

**United States Department of Labor
Employees' Compensation Appeals Board**

JOHN D. JACKSON, Appellant

and

**DEPARTMENT OF THE ARMY, NATIONAL
GUARD BUREAU, Sacramento, CA, Employer**

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**Docket No. 03-2281
Issued April 8, 2004**

Appearances:
John D. Jackson, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On September 24, 2003 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated June 24, 2003. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly reduced appellant's compensation to reflect a capacity to earn wages in the constructed position of budget officer; and (2) whether appellant met his burden of proof to establish that his migraine headaches were caused or aggravated by his April 7, 1999 employment injury.

FACTUAL HISTORY

On April 22, 1999 appellant, then a 50-year-old heavy mobile equipment mechanic supervisor, filed a traumatic injury claim alleging that on April 7, 1999 he experienced pain in his lower back and loss of strength and feeling in his left leg while jogging during a diagnostic fitness test. The Office accepted appellant's claim for a temporary aggravation of lumbar radiculopathy, a herniated disc at L4-5 and an aggravation of degenerative disc disease. This

was later expanded to include the permanent aggravation of a herniated nucleus pulposus at L5 on the left. Appellant did not work from May 5 through 7, 1999 and returned on May 11, 1999. He stopped work on May 12, 1999 due to increasing pain. Effective September 29, 2000, appellant was discharged from the employing establishment.¹

In a September 23, 1999 medical report, Dr. F. Karl Gregorius, a Board-certified neurosurgeon and appellant's treating physician, concluded that appellant was permanent and stationary from the April 7, 1999 employment injury. He noted that appellant would be unable to do the physical requirements necessary for his date-of-injury job. The physician advised that appellant should be able to do a job which would not require repetitive lifting, bending and stooping, jogging or doing comparable physical exertion activities.

In a November 8, 1999 report, Dr. Gerald Cady, a Board-certified orthopedic surgeon and Office referral physician, advised that appellant continued to have residuals of his injury-related conditions and that it was not anticipated that he could return to his date-of-injury occupation. Dr. Cady outlined the following work restrictions: no prolonged sitting, standing or walking; no bending or stooping; no squatting, kneeling and climbing; no carrying, pushing or pulling over 10 pounds and no twisting activities. Dr. Cady further noted that appellant should not operate a motor vehicle for more than two hours. In an OWCP-5c form dated November 3, 1999, he advised that appellant would be able to work four hours a day within those restrictions and work an eight-hour day by April 2000.

The Office referred appellant to a vocational rehabilitation counselor by letter dated December 7, 1999. The vocational rehabilitation counselor identified the positions of personnel manager, budget officer and management analyst as being within appellant's medical and vocational capabilities. The vocational rehabilitation counselor developed a training plan to eventually place appellant in a limited-duty position.

In a February 4, 2000 report, Dr. Gregorius indicated that the stress involved with finding a suitable vocational rehabilitation program caused appellant's migraine headaches, gastric reflux and gastrointestinal bleeding. He precluded appellant from performing more than three hours of work with restrictions, with the hours increasing to eight by June 2000. Dr. Gregorius agreed that appellant's plan to become a school psychologist would be an ideal job and that a 25 mile commuting range would be the limit for him. He further advised that accountancy would not be a suitable occupation for appellant due to the continuous sitting involved.

In a March 25, 2000 letter, John H. DeGregori, a certified public accountant, advised that retraining appellant for the position of a school psychologist was a more cost effective option than if he were to find a job as a comptroller, budget officer or accountant.

¹ The record reflects that, since appellant was in an excepted position in the Federal Civil Service, he was required to maintain concurrent military membership in the National Guard. Failure to hold military membership would cause separation from the Federal Civil Service. Due to his work-related medical condition, appellant was honorably discharged by the Army National Guard on July 11, 2000.

The Office found a conflict in the medical opinion evidence between Dr. Cady and Dr. Gregorius with regard to the number of hours appellant was able to work with restrictions. By letter dated March 28, 2000, the Office referred appellant, together with medical records, a statement of accepted facts and a list of specific questions, to Dr. Warren D. Clift, a Board-certified neurologist, selected as the impartial medical specialist.

