

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

W.M., Appellant

and

**SOCIAL SECURITY ADMINISTRATION,
Richmond, CA, Employer**

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**Docket No. 09-1075
Issued: February 1, 2010**

Appearances:
Hank Royal, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 16, 2009 appellant filed a timely appeal of the April 7, 2008 merit decision of the Office of Workers' Compensation Programs, which reduced his compensation benefits based upon his ability to earn wages in the constructed position of manager of credit and collections.¹ Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether the constructed position of manager credit and collection represents appellant's wage-earning capacity.

¹ The Board notes that in a May 6, 2008 decision, the Office granted appellant a schedule award for a 46 percent permanent impairment of his right lower extremity for the period April 13, 2008 through October 27, 2010. Appellant did not seek review of the schedule award decision and the Board will not address it on this appeal.

FACTUAL HISTORY

Appellant, a 57-year-old claims authorizer, sustained injuries to his low back and lower extremities when he tripped on the stairs at work on January 15, 2003. The Office accepted his claim for right ankle strain; low back strain; displacement of the lumbar disc; and right foot drop.² Appellant returned to limited duty on March 10, 2004. He retired as of May 20, 2004.³

Appellant came under the treatment of Dr. Michael Hebrard, a Board-certified physiatrist. In a November 5, 2003 report, he provided a review of the accepted injury and medical treatment. Dr. Hebrard noted that appellant underwent surgery for a lumbar discectomy on June 6, 2003 and had complaints of low back pain radiating down the right lower extremity to his foot. On examination, he noted palpable back spasms along the lumbar paraspinal muscles with a slight decrease to light touch over the medial and lateral aspects of the right calf and foot. Straight leg raising was positive in both the seated and supine positions. Dr. Hebrard noted that appellant was postoperative with residual right foot drop. He noted that appellant has residual radicular symptoms involving the low back and right leg. Dr. Hebrard recommended an electromyogram/nerve conduction study.

Appellant was referred for examination to Dr. John Randolph Chu, a Board-certified orthopedic surgeon. In a June 23, 2004 report, he reviewed the history of injury and lumbar discectomy at L4-5. Appellant noted that he had retired but still had low back discomfort, for which he recently had an epidural injection. On examination, Dr. Chu noted appellant's gait was consistent with a right foot drop. No spasm of the lumbar spine was found. Straight leg raising was negative in the seated position and positive in the supine position at 70 degrees. Dr. Chu diagnosed residual right L5 radiculopathy with degenerative disc disease of the lumbar spine. He found that appellant was capable of returning to sedentary work full time at eight hours a day subject to physical restriction. Dr. Chu completed an OWCP-5 work limitation form limiting walking, standing, pushing, pulling and lifting to two hours a day with lifting limited to 20 pounds. Appellant was restricted from twisting, squatting, kneeling, climbing or operating a motor vehicle.

The Office forwarded the report of Dr. Chu to Dr. Hebrard for review. In a July 28, 2004 report, Dr. Hebrard noted that appellant would not be able to return to his regular employment. Due to residuals of his low back condition, he recommended that appellant return to work four hours a day. Dr. Hebrard found decreased active range of motion of the dorsolumbar spine, which limited appellant's ability to bend, sit or stand for prolonged periods of time.

² The record reveals that appellant had a prior history of surgery at C5-6 in 1999. A February 6, 2003 x-ray of the lumbar spine revealed mild degenerative spondylosis with disc narrowing at L1-2, L2-3 and L5-S1. The vertebral body heights were maintained. A March 31, 2003 magnetic resonance imaging (MRI) scan revealed neural foraminal narrowing at L5-S1, a two millimeter retrolisthesis of L5 on S1, moderate disc space narrowing and desiccation.

³ While the Office of Personal Management (OPM) authorized appellant's retirement, he remained on benefits under the Federal Employees' Compensation Act. The record reflects that he elected benefits under OPM while in receipt of compensation under the most recent schedule award.

The Office found a conflict in medical opinion between Dr. Hebrard and Dr. Chu as to appellant's work limitations due to residuals of his accepted injury. It referred him to Dr. J.C. Pickett, a Board-certified internist, for an impartial medical examination. In a May 31, 2005 report, Dr. Pickett found that appellant had reduced range of motion of the spine, reduced straight leg raising bilaterally, inability to dorsiflex the left foot and ankle, sensory disturbances on the right side, atrophy on the right side, pain requiring narcotics, muscle relaxants and an anti-neurogenic medication to allow him to continue. He opined that appellant could start work at four hours a day, probably for a month or two and then increase work by an hour a month until he reached a full eight-hour day. Dr. Pickett noted, however, that his medications, which included narcotics and a muscle relaxant, might affect his mental state. He stated that appellant would require frequent breaks from sitting at a computer, perhaps as often as every 30 minutes for 5 minutes.

