

FACTUAL HISTORY

On April 27, 1998 appellant, then a 49-year-old electroplater, filed a traumatic injury claim alleging that on that date his left knee buckled as he was carrying gear from a doghouse and he slipped on the steps, which resulted in a sprained knee. The Office accepted appellant's claim for left knee sprain, medial meniscus tear, osteoarthritis of the left knee and aggravation of osteoarthritis of the left knee. The Office authorized arthroscopic surgery which was performed on appellant's left knee on July 13, 1998.¹

By letter dated March 22, 2000, the Office referred appellant to a vocational rehabilitation counselor based on the employing establishment's decision to remove him from his electroplater position because it was unable to provide him with work within his permanent physical restrictions.² In a letter of the same date, the Office requested that Dr. Michael S. McManus, appellant's treating physician who was Board-certified in preventive medicine, provide the date when appellant would be released to light-duty and full-duty work and information regarding his treatment plan and any complications that may delay his recovery.

Dr. McManus submitted an April 21, 2000, letter in which he stated that appellant suffered from post-traumatic arthritis and chondromalacia patella of the left knee and that he was status post arthroscopic medial meniscectomy and debridement. He stated that appellant had been released to light or modified duties since being under his care. Dr. McManus noted that appellant had permanent work restrictions and that he would not be able to return to full-duty work at anytime. He stated that at that time appellant was fixed and stable and that ongoing treatment would be maintenance care only. Dr. McManus was not aware of any complications that would delay appellant's recovery.

Appellant enrolled in a computer program at Olympic College as part of his vocational rehabilitation training program with the goal to work as a network administrator or computer service technician. After two quarters, he had a cumulative grade point average (GPA) of 3.38. Appellant's vocational rehabilitation was interrupted by an injury to the left knee which he sustained on March 26, 2001 while attending school. His left knee buckled causing him to fall down the stairs. The Office authorized appellant to undergo anterior cruciate ligament (ACL) reconstruction surgery, which was performed on June 7, 2001 by Dr. VanBuecken. Prior to appellant's surgery, the vocational rehabilitation counselor reported on April 24, 2001 that appellant was very happy with most of his classes and he enjoyed learning. She further noted that appellant reported that he got along with most of his instructors and that he was very good with communicating with his instructors and letting them know if he was having difficulty

¹ By decision dated May 18, 1999, the Office granted appellant a schedule award for a 16 percent permanent impairment of the left leg. On March 20, 2000 the Office accepted that appellant sustained a recurrence of disability on February 16, 2000.

² Dr. Kent P. VanBuecken, appellant's treating Board-certified orthopedic surgeon, stated that appellant could lift and carry up to 10 pounds 8 hours a day, pull and push up to 20 pounds 2 hours a day, walk and stand 4 hours a day and twist 8 hours a day. Dr. VanBuecken also indicated that appellant could not stoop, drive an automobile, operate machinery, run or jump, climb stairs or ladders and kneel. Appellant was allowed to sit, bend, perform simple grasping and fine manipulation, reach above the shoulder and be exposed to extreme temperatures, high humidity, chemical, solvent, fumes/dust and noise on a continuous basis.

understanding. The rehabilitation counselor indicated that appellant passed the A+ certification which would definitely improve his chances of finding employment.

Following surgery, appellant took his final examinations for the spring term and he was expected to return to school in the fall. By letter dated July 31, 2001, the Office reassigned him to a new vocational rehabilitation counselor.

In a November 27, 2001 evaluation form, Joseph Silverthorn, an instructor at Olympic College, indicated that appellant maintained regular attendance, reported absences promptly, was consistently punctual, discussed educational needs with the instructor, completed homework assignments, performed well on examination, interacted positively in class, responded to instructor feedback, demonstrated effective communication skills with the instructor and fellow students and grasped the subject matter. He noted appellant's special accomplishment wherein he performed very well during the demonstration of an artifact(s) he constructed before a group.