Dr. Clift submitted a May 9, 2000 report providing a history of appellant's April 7, 1999 employment injury and medical treatment. He stated that he had reviewed appellant's medical records, brought by appellant² and presented findings on physical examination. Dr. Clift provided an impression of left lumbar radiculopathy with an L5 distribution and no related motor findings. Appellant was noted to have some limitation of motion of the lumbar spine with an approximately equal limitation of motion of the cervical spine. Although there was a history of foot drop, Dr. Clift found no evidence present on examination or elicited through the current history. He concurred with the work limitations imposed by Dr. Cady, advising that appellant had no obvious motor restrictions and only very limited restriction on range of motion of the back with no obvious motor restrictions, no weakness, no reflex changes and no muscle loss. He noted that appellant's pain was subjective, but continuously present and was from slight to moderate due to his use of medication and his reported restrictions of activities such as prolonged walking and jogging. In a May 22, 2000 letter, Dr. Clift stated that a May 15, 2000 magnetic resonance imaging (MRI) scan showed no change from the previous April 21, 1999 scan. In response to an Office August 24, 2000 request for clarification regarding the number of hours appellant could work, Dr. Clift submitted an OWCP-5c form dated August 30, 2000, which indicated that appellant was capable of performing limited duty for eight hours a day. Appellant was restricted to no more than 6 hours of sitting; no more than 6 hours of pushing, with pulling and lifting at a 30-pound limit; and no more than 7 hours of squatting and 5 hours of kneeling.

In a September 26, 2000 report, Dr. Gary I. Cavanaugh, a Board-certified psychiatrist and neurologist, reported that appellant has been under his care for attention deficit hyperactivity disorder (ADHD) since 1995. He advised that appellant's work injury, the loss of his job and his endeavors to find other employment had created increased stress which had exacerbated appellant's disorganization, a major feature of his ADHD. Dr. Cavanaugh requested that appellant be retrained to accommodate his disorder and noted his support of appellant's desire to be a school psychologist.

In an April 6, 2000 report, Dr. Ronald F. Dugger, a Board-certified neurologist, advised that he had been treating appellant since August 1998 for migraine headaches. He opined that appellant suffered from an exacerbation in both the severity and frequency of migraine headaches as a result of his chronic low back pain and vocational rehabilitation issues. In an April 13, 2001 letter, the Office requested updated information on appellant's migraine condition and whether there were any work limitations. In an April 13, 2001 facsimile, the Office was notified that Dr. Dugger did not prepare narrative reports.

² The Office subsequently received those records from appellant.

To determine appellant's disability status as it related to his migraine headaches, the Office referred appellant to Dr. Michael M. Bronshvag, a Board-certified neurologist. In a May 23, 2001 report, the physician reviewed the history of injury, the medical records and the statement of accepted facts. He presented his findings on examination and diagnosed lumbar degenerative joint and disc disease with left-sided radiculopathy; esophagitis-reflux, history of attention deficit disorder and migraine headaches since a teenager with a history of recent worsening. Dr. Bronshvag noted that appellant stated his headache frequency increased in response to the stresses of the vocational rehabilitation program. Appellant's neurological examination was reported as normal with appropriate headache treatment. As there was no medical documentation of actual work loss prior to appellant's back difficulties from April to May 1999, Dr. Bronshvag opined that his headaches were not disabling. He advised that whether appellant's distress was related to his vocational rehabilitation difficulties was a psychological-psychiatric matter.

In a December 28, 2001 report, Dr. Dugger found that appellant continued to experience severe headaches up to two to three times a week which, when present, could last up to one to two days, during which appellant was bedridden. He opined that it would be unlikely that appellant would be able to perform any job that would require a regular eight-hour a day five days a week schedule. Dr. Dugger stated that appellant's headaches were sensitive to the amount of stress or pressure he was under and Dr. Dugger did not believe that any other interval agents were going to be effective until there was a resolution of the provoking factors. Other reports noting that appellant's migraine headaches were out of control and most likely related to his current life stressors were submitted.

