

was expanded to include the conditions of torn medial meniscus of the right knee and right knee surgery. The Office commenced payment for compensation for temporary total disability. By decision dated August 26, 1998, the Office reduced appellant's compensation based on its determination that the selected position of part-time assembler reasonably represented his wage-earning capacity. By decision dated April 25, 2000, an Office hearing representative affirmed the August 26, 1998 decision.

In a March 7, 2002 decision,¹ the Board reversed the Office's decisions. The Board found that the Office erred in determining that the selected position reasonably represented appellant's wage-earning capacity. The Board therefore concluded that the Office failed to meet its burden of proof to justify modification of compensation benefits. The complete facts of this case are set forth in the Board's March 7, 2002 decision and are herein incorporated by reference. Appellant's entitlement to disability compensation was restored.

In a report dated May 6, 2002, Dr. Randall Smith, a Board-certified orthopedic surgeon, stated that appellant had severe post-traumatic arthritis of the right knee as a direct result of the September 1991 work injury. He advised that this was a progressive degenerative condition resulting from damage to the meniscus and articular cartilage of the right knee. Dr. Smith noted pain, swelling and buckling for the knee in addition to crepitus and painful and restricted range of motion. He stated that appellant found it very difficult to do daily activities, including climbing up and down steps, walking and sitting. Dr. Smith concluded that appellant had been totally disabled since September 18, 1991, and saw no chance of his disability ceasing at any time.

In order to determine appellant's current condition, the Office referred him for a second opinion examination with Dr. Anthony W. Salem, a Board-certified orthopedic surgeon. He diagnosed morbid obesity, degenerative arthritis of both knees and arthritis of the left ankle. Dr. Salem stated:

“[Appellant's] condition is not related to the work injury by cause, aggravation or precipitation. He had multiple degenerative changes that I feel preexisted his work incident. I feel that the patient's condition is permanent *i.e.*, his morbid obesity and multiple degenerative changes of his knees, ankles and back, which compromises his ability to perform any physical work. This is secondary to his long-standing obesity and to the work injury as described to me. Therefore, [appellant] had preexisting factors of disability, that being his morbid obesity, underlying degenerative changes in both knees, and the preexisting arthritis of his left ankle.... I feel that the goal of returning this patient to gainful employment would have to be at sedentary duty, because he can barely walk around. This is not related to the work injury, but to his obesity. I think that a vocational rehabilitation program would be worthwhile. It is inconceivable that this man has been out of work all of these years. [Appellant] does not continue to suffer the residuals of his work injury. This is based on his preexisting arthritic changes and morbid obesity....”

¹ Docket No. 00-2486 (issued March 7, 2002).

In a work capacity evaluation dated June 4, 2002, Dr. Salem indicated that appellant was capable of returning to work with restrictions on walking, standing, reaching, reaching above the shoulder, pushing more than 40 pounds, pulling more than 30 pounds and lifting more than 20 pounds.

The Office determined that there was a conflict in the medical evidence between the opinions of Dr. Smith, the attending physician, and Dr. Salem, the second opinion physician, regarding whether appellant was totally disabled. The Office referred him to Dr. Barry J. Snyder, a Board-certified family practitioner, for an impartial medical examination to resolve the conflict. In a report dated April 25, 2003, Dr. Snyder stated findings on examination and reviewed the medical history and statement of accepted facts. He stated that, although appellant showed some impairment, his presentation was somewhat embellished. Dr. Snyder advised that appellant's complaints of right knee pain with any motion were not credible. He asserted that, although appellant had some degree of pain and limited motion of his right knee, nothing he had reviewed in the clinical records indicated a basis for such incapacity. Dr. Snyder stated:

“Recognizing impairment of right knee and left ankle function as accepted facts, I agree with the recommendations that have been made to restrict his physical activities. He is capable of sedentary work without limitations, otherwise. That would limit him to seated work, occasionally lifting/carrying no more than 10 pounds. If further evaluation of his ankle shows findings that corroborate his ankle symptoms, I would continue those restrictions indefinitely. On the other hand, should MRI [magnetic resonance imaging] [scan] of his ankle show no evidence of significant ligament involvement or examination under anesthesia show there is no ligament laxity, he would be capable of greater physical activity. At the least, he could perform light work involving occasionally lifting/carrying 20 pounds and could walk or stand during work.”

In a work capacity evaluation dated April 25, 2003, Dr. Snyder released appellant to return to work with restrictions on walking, standing, reaching, reaching above the shoulder, pushing more than 40 pounds, pulling more than 30 pounds and lifting more than 20 pounds.