In a December 27, 2001 letter, Dr. James H. Sullivan, Ph.d., appellant's licensed clinical psychologist, advised the vocational rehabilitation counselor that appellant should take a medical leave of absence or temporary suspension from the fall semester due to his post-traumatic stress disorder (PTSD) which was related to his military service in Vietnam and was being treated by the Department of Veterans Affairs (VA). Dr. Sullivan noted that appellant had filed a claim with the VA in September 2001, for evaluation and treatment of his PTSD. He stated that evaluations and interventions to date resulted in an exacerbation of some of appellant's symptoms. He noted that appellant experienced an increase of distressing and intrusive recollections and images from the war. He further noted that the September 11, 2001 terrorist attack was also a triggering factor as it contributed to heightened distractibility with impaired concentration and memory which had been disruptive to appellant's learning capacity and school program. Dr. Sullivan believed that a temporary absence from school would be in appellant's best interest. He noted that appellant wished to eventually continue and complete his education and retraining and that he planned to continue counseling and hopefully return to school in the spring.

In an August 23, 2001 letter, the Office requested that Dr. VanBuecken complete an enclosed work capacity evaluation (Form OWCP-5) to assess appellant's ability to be gainfully employed in suitable work.

As of January 28, 2002, appellant's vocational rehabilitation counseling was interrupted based on Dr. Sullivan's recommendation. By letter dated July 28, 2002, Dr. Sullivan indicated that appellant suffered from moderate to severe symptoms of PTSD and depression. He stated that the September 11, 2001 terrorist attack, loss of employment due to appellant's accepted employment-related knee injury and the recent death of appellant's father-in-law were major stressors that exacerbated his emotional condition. Dr. Sullivan, however, released appellant to return to his vocational rehabilitation training as he believed it was in his best interest.

Subsequently, the vocational rehabilitation counselor identified the positions of cashier and receptionist as being within appellant's physical limitations, vocational skills and geographical area. The receptionist position, as it appeared in the Department of Labor's *Dictionary of Occupational Titles* (DOT), required an individual to receive callers at the

establishment, determine the nature of business and direct callers to destination. It also required a person to obtain the caller's name and arrange an appointment. Other duties included the operation of a "PBX" telephone console to receive incoming messages, typing memoranda, correspondence reports and other documents, working in the office of a medical practitioner or in another health care facility and to be designated an outpatient receptionist or a receptionist in a physician's office, issuing a visitor's pass when required, making future appointments, answering inquiries, performing a variety of clerical duties and other duties pertinent to the type of establishment and collecting and distributing mail and messages.

According to the DOT, the training time for the average person to learn the techniques and acquire the information to perform the duties of a receptionist was over three months up to and including six months. Further, the position was classified as a sedentary occupation and the physical requirements included lifting, carrying, pushing and pulling up to 10 pounds occasionally, up to 5 pounds frequently or a negligible amount constantly. Sedentary work involved sitting most of the time but may involve walking or standing for brief periods of time. The position did not require climbing, balancing, stooping, kneeling, crouching, crawling, feeling, tasting, smelling, near acuity, far acuity, depth perception, accommodation, color vision, field of vision or exposure to weather. The position required frequent reaching, handling, talking and hearing. Additional physical requirements included occasional fingering which involved picking, pinching or otherwise working primarily with fingers rather than with the whole hand or arm as in handling.

The Office received Dr. McManus' OWCP-5 forms dated May 24 and June 10, 2002 in which he indicated appellant's permanent physical restrictions which included standing and walking four hours, operating a vehicle without a clutch and pushing, pulling and lifting up to 30 pounds. Appellant was not allowed to squat, kneel, climb, run, jump and crawl.

On October 17, 2002 Dr. VanBuecken reviewed the description and physical demands of the receptionist position and approved appellant for release to work in this position.

