United States Department of Labor
Employees' Compensation Appeals Board

CHARLES E. BARKER, Appellant	)	
and	)	**Docket No. 03-1891**
	)	**Issued: July 20, 2004**
DEPARTMENT OF THE NAVY, MARINE CORPS LOGISTICS BASE, Barstow, CA, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On July 7, 2003 appellant filed a timely appeal from the August 14, 2002 merit decision of the Office of Workers' Compensation Programs which reduced his compensation to reflect his wage-earning capacity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the August 14, 2002 decision, together with the July 3, 2003 decision of the Office hearing representative which affirmed the reduction of appellant's compensation.

ISSUE

The issue is whether the Office properly reduced appellant's compensation to reflect his wage-earning capacity in the constructed position of telephone solicitor.

FACTUAL HISTORY

On March 17, 1993 appellant, then a 34-year-old heavy mobile equipment mechanic helper, injured his back at work while finishing the interior of a light armored vehicle. The Office accepted his claim for low back sprain. After appellant expanded his claim to include

cumulative factors of employment, the Office accepted a herniated disc at L4-5, left shoulder strain, left rotator cuff tear with reconstructive surgery and temporary aggravation of cervical degenerative disc disease. Appellant received compensation for total disability on the periodic rolls.

On February 18, 1997 the Office terminated medical benefits for appellant's cervical and lumbar conditions. The Office found that the injury-related aggravation of cervical degenerative disc disease and L4-5 disc herniation had ceased. On September 11, 1998 an Office hearing representative affirmed, finding that appellant sustained only a temporary aggravation of his cervical and low back conditions as a result of his employment injury and that any continuing medical conditions in those portions of his body were no longer causally related to his employment. Appellant received a schedule award for a 22 percent permanent impairment of the left arm. After the period of the award expired on November 8, 1997 he again received compensation for total disability on the period rolls.

On April 24, 2000 Dr. Craig A. Sullivan, an orthopedic surgeon and Office referral physician, reported that appellant was able to work eight hours a day with certain limitations. On June 30, 2000 Dr. Shabbar Hussain, appellant's attending orthopedic surgeon, also reported that appellant could work eight hours a day with certain limitations. The Office determined that a conflict in medical opinion existed on the nature and extent of appellant's physical limitations.[1] To resolve the conflict the Office referred appellant to Dr. Thomas K. Howard, a Board-certified orthopedic surgeon, for an impartial medical evaluation.[2] In a statement of accepted facts dated March 10, 2000, the Office instructed Dr. Howard that the only work related accepted conditions he was to consider were left shoulder strain, left rotator cuff tear and left rotator cuff surgery.

Dr. Howard examined appellant on October 19, 2000. In a report dated October 22, 2002, he diagnosed the following: (1) severely degenerative lumbosacral joint with early attempts at spontaneous anterior fusion; (2) degenerative disc, L4-5, with annual tear and posterior bulge; (3) severely degenerative disc disease with kyphosis, cervical spine, with radiculopathy, bilateral and symmetric; and (4) status post rotator cuff surgery, left shoulder with degenerative acromioclavicular joints. On a work capacity evaluation completed that same date he reported that appellant could work only one to two hours a day with limitations.

On November 20, 2000 Dr. Howard modified his conclusions. Based on information about appellant's ability to care for his children and to perform such tasks as driving, shopping and doing housework, he concluded as follows:

> "I feel he can perform some type of employment as long as he is not taking Percocet while at work. He certainly could start with four hours per day and increase gradually to six, then eight hours a day as his rehabilitation and efforts at

[1] The Office apparently interpreted small marks on Dr. Hussain's June 30, 2000 work capacity evaluation to be the letter "N," or a symbol negating the capacity to perform the activity in question, as opposed to ditto marks, indicating that appellant was capable of performing the activity eight hours a day.

[2] 5 U.S.C. § 8123(a) (if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination).

> pain control are addressed through [v]ocational [r]ehabilitation which you refer to. I do feel he can perform a sedentary job. I do disagree with Doctor Sullivan as I did find from my examination that he is able to use his left arm for pushing, pulling and lifting, not overhead, but up to 90 degrees and up to 20 pounds, for as much as [4] hours per day."