As appellant was unable to secure employment, vocational rehabilitation services were closed effective January 25, 2001. In a final report dated January 24, 2002, the rehabilitation counselor identified the position of budget officer, (Department of Labor's *Dictionary of Occupational Titles*, DOT #161.117-010) to be suitable, both medically and occupationally and reasonably available in appellant's geographic area. The position was listed as sedentary with occasional lifting of no more than 10 pounds and no climbing, balancing, stooping, kneeling, crouching, crawling or reaching. The rehabilitation counselor opined that appellant's combined education and experience exceed the specific vocational preparation (SVF) factor of 4 to 10 years to compete on the open labor market. The counselor further noted that the selected position met the medical limitation criteria of the November 3, 1999 OWCP-5c form of Dr. Cady.

In a February 14, 2002 notice of proposed reduction of compensation, the Office advised appellant that it proposed to reduce his compensation because the factual and medical evidence of record established that he was no longer totally disabled. The Office advised appellant that he had the capacity to earn the wages of a budget officer and requested that he submit additional evidence or argument within 30 days if he disagreed with the proposed action. The Office additionally found that appellant did not establish that he sustained an emotional condition in the performance of duty.³

³ The Office noted that appellant remained entitled to medical benefits and monthly compensation benefits based on his wage loss in the constructed position.

In response to the notice of proposed reduction of compensation, appellant submitted a facsimile dated March 13, 2002, expressing his disagreement. In a March 25, 2002 report, Dr. Gregorius noted that appellant recently had an exacerbation of lumbar spine pain from sitting due to his work-related injury. In a June 17, 2002 report, Dr. Gregorius indicated that appellant's disability condition was unchanged.

In a July 2, 2002 decision, the Office reduced appellant's compensation, finding that he was capable of performing the constructed position of budget officer (DOT #161.117-010). The Office found that appellant's underlying conditions of ADHD and migraine headaches did not disable him from work as a budget officer. The Office further found that the exacerbation of appellant's migraine headaches was not work related and, thus, he had not established an emotional condition in the performance of duty.

By letter dated July 31, 2002, appellant requested an oral hearing and submitted additional evidence.⁴ A hearing was held on March 25, 2003, at which he testified. By decision dated June 24, 2003, an Office hearing representative affirmed the Office's July 2, 2002 decision.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.⁵ An injured employee who is either unable to return to the position held at the time of injury or unable 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

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 or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent the employee's wage-earning capacity or if the employee has no actual wages, the 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 and circumstances which may affect his wage-earning capacity in his disabled condition.⁷

⁴ This included materials already of record, an excerpt from the Office's Handbook for Vocational Rehabilitation and a March 23, 2001 letter from the County of San Joaquin rejecting appellant's application for the position of accounting officer on the basis that he failed to meet the minimum experience requirements. A March 17, 2003 report from Dr. Gregorius noted that appellant's status was unchanged.

⁵ *James B. Christenson*, 47 ECAB 775, 778 (1996); *Patricia A. Keller*, 45 ECAB 278 (1993); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

⁶ 20 C.F.R. §§ 10.402, 10.403 (2002); see *Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

⁷ 5 U.S.C. § 8115(a); see *Dorothy Lams*, 47 ECAB 584 (1996); *Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

The Office must initially determine appellant's medical condition and work restrictions before selecting an appropriate position that reflects his vocational wage-earning capacity. The Board has stated that the medical evidence upon which the Office relies must provide a detailed description of appellant's condition.⁸ Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.⁹

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 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. Finally, application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.¹⁰

In determining an employee's wage-earning capacity based on a position deemed suitable, but not actually held, the Office must consider the degree of physical impairment, including impairments resulting from both injury related and preexisting conditions, but not impairments resulting from post injury or subsequently acquired conditions.¹¹ Any incapacity to perform the duties of the selected position resulting from subsequently acquired conditions is immaterial to the loss of wage-earning capacity that can be attributed to the accepted employment injury and for which appellant may receive compensation.

ANALYSIS -- ISSUE 1

In finding that appellant was physically capable of performing the duties of a budget officer, the Office relied on the May 9 and 22, 2000 medical reports and the August 30, 2000 OWCP-5c form of Dr. Clift, the impartial medical specialist. The Office found that a conflict of medical opinion existed between the opinions of Dr. Gregorius, appellant's Board-certified neurologist, and Dr. Cady, a Board-certified orthopedic surgeon and Office referral physician.