In a January 28, 2004 notice of proposed reduction of compensation, 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 further advised him that he had the capacity to earn the wages of a receptionist. The Office determined that appellant's compensation would be reduced to \$441.00 based on the formula developed in *Albert C. Shadrick*.³ The Office indicated that his salary on February 16, 2000, the date he sustained a recurrence of disability, was \$857.68 per week, that the current adjusted pay rate for his job on the date of injury was \$972.86 per week and that he was currently capable of earning \$348.00 per week, the pay rate of a receptionist. The Office determined that appellant had a 36 percent wage-earning capacity, which when multiplied by \$857.68 totaled a wage-earning capacity of \$308.76 per week. The Office then determined that appellant had a loss of wage-earning capacity of \$548.92 by subtracting \$308.76 from \$857.68. The Office multiplied \$548.92 by 3/4 which amounted to a compensation rate of \$411.69 per week. The Office found that, based on the consumer price index effective February 16, 2001, appellant's current adjusted compensation

³ 5 ECAB 376 (1953).

rate was \$441.00. The Office requested that appellant submit additional evidence or argument within 30 days if he disagreed with the proposed action.

On March 2, 2004 appellant responded that he disagreed with the proposed action. He submitted Dr. Sullivan's February 10, 2004 medical report in support of his inability to perform the selected position. Dr. Sullivan stated that he had counseled appellant from November 30, 2001 to the date of his report for a total of 24 sessions. He further stated that appellant suffered from PTSD secondary to his military service in Vietnam, as well as, major depressive disorder. Dr. Sullivan indicated that both conditions were exacerbated by knee injuries and deterioration, which resulted in physical restrictions, recurring pain and loss of employment. He noted that appellant's vocational rehabilitation was interrupted by physical and psychological problems and stress. Regarding appellant's ability to work, Dr. Sullivan stated that his PTSD included strong symptoms of reexperiencing distressing and intrusive memories, flashbacks, nightmares, hyperarousal, anxiety, irritability, sleep disturbance and angry outbursts. Appellant had a low frustration tolerance level and the presence of pain heightened his symptoms and reactivity. He also had a high level of mistrust especially of government agencies and representatives. Dr. Sullivan stated that appellant had moderate to severe levels of anger and depression in response to multiple losses including family deaths and his health, job, career and ability to provide for his family. He opined that appellant did not handle stress or confrontation well and was quick to become verbally aggressive, intimidating and abusive. Emotional and psychological factors interfered with his concentration and performance which was evident in his schooling. Dr. Sullivan further opined that appellant had been physically oriented in his work history which he could no longer continue due to physical disabilities. He had limited transferable skills and severe impairment in his ability to relate to others, to deal with authority and to cope with stress and pressure of an office setting. Dr. Sullivan noted that, while appellant had responded favorably to supportive therapy, the likelihood of his conditions improving to where he could resume employment was low.

By letter dated March 5, 2004, the Office requested that Dr. Sullivan provide additional information regarding appellant's emotional condition and physical limitations and the causal relationship between the emotional condition and the accepted employment-related knee injury.

The Office received an unsigned report dated March 16, 2004, which contained Dr. McManus' typed name. This report found that appellant was post status arthroscopic partial medial meniscectomy and subsequent ACL reconstruction with early osteoarthritis, greatest medial compartment of the left knee that was work related.

In a decision dated April 15, 2004, the Office finalized the proposed reduction of compensation effective April 18, 2004. The Office found no evidence of record establishing a causal relationship between appellant's PTSD and/or major depressive disorder and his employment-related knee injury.

On April 16, 2004 Dr. Sullivan submitted an April 9, 2004 report in response to the Office's March 5, 2004 letter. Dr. Sullivan stated that he last saw appellant on March 4, 2004. He diagnosed chronic, moderate to severe PTSD on Axis 1 and chronic pain syndrome, post-traumatic arthritis of the left knee, esophagus reflux and recurring sleep disturbance on Axis 3. On Axis 2, Dr. Sullivan indicated that there was no diagnosis. He stated that appellant had