Dr. Howard advised the Office, however, that he was very confused with the directions he received:

> "You also note that the client has residuals from the only accepted condition of left shoulder strain, left rotator cuff tear and shoulder surgery and, in fact, this is by the patient's admission and my evaluation, way less than 10 percent of his current problem. This makes it difficult for me to address his current medical condition, which is 90 percent his neck and low back, which I am supposed to address his left shoulder, which the patient and I feel may well be the result of left radicular symptoms."

Dr. Howard completed a work capacity evaluation on December 22, 2000. He reported that appellant: "may work eight hours under proper conditions, restrictions and if patient is alert and responsive depending upon drug use." He listed chronic back pain and substance abuse as other medical facts, apart from the accepted left shoulder conditions, that needed to be considered in the identification of a position for appellant.

The Office referred appellant for vocational rehabilitation and testing. Appellant submitted a request for further back and left shoulder surgery, as recommended by Dr. Howard. On May 8, 2001 the rehabilitation specialist suggested that appellant's vocational rehabilitation be interrupted, as he was in the process of scheduling back fusion surgery.

On July 12, 2001 Dr. V.A.R. Kumar, appellant's attending neurosurgeon, reported that appellant underwent a right L5-S1 disc removal:

> "He continues to have a lot of back pain with muscle spasm and some swelling in the upper part of the incision due to muscle spasm. At this point we are trying to control his back pain with Percocet 7.5 milligrams 1 [to] 2 tab[let]s every 6 hours and he can take some Flexeril at bedtime. He is also having problems with his left shoulder. I am setting up an appointment with Dr. [Anthony] Bruno's group to get a second opinion to see if anything can or should be done regarding the management of his work[-]related left shoulder injury."

The Office placed appellant on an interrupted vocational rehabilitation status while he recuperated from surgery.

Appellant came under the care of Dr. Anthony Bruno, an orthopedic surgeon, for treatment of his left shoulder condition. On November 6, 2001 Dr. Bruno reported appellant's history and complaints of left shoulder pain, left hand numbness and chronic neck pain. He described his findings on physical examination and noted that a magnetic resonance imaging (MRI) scan showed remarkable stenotic changes from C4-6. He diagnosed cervical spine stenosis with possible peripheral radiculopathy, left shoulder pain status postoperative

intervention, possible internal derangement versus impingement versus rotator cuff tear with possible labral pathology, left upper extremity neurologic involvement with likely carpal tunnel syndrome, possible brachial plexopathy and possible thoracic outlet syndrome. On December 13, 2001 he completed a work capacity evaluation indicating there was no reason appellant could not work eight hours a day with limitations: "Would limit repetitive tasks left upper extremity and activity above chest level." Dr. Bruno restricted appellant to no reaching above shoulder level for more than one hour. He also restricted appellant to pushing, pulling and lifting 10 pounds for a minimal amount of time with his left upper extremity.

The Office reopened vocational rehabilitation and attempted job placement with several employers. On April 29, 2002 Dr. Kumar completed a work capacity evaluation stating that appellant was on narcotics for pain control and "will not be able to work at this time." Appellant's medications at that time included Flexeril, Methocarbamol and Oxycontin at 20 milligrams twice daily. The Office determined that appellant's placement with an employer was doubtful and ceased job placement activities as of June 24, 2002.

On July 11, 2002 the Office issued a notice of proposed reduction of compensation. The Office found that the opinion of Dr. Howard represented the weight of the medical evidence and established that appellant could work eight hours a day with restrictions. Finding that the constructed position of telephone solicitor was both medically and vocationally suitable, the Office proposed to reduce appellant's compensation based on his capacity to earn wages of $246.71 per week in that position.

On August 12, 2002 appellant submitted a July 26, 2002 report from Dr. Harvey H. Shapiro, a clinical psychologist, who stated that there was no way in which appellant could work in the competitive job market: "His constant pain and physical limitations caused by his left shoulder and spine injuries immediately preclude him from most jobs that he could perhaps do. His depression, poor concentration, sleep problems, psychomotor retardation and irritability preclude him from virtually all jobs of any sort." Dr. Shapiro explained that appellant had too much major depression to endure a job involving interaction with others and could not sustain the pace or attention that almost any job required. Also, appellant could not sit still for more than a few minutes without having to get up and pace. Dr. Shapiro concluded: "[Appellant] is totally disabled."