⁸ See *William H. Woods*, 51 ECAB 619 (2000); *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

⁹ *Carl C. Green, Jr.*, 47 ECAB 737, 746 (1996).

¹⁰ See *William H. Woods*, *supra* note 8; *Hattie Drummond*, 39 ECAB 904 (1988); see *Albert C. Shadrick*, 5 ECAB 376 (1953).

¹¹ See *James Henderson, Jr.*, 51 ECAB 268 (2000).

The Office properly referred appellant for an impartial medical examination by Dr. Clift, a Board-certified neurologist.¹²

In cases where the Office has referred appellant to an impartial medical specialist to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹³

In his August 30, 2000 OWCP-5c form, Dr. Clift indicated that appellant was capable of working an eight-hour day with restrictions, which included a six-hour sitting limit. In his May 9 and 22, 2000 reports, Dr. Clift reviewed the entire case record and statement of accepted facts. He examined appellant thoroughly and related his clinical findings. Based on his examination, which showed only limited restriction on range of motion of the back and disability factors of reported subjective pain and a May 15, 2000 MRI, Dr. Clift stated that he concurred with the work limitations recommended by Dr. Cady.¹⁴ He concluded that appellant was capable of working an eight-hour day with restrictions, which included a six-hour sitting limit. The Board finds that Dr. Clift provided an opinion that is sufficiently well rationalized to resolve the issue of whether appellant was capable of performing the duties of the offered position. The Board finds that Dr. Clift's opinion represents the weight of the medical evidence establishing that appellant is capable of performing the constructed position.

The Board notes that the Office, in the interim period between the issuance of Dr. Clift's reports and its June 24, 2003 decision, had developed the record pertaining to the migraine issue. The Board finds that there is insufficient evidence to establish that appellant's preexisting underlying conditions of ADHD and migraine headaches caused disability for the constructed position. In a September 26, 2000 report, Dr. Cavanaugh reported appellant's symptoms of ADHD, but failed to provide an opinion addressing appellant's capacity for work. In his report of May 23, 2001, Dr. Bronshvag reported a normal neurological examination with appropriate headache treatment. Dr. Bronshvag provided a well-rationalized opinion, based on a complete medical and factual history, that appellant's headaches were not disabling and were related to psychological-psychiatric matters. Although Dr. Dugger, appellant's treating neurologist, opined that it would be unlikely that appellant would be able to perform any job which would require a regular schedule, the Board finds that the physician's opinion is couched in speculative or equivocal terms and, thus, is of diminished probative value.¹⁵

¹² The Act provides that, "if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination." 5 U.S.C. § 8123(a); *Shirley L. Steib*, 46 ECAB 309, 317 (1994). A simple disagreement between two physicians does not, of itself, establish a conflict. To constitute a true conflict of medical opinion, the opposing physicians' reports must be of virtually equal weight and rationale. 20 C.F.R. §§ 10.321(a), 10.502 (1999); see *Robert D. Reynolds*, 49 ECAB 561, 565-66 (1998).

¹³ *Michael Hughes*, 52 ECAB 387 (2001); *Manuel Gill*, 52 ECAB 282 (2001).

¹⁴ In his November 3, 1999 OWCP-5c form, Dr. Cady imposed work limitations on appellant's ability to work and had projected that he would be able to work an eight-hour day by April 2000.

¹⁵ See *Annie L. Billingsley*, 50 ECAB 210, 213 n. 20 (1998); *Jennifer L. Sharp*, 48 ECAB 209 (1996).

