order clerk, DOT No. 249.362 beginning May 13, 1992. He was advised that he could make an election between compensation benefits and any OPM annuity. In a separate decision also dated November 23, 1999, the Office denied modification of the May 28, 1999 hearing representative's decision. This appeal follows.

Appellant filed his appeal with the Board on February 25, 2000. For this reason, the Board has jurisdiction over the November 23, 1999 wage-earning capacity determination and the issue of appellant's disability for work on and after May 12, 1992. The Board does not have jurisdiction over the August 13, 1996 decision, which denied appellant compensation benefits for

the period November 23, 1987 to January 2, 1992.⁴ On appeal, appellant contends that he remained totally disabled after May 12, 1992 and that the Office improperly made a retroactive wage-earning capacity determination based on the constructed position of order clerk.

The general test for determining loss of wage-earning capacity is whether an injury-related condition prevents the employee from performing the kind of work he or she was performing when injured.⁵ An injured employee who is unable to return to the position held at the time of injury or to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.⁶ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.

In determining compensation for partial disability, the wage-earning capacity of an employee is determined by his or her actual earnings provided the actual earnings fairly and reasonably represent the employee's wage-earning capacity.⁷ If the actual earnings of the employee do not fairly and reasonably represent his or her wage-earning capacity or if the employee has no actual earnings, wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, the employee's usual employment, age, qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect the employee's wage-earning capacity in his or her disabled condition.⁸

Appellant sustained an injury on August 5, 1985, accepted by the Office for cervical and scapular strains, aggravation of arthritis in the acromioclavicular joint and a herniated disc at T8-9. Appellant initially stopped work in 1985 and returned to full-time limited duty as of September 10, 1985. On December 16, 1985 he underwent surgery for resection of the right clavicle for degenerative joint disease of the right acromioclavicular joint. Appellant was released by his attending physician, Dr. B.I. Zeliger, to return to limited duty on January 16, 1986 with limitations on lifting over 20 pounds. He returned to modified duty on January 20, 1986. Appellant received physical therapy and continued at limited-duty work under the limitations set forth by Dr. Zeliger and Dr. G.H. Harhigh.⁹ Appellant stopped work on or about November 23, 1987, initially requesting extended leave without pay to pursue a

⁴ See 20 C.F.R. § 501.2(c)

⁵ See *Carolyn M. Leek*, 47 ECBA 374 (1996).

⁶ See *James R. Verhine*, 47 ECAB 460 (1996).

⁷ See *Alfred R. Hafer*, 46 ECAB 553 (1995). 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. See *Dennis E. Maddy*, 47 ECAB 259 (1995).

⁸ 5 U.S.C. § 8115(a).

⁹ In a September 16, 1986 report, Dr. Alan D. Roumm, a rheumatologist, noted that appellant could remain on light duty consisting of no pushing or pulling over 25 pounds and no lifting about shoulder level. The October 7, 1986 report of Dr. Harhigh noted some atrophy in the muscles of the rotator cuff, with full range of motion in the affected areas.

Pennsylvania State rehabilitation training program. However, he subsequently retired on an OPM annuity in 1990.¹⁰

On December 12, 1991 Dr. Zeliger treated appellant for increased symptoms related to his right shoulder. Following additional physical therapy, he came under the treatment of Dr. Lonegran. A right shoulder manipulation was performed on January 2, 1992, following which a January 13, 1992 right shoulder arthogram revealed evidence of a rotator cuff tear involving the supraspinatus muscle. Appellant underwent additional surgery by Dr. Lonegran on February 17, 1992 for repair of the rotator cuff tear.

The Office found that appellant submitted insufficient medical evidence to establish that he had total disability for work commencing November 23, 1987 to January 2, 1992, the day he underwent manipulation of the right shoulder. As noted above, this issue is not before the Board in the present appeal. The Office did award benefits for total disability commencing January 2, 1992, noting that the medical evidence established a material change to appellant's right shoulder condition as of that date. The Office found the period of appellant's total disability ran until May 12, 1992, the date of his release for full-time limited-duty work by Dr. Lonegran. On May 12, 1992 Dr. Lonegran completed an OWCP-5 work restriction evaluation form that released appellant to full-time work with a 10-pound restriction on lifting, pushing and pulling with his right shoulder.¹¹

