

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHARLES D. SPIVEY HAYS and DEPARTMENT OF THE NAVY,
LONG BEACH NAVAL SHIPYARD, Long Beach, Calif.

*Docket No. 96-329; Submitted on the Record;
Issued March 23, 1998*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly determined that the position of a motor vehicle dispatcher fairly and reasonably represented appellant's wage-earning capacity, effective July 23, 1995, the date it reduced his compensation benefits.¹

On September 5, 1985 appellant, then a 37-year-old sandblaster, injured his back while blasting across a beam. He stopped work on that day. The Office initially accepted appellant's claim for lumbosacral strain and later accepted his claim for a herniated nucleus pulposus level L4-5 with stenosis. On October 28, 1985 appellant returned to limited-duty work. On April 28, 1986 appellant alleged that he sustained a recurrence of disability. He stopped work on May 6, 1986. The Office accepted appellant's claim for a recurrence of disability. On August 20, 1986 appellant underwent foramenotomy surgery at levels L3-4, L4-5 and L5-S1 and an excision of the herniated nucleus pulposus at L5-S1. Appellant received appropriate compensation until he returned to limited-duty work on January 5, 1987 with restrictions of sitting, walking and standing 2 hours intermittently and being allowed to recline 30 minutes every 2 hours. Appellant was placed on permanent light duty on April 8, 1987. On January 13, 1988 the employing establishment advised the Office that it no longer had any light-duty work available within appellant's physical restrictions and salary requirements. Appellant was placed on the daily rolls.

On June 15, 1990 appellant was referred for rehabilitation services. Appellant completed training as a quality control inspector, but did not pursue employment in this occupation. In a final rehabilitation report dated January 31, 1992, Kathryn E. Melamed, appellant's rehabilitation counselor, provided a summary of contacts and concluded that the positions of

¹ Appellant submitted documentation to the Board to establish that on April 30, 1996 his name was legally changed from Charles Dennis Spivey, Jr., the name under which he filed his Office claims, to Charles Dennis Spivey Hays.

motor vehicle dispatcher, truck driver-light and messenger were reasonably available and appropriate for appellant based on a labor market survey and appellant's vocational testing. DuWayne Smith, an Office rehabilitation specialist, reviewed and concurred with this report.

In a letter dated March 16, 1993, the Office notified appellant of a proposed reduction in compensation on the grounds that he was no longer disabled and had the capacity to earn wages as a motor vehicle dispatcher. The Office attached a work restriction evaluation form dated March 2, 1993 from Dr. David F. Morgan, appellant's treating physician and a Board-certified neurosurgeon. He indicated that appellant could work an 8-hour day with intermittent sitting for 4 hours a day, continuous walking, intermittent standing for 3 hours a day and intermittent lifting of 10 to 20 pounds, bending, squatting, climbing, kneeling and twisting for 1 hour a day. Dr. Morgan also concluded that appellant had reached maximum medical improvement and would not require further vocational rehabilitation.

Appellant submitted a report dated April 14, 1993 by Dr. Geoffrey M. Miller, a Board-certified orthopedic surgeon, who indicated that appellant would find it difficult to work in even a light-duty position because of a loss of endurance related to his degenerative disc disease with disc herniation and his status post laminectomy. The Office referred appellant to Dr. Raymond J. Imatani, a Board-certified orthopedic surgeon, for a second opinion examination and opinion. Dr. Imatani indicated that appellant's prognosis was guarded because he had not effectively worked since his injury eight years ago and recommended physical therapy to improve appellant's energy. However, he concluded that appellant would be able to do the work of a motor vehicle dispatcher. He provided a work restriction form which indicated that appellant could sit intermittently 8 hours a day, walk and stand intermittently 4 hours a day, lift 0 to 10 pounds intermittently and squat or bend for 5 minutes to a ½ hour intermittently for 1 hour a day.

In a letter dated December 16, 1993, the Office proposed a reduction in appellant's compensation on the grounds that he was no longer disabled and had the capacity to earn wages as a motor vehicle dispatcher based on the report by Dr. Imatani. In response appellant submitted a report by Dr. Ronald S. Edwards, a chiropractor. He noted that appellant was status post lumbar laminectomy and discectomy and diagnosed chronic residual moderate lumbar strain secondary to the aforementioned surgery and inadequate structural stress syndrome. The Office found a conflict with respect to the issue of disability between Dr. Imatani and Drs. Miller and Edwards. Accordingly appellant, together with his medical records and a statement of accepted facts, was referred to Dr. Elliott L. Gross, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion.

In a report dated April 18, 1994, Dr. Gross noted that appellant was permanently disabled and that his work capacity was limited semi-sedentary work due to his prior back surgery. In a work restriction form, Dr. Gross indicated that appellant could sit 8 hours a day with occasional standing, could walk intermittently 2 hours a day, could lift 0 to 10 pounds and work an 8-hour day. He found that appellant had been retrained as a quality control inspector which was appropriate work. Dr. Gross also concluded that appellant could do the work of a motor vehicle dispatcher with minor modifications, including an appropriate chair and being allowed to get up from his position every 90 minutes.