The medical evidence appellant submitted subsequent to Dr. Clift's report is insufficient to overcome the special weight accorded to his medical opinion as the impartial medical specialist. In a March 25, 2002 report, Dr. Gregorius noted that appellant had suffered an exacerbation of lumbar spine pain from sitting, due to his work-related injury. The physician only noted appellant's treatment for lumbosacral pain and did not address his capacity for work. Furthermore, Dr. Gregorius, appellant's attending physician, was on one side of the conflict resolved by Dr. Clift. Therefore, the physician's report is insufficient to overcome the weight of the impartial medical specialist's reports or to create a new conflict of medical opinion.¹⁶

Dr. Clift's opinion represents the weight of the medical evidence establishing that appellant is capable of performing the duties of the offered position and the record establishes that the Office followed the requisite procedures in determining that the constructed position represented suitable work. Therefore, the Board finds that the Office properly reduced appellant's compensation, finding that he was capable of performing the constructed position of budget officer.

LEGAL PRECEDENT -- ISSUE 2

Appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which compensation is claimed was caused by the accepted injury. This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to employment factors and supports that conclusion with sound medical reasoning.¹⁷ An award of compensation may not be made on the basis of surmise, conjecture or speculation or on appellant's unsupported belief of causal relation.¹⁸

ANALYSIS -- ISSUE 2

Appellant has submitted insufficient medical evidence to establish that his migraine headaches were caused or aggravated by his 1999 employment injury. In the instant case, the Office relied upon the second opinion examiner, Dr. Bronshvag, a Board-certified neurologist, as representing the weight of the medical opinion evidence in establishing that appellant's headaches resulted from his stress over the Office's actions with regard to the rehabilitation programs and not from the back pain arising from his employment injury.¹⁹ Dr. Bronshvag found no medical documentation of disability prior to appellant's back difficulties of 1999 and reported that his neurological examination was normal with appropriate headache treatment. As appellant reported an increase in headache frequency due to vocational rehabilitation difficulties,

¹⁶ See *Michael Hughes*, *supra* note 13; *Dorothy Sidwell*, 41 ECAB 857, 874 (1990).

¹⁷ *Helen K. Holt*, 50 ECAB 279 (1999).

¹⁸ *Michael E. Smith*, 50 ECAB 313 (1999).

¹⁹ The Board notes that stress related to a claimant's pursuit of a claim before the Office does not constitute a compensable factor of employment. See *Norman M. Perras*, 49 ECAB 191 (1997).

Dr. Bronshvag opined that appellant's distress and increase in headaches were a psychological-psychiatric matter.

In assessing medical evidence, the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of the analysis manifested and the medical rationale expressed in support of the physician's opinion are facts which determine the weight to be given each individual report.²⁰

Dr. Bronshvag's opinion that appellant's distress and increase in headaches were a psychological-psychiatric matter was supported with a finding of a normal neurological examination with appropriate headache treatment and a well-rationalized explanation based on a complete and accurate history of the employment injury. Medical reports, such as Dr. Bronshvag's, which presents medical evidence as to why appellant's present condition was not caused by or aggravated by an employment factor and presents that conclusion with sound medical reasoning is entitled to great weight.²¹ Dr. Dugger, a Board-certified neurologist, initially opined in an April 6, 2000 report that appellant's increase in the severity and frequency of his migraine headaches were a result of his chronic low back pain and the rehabilitation issues. In a December 28, 2001 report, the physician later attributed appellant's headaches to the stress or pressure appellant was under and opined that the headaches would not improve until there was a resolution of the factors which were causing the stress. Dr. Dugger's reports fail to contain any explanation or rationale as to how the employment injury contributed to or aggravated appellant's headache condition and attributed the frequency of appellant's headaches to stress. Dr. Dugger's reports are insufficient to establish causal relationship between the employment injury and the claimed disability and are, therefore, insufficient to establish appellant's burden of proof.²² Accordingly, the weight of the evidence remains with the opinion of Dr. Bronshvag.

CONCLUSION

The Board finds that the Office met its burden of proof to justify reduction of appellant's compensation to reflect his capacity to earn wages in the constructed position of budget officer. The Board further finds that appellant has not met his burden of proof to establish that his migraine headaches were caused or aggravated by his April 7, 1999 employment injury.

²⁰ See *Connie Johns*, 44 ECAB 560 (1993).

²¹ See *Helen K. Holt*, *supra* note 17.

²² See *Gloria J. McPherson*, 51 ECAB 441 (2000).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 24, 2003 is affirmed.

Issued: April 8, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member