aggressive tendencies especially verbally but did not meet the criteria for a personality disorder or impulse control disorder. On Axis 4, Dr. Sullivan noted that appellant was a Vietnam veteran, he lost his job, career and physical capacity and he experienced the death of his son. He reported a global assessment of functioning score of 48. Dr. Sullivan stated that appellant's mental status and the implications for his employability remained current with his February 10, 2004 report. He noted that appellant still experienced distressing, intrusive memories, flashbacks and nightmares, which was exacerbated by news of the ongoing hostilities in Iraq. Dr. Sullivan further noted that appellant had a recent dangerous physical confrontation with several teenagers who were extremely disrespectful and provocative. Appellant was susceptible to hyperarousal and overreactiveness to frustrations, stress and disappointments. Dr. Sullivan stated that the prolonged proceedings with the Office had been a source of stress and distress. He related that, in general, there had been modest improvements in appellant's levels of depression and PTSD due to several factors such as his medications, counseling and other support and varying levels of stress of which the primary source came from social interactions. Dr. Sullivan indicated that isolation and avoidance were two coping strategies that were helpful in this regard. He reiterated that the probability of appellant's psychological and physical conditions improving to where he could be successfully employed was low. Dr. Sullivan opined that there was a strong interaction between appellant's employment-related knee injury and chronic pain syndrome and his psychological conditions. He further opined that the physical injuries and resultant disruptions and losses definitely contributed to appellant's psycho-social problems. Dr. Sullivan concluded that appellant's social and family backgrounds were discussed in prior reports and they did not appreciably alter his previously stated observations and opinions.

In an accompanying work capacity evaluation for psychiatric/psychological conditions dated April 12, 2004, Dr. Sullivan referred to his February 10 and April 9, 2004 reports and stated that appellant had severe restrictions both psycho-socially and physically. He opined that appellant could not perform his usual job. He stated that other medical factors needed to be considered in the identification of a position for appellant.

On April 19, 2004 appellant requested an oral hearing before an Office hearing representative regarding the Office's April 15, 2004 decision. He submitted an unsigned x-ray report dated March 22, 2004 regarding his left knee which contained the typed name of Dr. Karen C. Ackerman, a Board-certified radiologist. This report compared its findings with the findings of a December 27, 2001 x-ray. The March 22, 2004 report found that appellant was status post ACL reconstruction. There was moderate medial compartment narrowing that was unchanged to minimally advanced as compared to the previous x-ray study. In addition, there was mild patellofemoral spurring again and no significant joint effusion.

Appellant also submitted unsigned reports dated June 14 and August 17, 2004 which contained Dr. McManus' typed name. These reports found that he was status post arthroscopic partial medial meniscectomy with subsequent ACL reconstruction with secondary osteoarthritis, greatest at the medial compartment of the left knee which was work related.

An unsigned disability certificate also contained Dr. McManus' typed name and revealed that appellant was released to light-duty work as of August 17, 2004 with no change in his permanent restrictions. In an October 7, 2004 letter, Dr. McManus stated that he had only treated appellant for his left knee condition and not for any psychological condition. Regarding

appellant's psychological condition, Dr. McManus deferred any opinion or recommendations to appellant's behavioral medicine specialist or psychologist.

At the October 27, 2004 hearing, appellant testified about his participation in the vocational rehabilitation program. His attorney contended that the Office violated its procedures by failing to include a description of the selected position with the proposed notice of reduction of appellant's compensation. Appellant testified that his emotional condition, which prevented him from interacting with angry people and the filing requirement of the selected position, which did not fall within his physical restrictions because he was required to bend, prevented him from performing the duties of the reception position.

By decision dated January 24, 2005, the Office hearing representative found that the selected position of receptionist was suitable from a medical and vocational standpoint and was reasonably available in sufficient numbers in appellant's commuting area and, therefore, the Office properly reduced his compensation. The hearing representative further found that appellant's preexisting emotional condition was considered by the Office in determining that the selected position represented his wage-earning capacity. Accordingly, the hearing representative affirmed the Office's April 15, 2004 decision.

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.⁴

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.⁵

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 applicable services.⁶ Finally, application of the principles set forth in *Shadrick* will result in the

⁴ *William H. Woods*, 51 ECAB 619 (2000); *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

⁵ *Samuel J. Chavez*, 44 ECAB 431 (1993).