In a letter dated July 20, 1994, the Office again proposed a reduction in appellant's compensation on the grounds that he was no longer totally disabled and had the capacity to do the work as a motor vehicle dispatcher based on the report by Dr. Gross. In a decision dated September 20, 1994, the Office determined that appellant's wage-earning capacity was \$200.00 per week as represented by the position of a motor vehicle dispatcher and adjusted his compensation benefits from that for total disability to that for partial disability effective October 16, 1994.

In a decision dated February 27, 1995, an Office hearing representative reversed the Office's September 20, 1994 decision on the grounds that the opinion by Dr. Gross did not provide an unqualified conclusion with respect to whether appellant could do the work of a dispatcher since Dr. Gross had placed modification on that position. The case was remanded for the Office to determine whether appellant could do the work of a motor vehicle dispatcher without modification and, if not, whether a position within the parameters of those modification was reasonably available with appellant's geographical area.

After further development of the evidence which included a supplemental report from Dr. Gross dated March 20, 1995, in a letter dated June 16, 1995, the Office proposed a reduction in appellant's compensation benefits on the grounds that he was no longer totally disabled and the motor vehicle dispatcher position represented his wage-earning capacity. In a decision dated July 17, 1995, the Office determined that appellant's wage-earning capacity was \$200.00 per week as represented by the position of a motor vehicle dispatcher and adjusted his compensation benefits from that for total disability to that for partial disability effective July 23, 1995. In a merit decision dated August 4, 1995, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was not sufficient to warrant modification of the July 17, 1995 decision.

The Board finds that the Office properly determined that the position of motor vehicle dispatcher fairly and reasonably represented appellant's wage-earning capacity effective July 23, 1995, the date it reduced his compensation benefits.

Once the Office accepts a claim, it has the burden of proving that the disability ceased or lessened in order to justify termination or modification of compensation. Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions given the nature or the employee's injuries and the degree of physical impairment, his or her usual employment, the employee's age and vocational qualifications and the availability of suitable employment.² 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. Once this selection is made, a determination of wage rate and availability in the open market should be made through contact with the state employment service or other

² See generally 5 U.S.C. § 8115(a), *The Law of Workmen's Compensation* § 57.22 (1989); see also *Bettye F. Wade*, 37 ECAB 556 (1986).

applicable services. Finally, application of the principles set forth in the *Albert C. Shadrick*³ decision will result in the percentage of the employee's loss of wage-earning capacity.⁴

In the present case, the Office assigned appellant a rehabilitation counselor, who selected positions as a motor vehicle dispatcher, truck driver-light and messenger for appellant based on his vocational capabilities and physical requirements and who concluded that these positions were reasonably available in appellant living area. When the case was remanded for further development by an Office hearing representative, the Office requested that Dr. Gross provide a rationalized opinion on why appellant could do the suggested position and an opinion of whether the modifications he listed were suggestions for appellant to follow in the motor vehicle dispatcher position or requirements. In a report dated March 20, 1995, Dr. Gross indicated that appellant could do the position of dispatcher as his symptoms were not so severe as to prevent him engaging in this type of work. He also reported that the modification were requirements and the type of chair that would be appropriate was a chair with a stiff back and lumbar support. The Office therefore had the rehabilitation specialist conduct a labor market survey on whether the motor vehicle dispatcher was available with the required modifications. In a report dated June 14, 1995, the rehabilitation specialist indicated that the motor vehicle dispatcher did allow employees to stand or sit, as needed, did have supportive chairs available for employees, and was readily available with the specified modifications within appellant's geographical area. Thus, the Office properly determined that the position of motor vehicle dispatcher fairly and reasonably represented appellant's wage-earning capacity effective July 23, 1995.

With appellant's request for reconsideration, he submitted a report by Dr. Dennis D. Revere, a chiropractor, who challenged the Office's determination that appellant's compensation should be lowered, asserting that appellant was totally disabled, that he had previously tried to engage in this type of work without success, that he had bulges from L3-5 which would not permit him to work as a dispatcher without modifications and that the Office seemed to have disregarded the opinion by Dr. Edwards because he was not Board-certified. Pursuant to section 8101(2) of the Federal Employees' Compensation Act, "[t]he term 'physician' includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist."⁵ Thus, Dr. Revere is not considered a physician within the meaning of the Act since he did not diagnose a subluxation of the spine as demonstrated by x-ray and his report cannot overcome the well-reasoned and rationalized report by Dr. Gross.⁶ Nonetheless, the Board notes that the opinion by Dr. Revere is not rationalized as he did not explain why appellant was totally disabled and that the position ultimately deemed to represent appellant's wage-earning capacity did provide for modifications, a fact of which that Dr. Revere appears to have been unaware. The Office properly found that no basis for modification of its July 1995 decision was

³ 5 ECAB 376 (1953).

⁴ See *Hattie Drummond*, 39 ECAB 904 (1988); *Shadrick*, *supra* note 3.

⁵ 5 U.S.C. § 8101(2).

⁶ *Linda L. Mendenhall*, 41 ECAB 532 (1990).

established and has met its burden of proof in reducing appellant's wage-earning capacity on the grounds that he was capable of working as a motor vehicle dispatcher.

The decisions of the Office of Workers' Compensation Programs dated August 22 and July 17, 1995 are hereby affirmed.

Dated, Washington, D.C.
March 23, 1998

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member