The medical evidence of record supports the finding that appellant was partially disabled commencing May 12, 1992, following his release to full-time limited duty by Dr. Lonegran. Based on this evidence and in conformance with the direction of the Office hearing representative, the Office proceeded to determine a retroactive wage-earning capacity based on the constructed position of order clerk.¹² The record was referred to an Office rehabilitation specialist who contacted the state of Pennsylvania Department of Labor and Industry's Bureau of Statistics to obtain wage rate and employment availability information from 1992. The rehabilitation specialist identified the position of order clerk (clerical), *Dictionary of Occupational Titles* No. 249.362 as conforming to the physical limitations imposed by Dr. Lonegran. The position was described as sedentary, exerting force to 10 pounds, occasionally, or a negligible amount of force to lift, carry, push, pull or move objects. The position was described as semi-skilled, requiring three to six months of education, training or experience and conforming to appellant's educational background and work experience. Wage rate information for a full-time position was confirmed with a representative of the Pennsylvania

¹⁰ The record indicates that appellant stopped the school program at the suggestion of Dr. Harhigh, due to stress and physical limitations.

¹¹ In a May 11, 1992 report, Dr. Lonegran noted appellant had been treated with physical therapy and his range of motion had improved to within normal limits for shoulder flexion and to 160 degrees abduction.

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(f) (December 1993). A retroactive wage-earning capacity based on a constructed position may be made where the adjudication process has been prolonged; the evidence clearly shows partial rather than total disability existed prior to adjudication; no compensation has been paid for the period of disability in question; and vocational rehabilitation services cannot be employed.

State Employment Service in Harrisburg. Applying the *Shadrick* formula,¹³ the Office determined that appellant had a 43 percent wage-earning capacity commencing May 13, 1992 and was eligible for compensation in the amount of \$1,202.00 every 4 weeks.

Appellant contends that he has remained totally disabled for work since 1987 and submitted an October 28, 1994 note from Dr. Harhigh, who stated: "Please be advised that [appellant] has been totally disabled since November 1987." Dr. Harhigh did not provide any background information, physical findings or review of any medical evidence to support his stated conclusion.¹⁴ This evidence is insufficient to outweigh the medical evidence from Dr. Lonegran that was contemporaneous to his treatment of appellant in 1992. This evidence establishes appellant's partial capacity for work commencing May 13, 1992 and provides sufficient basis for the Office's retroactive constructed wage-earning capacity determination as of that date.

The Board notes, however, that the case is not in posture for decision as to the nature and extent of appellant's disability for work commencing on or about 1995 and continuing. Once the Office has made a determination of an employee's wage-earning capacity, 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. The burden of proof is on the party attempting to show a modification of the wage-earning capacity award.¹⁵

Appellant has submitted medical evidence that establishes that, in addition to his accepted shoulder condition and residuals, he was diagnosed with a disc herniation of T8-9. This includes magnetic resonance imaging scans of June 9 and November 22, 1994 and March 7, 1995, that noted an increased disc herniation with accompanying bony changes at the T8-9 level when compared to the 1984 studies. In a March 11, 1995 report, Dr. George M. Kent attributed appellant's herniated disc to the 1985 employment injury. The record indicates that in March 1995 the Office accepted appellant's T8-9 disc herniation was employment related and, on March 21, 1995 authorized surgery by Dr. Paul McAfee for treatment of this condition. This evidence is sufficient to require the Office to further develop the issue of appellant's disability due to his accepted T8-9 herniated disc as it indicates a material change in the nature and extent of his injury-related condition following the May 13, 1992 wage-earning capacity determination. The case will be remanded to the Office for further development on this aspect of the claim.

¹³ *Albert C. Shadrick*, 5 ECAB 376 (1953).

¹⁴ A physician's opinion on causal relationship between a claimant's disability and an employment injury is not dispositive simply because it is rendered by a physician. To be of probative value, the physician must provide rationale for the opinion reached. Where no such rationale is present, the medical opinion is of diminished probative value. See *Jean Culliton*, 47 ECAB 728 (1996).

¹⁵ See *Sue A. Sedgwick*, 45 ECAB 211 (1993).

The November 23 and May 28, 1999 decisions of the Office of Workers' Compensation Programs are affirmed with regard to the retroactive constructed wage-earning capacity commencing May 13, 1992. The case is remanded for further development on the nature and extent of appellant's injury-related condition and whether the 1992 wage-earning capacity determination warrants modification.

Dated, Washington, DC
April 3, 2002

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member