By letter dated May 28, 2003, the Office referred appellant for vocational rehabilitation. In a report dated November 11, 2003, a vocational rehabilitation counselor issued a report summarizing his efforts to find vocational training or suitable alternate employment for appellant within his physical restrictions. The vocational counselor recommended a position for appellant listed in the Department of Labor, *Dictionary of Occupational Titles*, (DOT) which, he determined, reasonably reflected appellant's ability to earn wages, that of market researcher/customer service worker, DOT #299.357-014.²

By notice dated December 17, 2003, the Office advised appellant of its proposal to reduce his compensation because the factual and medical evidence established that he was no

² The job description indicated that appellant would take customer calls over the telephone and evaluate customer needs, transmit orders, sell service plans, explain types of services available and provide basic information to the public, such as the amounts of fees. The job was sedentary and required appellant to use a keyboard with a mouse and engage in occasional reaching, handling and fingering.

longer totally disabled and had the capacity to earn wages as a market researcher/customer service worker at the weekly rate of \$290.00 in accordance with the factors outlined in 5 U.S.C. § 8115.³ The Office calculated that appellant's compensation rate should be adjusted to \$1,421.00 using the *Shadrick*⁴ formula. The Office indicated that appellant's salary on September 18, 1991, the date he began receiving compensation for temporary total disability, was \$568.00 per week, that his current, adjusted pay rate for his job on the date of injury was \$816.74, and that he was currently capable of earning \$290.00 per week, the rate of a market researcher/customer service worker. The Office therefore determined that appellant had a 36 percent wage-earning capacity, which when multiplied by 3/4 amounted to a compensation rate of \$272.64. The Office found that, based on the current consumer price index, appellant's current adjusted compensation rate was \$355.25. The Office stated that the case had been referred to a vocational rehabilitation counselor, who had located a position as a market researcher/customer service worker which he found to be suitable for appellant given his work restrictions and was available in appellant's commuting area. The Office allowed appellant 30 days in which to submit any contrary evidence.

In a follow-up hospital report dated January 7, 2004, Dr. Smith stated that appellant underwent a computerized axial tomography (CAT) scan which revealed a herniated nucleus pulposus at L4-5. The diagnosis of herniated disc at L4-5 was also indicated by an MRI scan dated July 5, 2001.

In a report dated January 14, 2004, Dr. Kenneth A. Morris, an osteopath, stated that appellant had complaints of persistent, daily symptoms involving his right knee and left ankle. He advised that appellant had severe degenerative joint disease of both knees and both ankles, and had difficulty with walking, standing and sleeping. Dr. Morris related that appellant had difficulty in sitting and arising from a sitting position and that consequently he suffered from depression. He opined that appellant had post-traumatic arthritis and internal derangements of the right knee and left ankle, chronic ankle sprain, chronic knee sprain and swelling. Dr. Morris stated that appellant was unable to work and he did not anticipate any significant change in his condition.

In a letter received by the Office on January 20, 2004, appellant contested the proposed reduction of compensation, contending that he was physically unable to perform the selected position. Appellant maintained that residuals from his work-related conditions precluded him from performing even sedentary work.

By decision dated January 27, 2004, the Office reduced appellant's compensation, finding that the weight of the medical evidence established that he was no longer totally disabled for work due to effects of his September 18, 1991 employment injury. The Office found that the position of market researcher/customer service worker represented his wage-earning capacity.

On February 16, 2004 appellant requested a hearing, which was held on March 2, 2005.

³ 5 U.S.C. § 8115.

⁴ *Albert C. Shadrick*, 5 ECAB 376 (1953); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.814.2 (April 1995).

In a report dated February 9, 2005, Dr. Smith related appellant's complaints of constant, severe pain in both knees and both ankles. He stated that appellant had bilateral knee and ankle degenerative joint disease with synovitis, conditions which caused a gait dysfunction and buckling. Dr. Smith also advised that appellant had degenerative discogenic disease in the lumbar spine with low back syndrome and sciatica. He noted that he had discussed the possibility of knee replacements with appellant, as well as ankle supports, special shoes and braces. Dr. Smith concluded that appellant's difficulties had begun with his September 1991 work injury and had since progressed because of his size and inability to exercise. This resulted in appellant's having a chronic and permanent problem which he was coping with to the best of his ability.

