

<sup>1</sup> The Board notes that appellant's traumatic injury claim form is not contained in the case record.

accepted his claim for sciatic neuritis and lumbar strain. Appellant returned to work in a light-duty housing coordinator position on October 26, 1992. He stopped work on January 15, 1993 and did not return.

By letter dated February 5, 1998, the Office referred appellant, together with a statement of accepted facts, the case record and a list of questions to be addressed, to Dr. Ernest B. Miller, an orthopedic surgeon, for a second opinion medical examination. In an April 15, 1998 medical report, Dr. Miller opined that the April 8, 1991 employment injuries had resolved with no objective factors of disability. He stated that the subjective factors of appellant's disability were exaggerated, nonphysiologic and nonanatomic due to emotional overlay and somatization. Dr. Miller restricted appellant from lifting more than 75 pounds. However, he found that appellant could return to his date-of-injury position with the stated lifting restriction. In an accompanying work capacity evaluation (Form OWCP-5c) dated May 29, 1998, Dr. Miller stated that appellant could work eight hours per day with a 75-pound lifting restriction.

On August 20, 1998 the Office found a conflict in the medical opinion evidence between Dr. Gregg K. Satow, an attending physician, and Dr. Miller with regard to whether appellant had any continuing residuals of his accepted employment injuries. To resolve the conflict, the Office, by letter dated September 1, 1998, referred appellant, together with a statement of accepted facts, the case record and a list of questions to be addressed, to Dr. Edwin J. Kingsley, a Board-certified orthopedic surgeon, for an impartial medical examination.

In an October 7, 1998 medical report, Dr. Kingsley provided a history of appellant's April 8, 1991 employment injuries, medical treatment, family and social background. He noted appellant's current back symptoms and reviewed his medical records. Dr. Kingsley reported essentially normal findings on physical examination. He diagnosed status post bilateral hemilaminectomy with excision of the L5-S1 and removal of free fragment on January 12, 1989, surgery as a result of a September 27, 1985 injury and lumbosacral strain syndrome with right radiculitis associated with the April 8, 1991 employment injuries. Dr. Kingsley found that appellant had employment-related residuals and that his condition was permanent and stationary within six months of the employment injury. He stated that appellant had a Category D disability which precluded him from lifting more than 25 pounds, bending and stooping. Dr. Kingsley opined that appellant was capable of performing the duties of the offered police dispatcher position provided that it did not require lifting more than 25 pounds. In an accompanying Form OWCP-5c, he stated that appellant could work eight hours per day with a 25-pound lifting restriction.

The Office accepted that appellant had permanent work limitations precluding him from heavy work based on Dr. Kingsley's October 7, 1998 report and on January 28, 1999 advised a vocational rehabilitation counselor, to whom appellant had been referred, that Dr. Kingsley's report represented the weight of the medical evidence regarding appellant's work limitations.

In reports dated January 31 and March 2, 2001, a vocational rehabilitation counselor identified the position of help desk representative as being within appellant's physical limitations, vocational skills and geographical area. The help desk representative position, as it appeared in the Department of Labor, *Dictionary of Occupational Titles* (DOT), was classified as a sedentary position. The position required, among other things, investigation and resolution of

computer software and hardware problems of users, answering telephone calls from users having problems with computer software and hardware or inquiring how to use specific software and placing calls to software and hardware vendors to request service regarding defective products. It also required possible testing, writing software and hardware, developing training materials, training users and installing microcomputers, software and peripheral equipment. The physical requirements included lifting of up to 10 pounds occasionally, no climbing, balancing, stooping, kneeling, crouching and crawling, and frequent reaching, handling and fingering. Vocational preparation for the constructed position required two to four years. The vocational rehabilitation counselor stated that appellant received an Associate of Arts degree in 1983 and completed coursework up to his senior year at San Jose State University. He successfully completed 36 units of college computer-related courses in software applications, computer operating systems, Unix/Senix System Management, microcomputer database systems and LAN Systems Management.

On April 19, 2001 the Office advised appellant that it had determined that the vocational rehabilitation counselor's plan to return him to work as a help desk representative was within his limitations. The Office stated that he was expected to fully cooperate and that, at the end of the rehabilitation program, whether he was actually employed or not, his compensation would likely be reduced.