In a decision dated August 14, 2002, the Office reduced appellant's compensation effective September 8, 2002, based on his capacity to earn wages in the constructed position of telephone solicitor. Noting that it had received no response to its notice of proposed reduction of compensation, the Office found that the weight of the medical evidence established the position of telephone solicitor to be medically and vocationally suitable in accordance with the factors set forth at 5 U.S.C. § 8115(a). Appellant requested a review of the written record by an Office hearing representative.

In a decision dated July 3, 2003, the Office hearing representative affirmed the reduction of appellant's compensation. The hearing representative noted that the Office relied on the opinion of the impartial medical specialist, Dr. Howard. Given the limited medical restrictions set forth by Dr. Howard, the hearing representative stated that it appeared appellant was capable of performing the duties of the position of telephone solicitor up to the designated time periods.

The hearing representative found that Dr. Shapiro's opinion lacked probative value because he discussed chronic pain and depression in a general sense without providing rationale relating to appellant's claim. Further, Dr. Shapiro attributed appellant's pain to the accepted employment injury while ignoring the preexisting cervical and lumbar conditions, which would have worsened.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[3]

Section 8115(a) of the Federal Employees' Compensation Act provides that in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his actual earnings, if his actual earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings of the employee do not fairly and reasonably represent his wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity as appears reasonable under the circumstances is determined with due regard to the nature of his injury, the degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect his wage-earning capacity in his disabled condition.[4]

When the Office makes a medical determination of partial disability and of the 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 in light of 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 *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.[5]

ANALYSIS

The Office reduced appellant's compensation based on the opinion given by Dr. Howard, the physician selected to resolve a conflict on the nature and extent of appellant's limitations. The Office found that Dr. Howard's opinion represented the weight of the medical evidence, but his opinion raises a serious question of whether appellant has the capacity to earn wages as a telephone solicitor. When Dr. Howard reported on November 20, 2000 that appellant could perform a sedentary job, he made clear that he felt constrained by the Office's instructions to consider only appellant's left shoulder conditions. These conditions, he explained, represented less than 10 percent of appellant's current problem and made it difficult to address appellant's

[3] *Harold S. McGough*, 36 ECAB 332 (1984).

[4] 5 U.S.C. § 8115(a).

[5] *Hattie Drummond*, 39 ECAB 904 (1988); *see Albert C. Shadrick*, 5 ECAB 376 (1953).

current medical condition, 90 percent of which involved the neck and low back. Dr. Howard's October 22, 2002 diagnoses reflect the significance of appellant's neck and low back conditions: it was only after he diagnosed severely degenerative lumbosacral joint with early attempts at spontaneous anterior fusion, degenerative L4-5 disc with annual tear and posterior bulge and severely degenerative cervical disc disease with kyphosis and radiculopathy, bilateral and symmetric, that he identified status post rotator cuff surgery, left shoulder with degenerative acromioclavicular joints. On his December 22, 2002 work capacity evaluation form, Dr. Howard advised the Office that chronic back pain needed to be considered in identifying a position for appellant.

The Office, however, did not take appellant's neck and low back conditions into account when it reduced his compensation effective September 8, 2002. Having terminated medical benefits for cervical and lumbar conditions on February 18, 1997 the Office focused solely on appellant's accepted left shoulder conditions. It is well established that in determining a loss of wage-earning capacity, where the residuals of an injury prevent an employee from performing his regular duties, the Office must take into consideration, in addition to the injury-related impairments, the impairments that preexisted the injury. It is only subsequently acquired impairments unrelated to the injury that are excluded from consideration in the determination of work capabilities.[6]

Thus, it is immaterial whether the injury-related aggravation of appellant's cervical and lumbar conditions was only temporary and ceased by February 18, 1997. Appellant continued to experience residuals from significant preexisting neck and low back conditions, as Dr. Howard reported.[7] The Office should have taken these conditions into account when determining appellant's capacity to earn wages. The Board finds that the Office's failure to consider appellant's preexisting neck and low back conditions constitutes reversible error.

CONCLUSION

The Board finds that the Office did not meet its burden of proof in reducing appellant's compensation to reflect a capacity to earn wages in the constructed position of telephone solicitor.

[6] *James Henderson, Jr.*, 51 ECAB 268, 271 (2000).

[7] Indeed, Dr. Bruno noted in his November 6, 2001 report, that an MRI scan showed remarkable stenotic changes from C4-6.

ORDER

IT IS HEREBY ORDERED THAT the July 3, 2003 and August 14, 2002 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: July 20, 2004
Washington, DC

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member