U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT WHISNAND and DEPARTMENT OF THE ARMY, CORPS OF ENGINEERS, Seattle, Wash.

Docket No. 95-1558; Submitted on the Record;
Issued March 13, 1998

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT, A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation for total disability, effective February 13, 1995, based upon his capacity to perform the duties of a computer software sales representative.

The Board has duly reviewed the record in the instant appeal and finds that the Office properly modified appellant's compensation to reflect his wage-earning capacity.

Once the Office has made a determination that a claimant 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.[1] The Office met that burden in this case.

The Office properly found, in its November 22, 1994 proposed reduction of compensation, which was finalized on February 13, 1994, that appellant was only partially disabled for work due to the effects of his January 10, 1984 employment injury.

Appellant was first referred for vocational rehabilitation in early 1986, but by October 1987 it became clear that appellant was not yet ready to return to work. Subsequently, rehabilitation efforts ceased. On January 5, 1990 appellant was examined by Office referral physicians Dr. Charles N. Brooks, a Board-certified orthopedic surgeon, and Dr. Brooke Thorner, a psychiatrist, whose findings supported appellant's ability to return to sedentary light or medium work, provided that the employment allowed for intermittent changes of body position. Dr. Mitchel Storey, an osteopath and appellant's attending physician concurred with Dr. Brooks' general conclusions. In addition, Dr. Storey submitted a work restriction evaluation form indicating that appellant could work eight hours a day within certain medical restrictions.

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[1] *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976). The Office accepted that appellant sustained a lumbosacral strain, herniated nucleus pulposus, L5-S1, an umbilical hernia and surgical repair, and somatoform pain disorder as a result of his January 10, 1984 employment injury.

In May 1990 rehabilitation efforts began again. Through the rehabilitation program, in April 1991 appellant enrolled in, and eventually completed, a two-year course in Computer Science and Information Management. In 1991 appellant was also diagnosed as having a learning disability in both reading and written expression areas, and vocational rehabilitation efforts were adapted to account for this additional disability. In April 1993 the employing establishment requested that appellant receive an updated physical and psychological examination, with an eye toward returning appellant to work at the employing establishment. In a report dated June 17, 1993, Dr. Brooks opined that appellant "would be capable of employment in a sedentary, light or medium work capacity, provided that such employment permitted intermittent change in position from sitting to standing to walking." With respect to the issue of appellant's need for continuing medical treatment for his accepted lumbosacral strain, herniated nucleus pulposus, L5-S1, umbilical hernia and surgical repair, and somatoform pain disorder, the physician stated:

> "The continued prescription by Dr. Storey [appellant's attending physician] of Percodan and Halcyon is not medically proper treatment for the residual effects of this injury. Ongoing passive treatments, such as massage and osteopathic manipulations, are not appropriate either. These treatments may be temporarily palliative. They have not been, and will not be, curative. At this point, the only appropriate treatment is weight reduction, and initiation and continuation of a regular, self-directed stretching, strengthening, and aerobic conditioning exercise program, along with rigorous adherence to proper lifting techniques, posture, et cetera. Passive treatments, such as massage and manipulations, will not reduce the patient's level of incapacity."

Dr. Brooks based his opinion on his physical examination of appellant, his review of the relevant medical evidence of file and appellant's factual and medical history. As part of the same report, Dr. Terrance Chinn, a psychiatrist and Office referral physician stated that there was no psychiatric reason why appellant would be unable to return to work on a continuous full-time basis. Dr. Storey, appellant's attending physician, reviewed Dr. Brook's report and stated that he was in general agreement with his diagnostic conclusions. Specifically, Dr. Storey stated that he agreed that appellant should be gradually weaned from Percodan and Halcyon and added that he intended to discuss this with appellant at his next appointment. With respect to the ongoing osteopathic manipulation and massage therapy, however, Dr. Storey stated, in pertinent part:

> "I do believe that intermittent use of osteopathic manipulation is beneficial and helps to restore normal segmental movement. Recurrence of segmental dysfunction are more likely in discogenic backs. As far as massage therapy itself, I am not certain that I have seen any long term improvement for the use of this but do know that [appellant] has fewer pain complaints and requires less manipulative therapy while using massage therapy. At this point I would concur with Dr. Brooks that it is not curative. I believe that if [appellant] believes that continuing on with massage therapy is beneficial to his feeling of well being, that he may wish to continue this on his own."

Dr. Storey did not feel he was qualified to comment on Dr. Chinn's psychiatric analysis of appellant.

In September 1993, in an effort to further clarify appellant's employment capabilities in light of his learning disability, appellant was referred to Dr. Jeffrey E. Powell, a clinical psychologist. In his report summarizing his evaluation of appellant on September 8 and 15, 1993, Dr. Powell stated:

> "[Appellant] has the cognitive capacity to participate within an established corporation doing purchasing and negotiations. He is quite bright and quite verbal. He would be competitive in all aspects of the job that did not place heavy emphasis on reading and writing. Reports can be communicated via dictation and are likely not to be a major obstacle. However, the reading of incoming information may pose an obstacle and some accommodation would be required."