In an August 23, 2001 notice, the Office advised appellant that it proposed to reduce his compensation because the medical and factual evidence of record established that he was no longer totally disabled. The Office found that he had the capacity to earn the wages of a help desk representative. The Office requested that appellant submit additional evidence or argument within 30 days if he disagreed with the proposed action.

By letter dated September 10, 2001, appellant stated that he was neither physically nor mentally able to perform the help desk representative job. He denied a vocational rehabilitation counselor's allegation that he refused to cooperate with testing. Appellant stated that he was not physically able to participate in testing due to severe chronic pain and prescription pain medications. He related that he always called to notify the staff when he was unable to drive or keep appointments. Appellant denied having the ability or "transferable skills" necessary to perform the duties of a help desk representative. He stated that his employment and educational background was in the field of flight operations and he was an aircraft mechanic. Appellant received his education in these fields in the 1970s. He related that he was unable to complete computer training classes at Heald College because the school stated that it could not comply with the physical limitations established by his doctor and that, when he did enroll in classes, an instructor refused to allow him to take frequent breaks. Appellant contended that medical evidence from his physicians established that he had continuing physical and emotional residuals of his employment-related injuries.

Appellant submitted prescriptions notes dated May 11 and 23 and September 12, 2001 for swim therapy, chiropractic treatment, nerve conduction velocity/electromyogram (NCV/EMG)

studies, medication and a referral to Dr. Gerald F. Wahl, a Board-certified neurologist, Dr. Fennel,<sup>2</sup> and a psychiatrist.

In reports dated March 23, 2001 and May 11, 2002, Dr. Satow found that appellant had chronic radiculopathy and degenerative disc disease with chronic low back pain and myositis, bilateral carpal tunnel syndrome and chronic depression secondary to long-term pain. He opined that appellant was totally disabled and that he was unable to work due to the diagnosed conditions. Dr. Satow stated that possibly, with psychiatric care and chiropractic treatment, he could perform three to four hours of light-duty work per day. In the May 11, 2002 report and addendum to this report, Dr. Satow stated that appellant could not perform repetitive bending, twisting or lifting and he was not able to lift any amount, although on a rare occasion he could lift up to 10 pounds or possibly 20 pounds.

In an August 27, 2001 report, Dr. Satow opined that appellant was disabled due to pain in a mild to moderate form on a frequent to continuous basis despite significant and ongoing conservation management. Appellant was a candidate for back surgery. Dr. Satow reported his objective findings which included positive straight leg raising on the right and diminished reflex at the S1 nerve root on the right, limitation of spinal motion, a magnetic resonance imaging (MRI) scan that was positive for a prior surgery and probable nerve root impingement on the right. He opined that appellant's condition was permanent and stationary. Dr. Satow stated that appellant was going to have ongoing pain symptoms and limited motion of the spine and ability to perform any type of work. He further stated that, if he worked, the position must have significant flexibility which included time restraints and mental and physical requirements. Dr. Satow opined that it was highly unlikely that appellant could work eight hours per day. He could only perform extremely light work three to four hours per day. Dr. Satow concluded that appellant's disabling condition was a result of his repeated work injuries and that he would not be able to perform any sustained employment in a competitive work environment with continuity, safety and ability.

An April 4, 2001 report of Karuna Licht, a family counselor, found that appellant had post-traumatic stress syndrome associated with his work-related 1985 and 1986 back injuries and 1989 spinal surgery. She also reported recurrent major depression disorder resulting from his chronic debilitating pain. In an April 10, 2001 report, Ms. Licht diagnosed recurring panic and flashbacks and hopelessness regarding appellant's 1985 employment injury.

By decision dated November 1, 2001, the Office finalized the wage-earning capacity determination, effective November 4, 2001, based on appellant's capacity to earn wages as a help desk representative. It found that he failed to submit evidence sufficient to overcome the weight of Dr. Kingsley's October 7, 1998 impartial medical report. Based on the formula developed in *Albert C. Shadrick*,<sup>3</sup> the Office determined appellant's weekly pay rate in the former position to be \$558.80, his adjusted earning capacity in the help desk representative position was \$486.15 per week which resulted in loss in earning capacity of \$72.65 per week. Appellant's compensation rate every four weeks was found to be \$243.00 with a net

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<sup>2</sup> The Board notes that Dr. Fennel's professional qualifications are not contained in the case record.