The Office referred appellant back to Dr. Pickett, the impartial specialist, for clarification of his medical opinion as to appellant's work capabilities. It noted that it was unclear whether appellant could currently work eight hours a day, five days per week. In a June 20, 2006 report, Dr. Pickett provided detailed examination findings, noting that appellant moved about the room with a slapping gait with the right foot, which he had to pick up to put down. In the standing position, he flexed forward 80 degrees; he extended in the range of 20 degrees; lateral bending was 30 degrees to the right and 30 degrees to the left with minimal pain. Appellant's rotation was to 80 degrees to the right and to the left. A deep knee bend was done down to the last 20 degrees, but with fair ease, watching for his balance. In the seated position, cervical range of motion showed flexion to chin-on-chest, extension of 60 degrees, rotation of 80 degrees bilaterally, lateral bending of 45 degrees bilaterally. The shoulders showed good range of motion, although abduction was at 120 degrees on the right and 140 degrees on the left, while forward flexion was at 140 degrees on the right and 155 degrees on the left. External rotation was matching at 70 degrees and internal rotation was matching at 65 degrees bilaterally. In the supine position, straight leg raising was tight and could not be brought beyond 60 degrees, with mild to moderate pain. Range of motion of the hips, knees and ankles was stable. The feet showed good passive motion. There was a lack of full dorsiflexion on the right, compared to the left and no active motion of the forefoot or toes involving any of the extensor muscles. Flexion on the left was good. Eversion and inversion done passively was equal bilaterally. Reflexes at the patellar level were 2+. At the Achilles' level, it was a trace on the right and 1+ on the left. Dr. Pickett opined that appellant could work four hours a day on a five-day per week schedule. He would require frequent breaks, as well as the ability to sit or stand as needed and could lift no more than 25 pounds. Appellant was not able to work overhead, would not be able to do any significant walking and could not climb. Dr. Pickett noted that, after having worked for several months, appellant could increase his hours depending on the type and amount of work he was offered.

Based on the report of the impartial specialist, appellant was referred for vocational rehabilitation services. The employing establishment advised that no modified work was available within his physical restrictions.⁴

⁴ The record reflects that appellant's wife died on February 24, 2007 and rehabilitation job efforts were interrupted.

Appellant continued under treatment by Dr. Hebrard, who noted his capacity to work four hours per day with restrictions. On September 7, 2006 he diagnosed lumbosacral radiculopathy and recurrent flare-ups, with left lower extremity radicular symptoms. On September 21, 2006 Dr. Hebrard noted that appellant was followed up for a flare-up of back pain. On examination, he noted that appellant was in slight distress with palpable spasms at the waist. Dr. Hebrard recommended an MRI scan and that appellant obtain a back brace. He continued appellant's current work status.

On March 30, 2007 Dr. Hebrard released appellant to return to work on April 2, 2007 at eight hours a day. He listed temporary alternative work restrictions of no prolonged standing or walking, sitting up to 30 minutes, allowance to stretch every 30 minutes for 5 minutes and no lifting over 25 pounds.

Based upon medical restrictions provided by Dr. Hebrard, the rehabilitation specialist identified the constructed position of "manager, credit and collections" as vocationally and medically suitable.⁵ She noted that it was a sedentary position within appellant's medical restrictions and required occasional lifting up to 10 pounds. It was performed in an office setting with no climbing, stooping, kneeling, crouching, crawling or balancing. Appellant's extensive experience as a collections manager and supervisor met the two- to four-year vocational preparation qualification. Pursuant to a June 25, 2007 labor market survey, the position was full time and available in sufficient numbers in appellant's commuting area so as to be reasonably available.

By letter dated July 6, 2007, the Office advised appellant that the constructed position of a manager of credit and collections was found to be within his work limitations and that he was expected to cooperate fully in efforts to secure such a position. Appellant was further advised that the Office would provide 90 days of placement services so that he might reach this goal and that, if he had not obtained employment within the 90-day period, his compensation could be reduced based on his ability to earn the wages of the identified position (\$52,560.00 per annum).

In a December 31, 2007 report, the rehabilitation counselor noted that she had provided job leads to appellant on a weekly basis and that he had received services to assist him in securing employment for more than 90 days. However, appellant was unable to obtain employment, despite extended placement services.