⁶ *Karen L. Lonon-Jones*, 50 ECAB 293, 297 (1999).

percentage of the employee's loss of wage-earning capacity.⁷ This has been codified by the regulations in 20 C.F.R. § 10.403(c).

ANALYSIS

In finding that the selected position of receptionist represented appellant's wage-earning capacity, the Office determined that appellant was qualified for the position as no prior training was required and the physical requirements of the selected position fell within his permanent medical restrictions. Appellant could receive on-the-job training in the receptionist position within three to six months according to the DOT description of the selected position. The general duties of the receptionist position involved answering telephone calls, determining the nature of the call, assisting callers, making desired appointments, typing, performing other clerical duties and collecting and distributing mail and messages. Appellant contends that the Office did not consider his preexisting emotional condition which caused him to be impatient when dealing with angry people. He submitted Dr. Sullivan's reports which found that he did not have any transferable skills or interpersonal skills to relate to others in an office setting and, thus, his ability to be successfully employed was low. The record, however, establishes that appellant was performing well in school and he was getting along with his classmates and professors while attending college. For two quarters, he had a cumulative GPA of 3.38 and completed a certification program with an A+ grade. The vocational rehabilitation counselor reported that he was very happy with most of his classes, he enjoyed learning and he was getting along with most of his instructors. Mr. Silverthorn, a college instructor, stated that appellant used effective communication skills with the instructor and his fellow students. In light of the above, the Board finds that appellant is capable of performing the general duties of the selected position.

The physical requirements of the receptionist position involved lifting, carrying, pushing and pulling up to 10 pounds occasionally, up to 5 pounds frequently or a negligible amount constantly. The position was also sedentary in nature in that it involved sitting most of the time and some walking or standing for brief periods of time. It also required frequent reaching, handling, talking and hearing and occasional fingering. Appellant was permanently restricted to standing and walking four hours, operating a vehicle without a clutch and pushing, pulling and lifting up to 30 pounds. He was not allowed to squat, kneel, climb, run, jump and crawl. Further, Dr. VanBuecken reviewed the description and physical demands of the selected position and approved the position. Based on the evidence of record, the Board finds that the selected position was within appellant's permanent work restrictions and was appropriate for a wage-earning capacity determination.

Further, the vocational rehabilitation counselor confirmed that the selected position is available in appellant's commuting area based on a labor market survey and her contact with employers in the area.

⁷ See *William H. Woods*, *supra* note 4; *Shadrick* *supra* note 3.

Finally, the Office properly determined appellant's loss of wage-earning capacity in accordance with the formula developed in *Shadrick*,⁸ and codified at section 10.403.⁹ In this regard, the Office indicated that appellant's salary on February 16, 2000, the date he sustained a recurrence of disability, was \$857.68 per week, that the current adjusted pay rate for his job on the date of injury was \$972.86 per week and that he was currently capable of earning \$348.00 per week, the pay rate of a receptionist. The Office then determined that appellant had a 36 percent wage-earning capacity, which when multiplied by \$857.68 totaled \$308.76 per week. The Office went on to determine that appellant had a loss of wage-earning capacity of \$548.92 by subtracting \$308.76 from \$857.68. The Office then multiplied \$548.92 by 3/4, as appellant had dependents, which amounted to a compensation rate of \$411.69 per week. The Office found that, based on the current consumer price index, appellant's current adjusted compensation rate was \$441.00. The Board finds that the Office's application of the *Shadrick* formula was proper and, therefore, it properly found that the position of receptionist reflected appellant's wage-earning capacity effective April 18, 2004.

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation effective April 18, 2004 based on its determination that the selected position of receptionist represented his wage-earning capacity.

⁸ See *Albert C. Shadrick*, *supra* note 3.

⁹ 20 C.F.R. § 10.403.

ORDER

IT IS HEREBY ORDERED THAT the January 24, 2005 and April 15, 2004 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 23, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board