<sup>3</sup> 5 ECAB 376 (1953).

compensation every four weeks of \$173.20 based on applicable cost-of-living adjustments of \$60.75 and deductions of \$68.52 for a health insurance premium and \$1.20 for an optional life insurance premium.

Appellant disagreed with the Office's decision and, by letter dated November 27, 2001, requested a review of the written record by an Office hearing representative. He submitted a January 18, 2002 report from Dr. Satow who found that he had chronic degenerative disc disease, myofascial pain, failed lumbar surgery syndrome and probable carpal tunnel syndrome or cervical radiculopathy. Dr. Satow opined that appellant could perform light-duty work as previously found, with frequent breaks.

Magnetic resonance imaging scan reports dated January 11, 1989 and October 14 and 25, 1999 found that appellant had right-sided disc herniation at L5-S1 with residual disc protrusion and osteophyte and degenerative changes in the cervical spine.

In reports dated June 22 and 24, 2002, Dr. Robert T. Badke, a Board-certified orthopedic surgeon, found that appellant suffered from recurrent disc problems at L5-S1. He stated that his subjective complaints were severe. Based on his objective findings, Dr. Badke placed appellant in Category H of the guidelines for work capacity which required him to be in a limited job environment that provided sedentary work.

Dr. Satow's treatment notes and report, covering the period October 1 through November 24, 1999, addressed problems related to appellant's lumbosacral and cervical spine, right elbow and a lower extremity.

In reports dated November 2, 1999 to June 22, 2002, Dr. Satow diagnosed residual or recurrent right paracentral and lateral disc protrusion partially embraced by osteophytes at L5-S1, degenerative disc disease, recurrent lumbar herniation, cervical radiculopathy on the left greater than the right at L5, right carpal tunnel syndrome and chronic depression. He stated that appellant could continue performing semi-sedentary part-time work. On May 22, 2002 Dr. Satow found that appellant was temporarily totally disabled from May 22 through June 22, 2002 pending a psychiatric or psychological treatment.

By letter dated June 17, 2002, the Office denied appellant's June 14, 2002 request for authorization to seek psychiatric treatment and an evaluation by Dr. Dale A. Helman, a Board-certified neurologist. The Office noted that his claim had been accepted for sciatic neuritis and lumbar strain. Therefore, it could not authorize treatment for cervical radiculopathy, carpal tunnel syndrome and upper extremity and psychiatric conditions.

In reports dated June 19 and August 14, 2002, Dr. Satow reiterated his prior diagnoses and found that appellant continued to be temporarily totally disabled. He noted that appellant continued to experience back pain and refused surgery.

Following a September 25, 2002 hearing,<sup>4</sup> appellant submitted handwritten notes from his computer class, classroom policies for Heald College and letters dated October 6, 18 and December 6, 1999 in which he contended that the vocational rehabilitation program conflicted with his physician's orders and treatment. Dr. Satow's October 1, 1999 treatment note indicated that there was a hold on vocational rehabilitation until November 1, 1999. In an October 29, 1999 note, appellant stated that he continued to experience pain in his back and left and right legs along with other symptoms. He attended a four-hour computer class at Heald College on October 20, 1999 as ordered by a vocational rehabilitation counselor and noted that it very difficult to concentrate. By the end of the class, appellant experienced intense shooting pain in his right thigh. He stated that he was making a good faith effort to participate in vocational rehabilitation.

Dr. Satow's treatment notes covering intermittent dates in 1999 addressed appellant's back condition and indicated that he could perform modified work duties. In a November 24, 1999 treatment note, Dr. Satow found that appellant was totally disabled beginning November 24, 1999 until he was evaluated by Dr. Howard.

A December 18, 2001 report of Robert M. Sayad, Ph.D., a psychologist, found that appellant had a dysthymic disorder versus major depressive disorder, pain disorder with psychological factors and a general medical condition. Dr. Sayad stated that his ability to interact and respond appropriately to coworkers, supervisors and the public on a consistent basis would be impaired by factors associated with the distracting effects of chronic pain, social avoidance, emotional withdrawal, low self-esteem and affective instability. He further stated that, although appellant's current measured cognitive abilities fell within the low average to average range and within that which would be necessary to understand, remember and carry out simple instructions, the combined and interactive effects of his chronic pain symptoms and mental processes suggested an impaired ability to consistently perform work activity while dealing with the stresses and demands encountered in competitive work which would continue to reflect the effects of his physical disability and the impact of chronic pain on his level of adaptive functioning.