In a report dated February 28, 2005, Dr. Morris stated that appellant had experienced pain in his right knee and left ankle since the September 1991 work injury. He advised that appellant had extremely limited mobility, his right knee frequently buckled and swelled and his left ankle was unstable and prone to swelling. Dr. Morris stated that appellant's severe limitations of his right knee and left ankle had altered his gait and weight-bearing ability and had added significant wear and strain to his left knee and right ankle. Appellant also had problems sleeping. Dr. Morris stated that appellant's physical problems had contributed to significant psychosocial problems in his everyday life. He concluded that appellant was permanently disabled and had no potential for future employment at his previous job.

By decision dated June 3, 2005, an Office hearing representative affirmed the January 27, 2004 wage-earning capacity determination.

LEGAL PRECEDENT

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.⁵

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.⁶ 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.⁷

In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving

⁵ *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

⁶ *Samuel J. Chavez*, 44 ECAB 431 (1993); *Hattie Drummond*, 39 ECAB 904 (1988); see 5 U.S.C. § 8115(a); A. Larson, *The Law of Workers' Compensation* § 57.22 (1989).

⁷ *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.⁸

ANALYSIS

In this case, the Office found that a conflict existed in the medical evidence between Dr. Smith, appellant's treating physician, and Dr. Salem, a second opinion physician. The Office referred appellant to Dr. Snyder, selected as the impartial medical specialist. In an April 25, 2003 report, Dr. Snyder found that appellant was able to perform sedentary work with restrictions on occasionally lifting and carrying no more than 10 to 20 pounds, walking, standing, reaching, reaching above the shoulder, pushing more than 40 pounds and pulling more than 30 pounds. He provided a thorough report which included an accurate factual and medical background of the case and set forth findings on physical examination. The Board finds that the report of Dr. Snyder constitutes the weight of medical opinion and establishes appellant's capacity for work within specified physical limitations.

The rehabilitation counselor assigned to assist appellant in placement efforts identified two positions listed in the DOT, appropriate for appellant based on Dr. Snyder's work restriction evaluation. Based on these restrictions, the Office selected a position as a market researcher/customer service worker which it found suitable for appellant. The Office used the information provided by the rehabilitation counselor of the prevailing wage rate in the area for a market researcher/customer service worker, and established that jobs in the position selected for determining wage-earning capacity were reasonably available in the general labor market in the geographical commuting area in which the employee lived, as confirmed by state officials. Finally, the Office properly applied the principles set forth in the *Shadrick*⁹ decision to determine appellant's employment-related loss of wage-earning capacity.

The Office properly found that appellant was no longer totally disabled as a result of his September 18, 1991 employment injury and it followed established procedures for determining appellant's employment-related loss of wage-earning capacity. The Board therefore finds that the Office has met its burden of justifying a reduction in appellant's compensation for total disability.

Following the June 3, 2004 decision, appellant submitted reports from Dr. Smith and Dr. Morris. However, these physicians merely reiterated findings and conclusions expressed in previous reports. Dr. Morris stated that appellant was experiencing pain in his right knee and left ankle stemming from the September 1991 work injury, and noted that the limitations in his right knee and left ankle had resulted in extremely limited mobility, swelling and instability. He noted that these limitations had altered his gait and weight-bearing ability. Dr. Morris reiterated that appellant was incapable of returning to work with the employing establishment. However, he expressed no opinion as to whether appellant was capable of performing alternative employment within the restrictions outlined by Dr. Snyder. Dr. Smith noted appellant's complaints of constant, severe pain in both knees and both ankles and reiterated the diagnoses of bilateral knee

⁸ *Barbara J. Warren*, 51 ECAB 413 (2000).

⁹ *Shadrick*, *supra* note 4.

and ankle degenerative joint disease with synovitis. He also stated that these conditions had caused gait dysfunction and buckling. Dr. Smith advised that these difficulties had begun with his September 1991 work injury and had since developed into a chronic and permanent problem because of his size and inability to exercise. However, Dr. Smith was merely restating one side of the conflict in medical evidence resolved by Dr. Snyder's referee report. His February 9, 2005 report did not vitiate the Office's finding that Dr. Snyder's opinion, which released appellant to return to sedentary employment with restrictions, represented the weight of the medical evidence.

Accordingly, the Office hearing representative, in his June 3, 2005 decision, properly affirmed the Office's determination which reduced appellant's compensation effective February 22, 2004, based on his capacity to perform the duties of a market researcher/customer service worker. The Board therefore affirms the June 3, 2005 Office decision affirming the January 27, 2004 Office decision reducing appellant's compensation.

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation effective February 22, 2004, based on his capacity to perform the duties of a market researcher/customer service worker.

ORDER

IT IS HEREBY ORDERED THAT the June 3, 2005 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: July 5, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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