Dr. Powell added that it was his opinion that a job selling computers for businesses was within appellant's capacity.

On a work restriction evaluation (Form OWCP-5), dated January 5, 1994, Dr. Storey indicated that appellant could lift 20 to 30, and occasionally 45 pounds, required frequent changes of position, and was restricted by his learning disability and sensitivity to fumes, but otherwise could work 8 hours a day.[2] Dr. Storey further indicated that appellant's condition had not changed since he reached maximum medical improvement in 1991.

The Office proceeded to calculate appellant's wage-earning capacity in his partially disabled state.

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 of 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.[3] Accordingly, the evidence must establish that jobs in the position selected for determining wage-earning capacity are reasonably available in the general labor market in the commuting area in which the employee lives. In determining an employee's wage-earning capacity, the Office may not select a makeshift or odd lot position or one not reasonably available on the open labor market.[4]

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[2] Dr. Storey actually checked the preprinted portion of the Form OWCP-5 indicating that appellant could lift 20 to 50 pounds. However, in the area of the form designated for restrictions, the physician noted that appellant could only occasionally lift 45 pounds. In addition, Dr. Storey stated that appellant's condition had not changed since 1991. On an OWCP-5 form completed by Dr. Storey on October 29, 1991, the physician amended the preprinted portion of the form to indicate appellant's lifting restriction to be 20 to 30 pounds. It appears from the totality of the evidence, that Dr. Storey believes appellant's lifting restriction to be 20 to 30 pounds, with occasional lifting of 45 pounds.

[3] *See generally*, 5 U.S.C. § 8115(a); A. Larson, *The Law of Workers' Compensation* § 57.22 (1989); *see also Betty F. Wade*, 37 ECAB 556 (1986). Section 8115(a) of the Federal Employees' Compensation Act.

[4] *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

The two jobs selected by the rehabilitation counselor as appropriate for appellant, sales representative, computers and EDP Systems, and user support analyst, were certified as being reasonably available within appellant's geographic area, and having physical and cognitive demands that were compatible with the most recent opinions of Drs. Brooks, Chinn, Storey and Powell.

On November 22, 1994 the Office selected the position of computer software sales representative with an average salary of $480.00 per week, calculated appellant's loss of wage-earning capacity based upon his ability to perform such a position and issued a notice of proposed reduction of compensation. The Office additionally notified appellant that payment for osteopathic manipulation, physical therapy and massage therapy would be suspended. Appellant was allowed 30 days to present further medical evidence or argument relevant to his capacity to earn wages in the position described.

In a letter dated December 9, 1994, appellant, through counsel, responded requesting a second medical opinion. Appellant asserted that the 1993 examinations by the Office referral physicians were essentially incomplete, being in large part based on the physicians' more complete examinations and testing performed several years earlier. Appellant additionally asserted that no osteopathic opinion was ever obtained as to the continuing efficacy of osteopathic treatment, but rather the termination of osteopathic benefits was made by an individual trained in a medical discipline hostile to osteopathic medicine. Therefore, appellant specifically requested the addition of an osteopath to the review panel.

Thereafter, on February 13, 1994, the Office determined that during the job placement program appellant had received job placement assistance, that jobs were certified as being reasonably available, and that the physical demands in performing these jobs were compatible with appellant's medical restrictions, yet appellant remained unemployed. The Office, therefore, finalized the proposed reduction of compensation, finding that, although appellant did not reach the goal of job placement, had he been successful he would have been capable of earning wages as a computer software sales representative, and it calculated his loss of wage-earning capacity following the principles set forth in the *Shadrick* decision.[5] In addition, the Office stated that pursuant to its review of appellant's response to the proposed reduction of compensation, the decision regarding osteopathic manipulation had been adjusted. The Office reiterated, however, that other ongoing palliative treatments such as physical therapy and massage therapy would no longer be covered.

The Office properly found that appellant was no longer totally disabled as a result of his January 10, 1984 back injury and it followed established procedures for determining appellant's employment-related loss of wage-earning capacity. Both appellant's attending physician and the Office referral physicians opined that appellant was capable of performing the type of work identified by the Office, and, both further opined that appellant's prescription should be reduced, and that continuing massage therapy and physical therapy were not specifically required for treatment of appellant's residual symptoms. The Board therefore finds that the Office has met its

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

burden of justifying a reduction in appellant's compensation for total disability and in terminating approval for ongoing physical therapy and massage therapy.

Consequently, the decisions of the Office of Workers' Compensation Programs dated February 13 and November 22, 1994 are hereby affirmed.

Dated, Washington, D.C.
March 13, 1998

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member