In a December 2, 2002 report, Dr. Wahl found that appellant had chronic lumbosacral strain associated with lumbar disc disease.

By decision dated December 19, 2002, an Office hearing representative affirmed the Office's wage-earning capacity. She found that the evidence submitted by appellant was insufficient to overcome the weight of Dr. Kingsley's October 1, 1998 impartial medical report. The hearing representative determined that, as the selected position of help desk representative was suitable from a medical and vocational standpoint and was reasonably available in sufficient numbers in appellant's geographic area, the Office properly reduced his compensation. She further determined that there was *prima facie* evidence of a chronic pain condition causally related to the April 8, 1991 accepted employment injuries. The hearing representative instructed the Office to further develop the record regarding this issue.

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<sup>4</sup> The Board notes that it appears that appellant changed his request from a review of the written record to an oral hearing before an Office hearing representative.

The Office received prescriptions and medical reports from Dr. Wahl and Dr. Charles J. Martin, a Board-certified neurologist, covering the period December 2, 2002 to June 26, 2003 which indicated that appellant continued to experience back problems and required medical treatment.

By letter dated August 22, 2003, the Office requested that Dr. Wahl submit a rationalized medical opinion as to whether appellant's chronic pain was causally related to the April 8, 1991 accepted employment injuries.

In reports dated August 18 and September 2, 2003, Dr. Wahl found that appellant had lumbar disc disease. He opined that appellant could not work in his regular capacity or sit more than one hour without a marked increase in pain. Dr. Wahl doubted that appellant could work at that time in any useful capacity or for any length of time.

In a September 22, 2003 report, Dr. Dale K. Buche, a psychiatrist, stated that he began treating appellant on May 24, 2002 regarding a September 27, 1995 employment injury. He diagnosed major depression on Axis I, post back surgery with continuing severe pain and disability on Axis III, severe stress from continuing pain and disability secondary to industrial causation on Axis IV and a global assessment functioning score of 50 on Axis V. Dr. Buche found no diagnosis on Axis II. He stated that appellant's prognosis was poor due to continuing severity of both his physical and emotional conditions.

By letter dated November 21, 2003, appellant requested reconsideration of the hearing representative's December 19, 2002 decision.

On February 19, 2004 the Office denied modification of the December 19, 2002 decision. It found that the evidence submitted was insufficient to overcome the weight of the medical opinion evidence which established that appellant could perform the duties of the offered help desk representative position.

The Office received medical reports and prescriptions from Dr. Martin and Dr. Wahl covering the period February 19 to September 23, 2004 which addressed appellant's back condition and medical treatment. In a July 13, 2004 report, Dr. Wahl stated that appellant's back pain had not improved. He opined that appellant had marked immobility and inability to sit for brief periods of time, which made work activities in any capacity virtually impossible.

On October 13, 2004 the Office received Dr. Buche's February 23, 2003 report. Dr. Buche tested the nature and severity of appellant's mental impairment and based on his findings, he opined that appellant remained severely depressed and that he was very anxious, frustrated and angry. He further opined that appellant's chronic pain and disability caused his emotional symptoms and continued to aggravate them. Dr. Buche stated that appellant had not improved psychologically in spite of treatment due to the severity of his physical problems and their effect on other aspects of his life.

Dr. Wahl's October 18, 2004 report found that appellant remained disabled for any work activities. He stated that short periods of sitting and any bending or lifting markedly increased his back pain and that depression was an associated factor.

On November 16, 2004 appellant, through his attorney, requested reconsideration of the Office's February 19, 2004 decision. He submitted Dr. Buche's November 7, 2004 report which found that he became depressed because he could not perform his job due to a work injury and that his depression was aggravated by chronic pain associated with this injury. Dr. Buche stated that, due to the severity of his depression, appellant had poor concentration and memory, difficulty relating to people generally and a sleep disorder, which prevented him from working. He concluded that appellant could not perform the duties of a help desk representative due to the severity of his emotional problems.

In a January 21, 2005 report, Dr. Wahl noted that appellant continued to have very intractable pain making even short periods of walking virtually impossible. He opined that appellant continued to be totally disabled for any work activities.

By decision dated February 1, 2005, the Office denied modification of the February 19, 2004 decision. It found that the evidence of record established that appellant could perform the duties of a help desk representative.<sup>5</sup>

### **LEGAL PRECEDENT**

Once the Office has made a determination that an employee is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction of benefits.<sup>6</sup>

Under section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and reasonably represent his wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injuries and the degree of physical impairment, his usual employment, the employee's age and vocational qualifications and the availability of suitable employment.<sup>7</sup>

After the Office makes a medical determination of partial disability and of special work restrictions, it may refer the employee's case to an Office wage-earning capacity specialist for selection of a position listed in the DOT or otherwise available in the open market, that fits the employee's capabilities with regard to his physical limitations, education, age and prior experience. Once this selection is made, determination of wage rate and availability in the open labor market should be made through contact with the state employment services or other

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<sup>5</sup> The Board notes that, following the Office's February 1, 2005 decision, the Office received additional evidence. The Board may not consider evidence for the first time on appeal which was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c). Appellant can submit this evidence to the Office and request reconsideration. 5 U.S.C. § 8128; 20 C.F.R. § 10.606.

<sup>6</sup> *William H. Woods*, 51 ECAB 619 (2000); *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

<sup>7</sup> *Samuel J. Chavez*, 44 ECAB 431 (1993).



applicable services.<sup>8</sup> Finally, application of the principles set forth in *Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.<sup>9</sup> This has been codified by the regulations in 20 C.F.R. § 10.403(c).

### ANALYSIS

On January 28, 1999 the Office advised a vocational rehabilitation counselor to whom appellant had been referred, that it had accepted that he had permanent work restrictions which precluded him from heavy work based on the October 7, 1998 report of Dr. Kingsley, an impartial medical specialist. However, by the time the Office issued its November 1, 2001 final decision reducing appellant's compensation, Dr. Kingsley's evaluation of appellant was over three years old. The Board has held that the Office must base its determination of wage-earning capacity on a reasonably current medical evaluation.<sup>10</sup>

In the present case, Dr. Kingsley's October 7, 1998 report on appellant's physical limitations grew stale by the time the Office reduced his compensation. The passage of time lessened its relevance on the nature and extent of his current limitations. Prior to the November 1, 2001 wage-earning determination, appellant submitted medical evidence from his attending physician who opined that he was totally disabled. After the Office reduced his compensation, appellant submitted reports from Dr. Wahl who opined that appellant had lumbar disc disease and that he could not work at that time in any useful capacity or for any length of time. Dr. Wahl stated that appellant was unable to sit, bend, lift or walk for a short period of time without experiencing increased pain. Because preexisting and injury-related medical conditions and their resulting physical limitations can change over time, "due regard" to the factors specified in section 8115 of the Act requires a reasonably current medical evaluation. Further, the Board notes that the Office did not send Dr. Kingsley a description of the constructed help desk representative position for an opinion as to appellant's physical ability to perform the duties of this position or request that he conduct another medical examination in light of intervening medical evidence submitted by appellant.

As Dr. Kingsley's evaluation of appellant was not reasonably current, the Office did not establish that the constructed position of help desk representative was consistent with his current work tolerance limitations. The Office did not give due regard to the factors specified in section 8115 of the Act and, therefore, the Board finds that the Office did not discharge its burden of proof to justify the reduction of appellant's compensation. The Board will reverse the Office hearing representative's February 1, 2005 decision.

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<sup>8</sup> *Karen L. Lonon-Jones*, 50 ECAB 293, 297 (1999).

<sup>9</sup> *See William H. Woods*, *supra* note 6; *Shadrick*, *supra* note 3.

<sup>10</sup> *Carl C. Green, Jr.*, 47 ECAB 737, 746 (1996); *Anthony Pestana*, 39 ECAB 980, 987 (1988); *Ellen G. Trimme*, 32 ECAB 1878, 1882 (1981).

### **CONCLUSION**

The Board finds that the Office did not meet its burden of proof to justify the reduction of appellant's compensation on the grounds that he had the capacity to earn wages in the constructed position of help desk representative. The medical evidence on which the Office relied, the report of the impartial medical specialist, Dr. Kingsley, was not reasonably current to establish relevant work limitations.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the February 1, 2005 decision of the Office of Workers' Compensation Programs is reversed.

Issued: January 31, 2007  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board