On February 15, 2008 the Office issued a notice of proposed reduction of compensation, on the grounds that appellant was partially disabled as a result of his accepted work-related injury and could perform the position of a manager of credit/collections. It found that appellant was physically capable of performing the duties of the position. The Office further found that he was vocationally qualified for the position based upon his job experience and education. The position was performed in sufficient numbers in appellant's commuting area so as to be considered reasonably available. Appellant was provided 30 days to submit additional evidence or argument in support of any objection to the proposed reduction.

⁵ Dictionary of Occupational Titles (DOT), No. 169.167-086. The position includes directing and coordinating activities of workers engaged in conducting credit investigations and collecting delinquent accounts of customers.

By letter dated January 8, 2008, appellant addressed his difficulty in obtaining employment, noting that employer's were favoring a younger workforce.

In an April 7, 2008 decision, the Office reduced appellant's wage-loss compensation based on his ability to earn \$930.37 per week as manager of credit/collections. The reduction in compensation was effective April 13, 2008.

LEGAL PRECEDENT

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 the 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.⁷ 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 wage-earning capacity in his or her disabled condition.⁸

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 medical evidence on which the Office relies must provide a detailed description of his condition.⁹ Additionally, a wage-earning capacity determination must be based on a reasonably current medical evaluation.¹⁰

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 DOT 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

⁶ 20 C.F.R. §§ 10.402, 10.403 (2008); see *Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

⁷ 5 U.S.C. § 8115(a) (2006).

⁸ *Id.* See *Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

⁹ *Samuel J. Russo*, 28 ECAB 43 (1976).

¹⁰ *Carl C. Green, Jr.*, 47 ECAB 737, 746 (1996).

other applicable service.¹¹ 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.¹²

ANALYSIS

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.¹³ The Board finds the Office met its burden in this case. The evidence of record establishes that appellant is capable of performing the duties of the constructed position of a manager, credit and collections.

Appellant's claim was accepted for a right ankle strain, low back strain, herniated disc and right foot drop following his injury on January 15, 2003. He underwent a lumbar discectomy on June 6, 2003. Appellant was treated by Dr. Hebrard, a specialist in physical medicine and rehabilitation and he returned to limited-duty work until his retirement.

The medical evidence reflects that appellant is not totally disabled. A conflict in medical opinion arose between Dr. Hebrard and Dr. Chu as to the extent of appellant's work limitations a capacity for full-time employment. The case was referred in 2005 to Dr. Pickett, who provided work limitations and advised that appellant could initially start work at four hours a day and overtime, increase work by an hour a month until he reached an eight-hour day. On June 20, 2006 Dr. Pickett reiterated that appellant was not totally disabled and could start work four hours a day on a five-day per week schedule. He provided work limitations and noted that, after having worked for several months, appellant could increase his hours depending on the nature of the work he was offered. Based on the finding of the impartial medical specialist, appellant was referred for vocational rehabilitation services.

Appellant continued under the treatment of Dr. Hebrard through 2006, who noted that his capacity for work was four hours a day. On March 30, 2007 Dr. Hebrard released appellant to return to work as of April 2, 2007 for eight hours a day. He noted limitations on prolonged standing, walking and sitting, allowance for appellant to move around and stretch for five minutes every 30 minutes and limited lifting to a maximum of 25 pounds.¹⁴

Based on these work limitations, the vocational rehabilitation counselor contacted appellant's former employer to determine whether a job offer could be made. The employing establishment, however, was not able to accommodate appellant's physical restrictions. Therefore, the vocational rehabilitation counselor determined that the constructed position of

¹¹ The job selected for determining wage-earning capacity must be a position that is reasonably available in the general labor market in the commuting area in which the employee lives. *David L. Scott*, 55 ECAB 330, 335 n.9 (2004). Lack of current job openings does not equate to a finding that the position was not performed in sufficient numbers to be considered reasonably available. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(c) (December 1995).

¹² *Albert C. Shadrick*, 5 ECAB 376 (1953); 20 C.F.R. § 10.403(d).

¹³ *Curtis Hall*, 45 ECAB 316 (1994).

¹⁴ The Board notes that these limitations are similar to those recommended in 2006 by Dr. Pickett who limited significant walking, recommended frequent breaks and restricted lifting more than 25 pounds.

“manager, credit and collection” DOT number 169.167-086 was in keeping with appellant’s educational and work experience and conformed to the medical restrictions recommended by Dr. Hebrard, the attending physician. The position selected was sedentary in nature and required occasional lifting up to 10 pounds. There was no climbing, balancing, stooping, kneeling, crouching or crawling required or exposure to extreme weather conditions as the work was performed in an office setting. Appellant would have the capacity to take breaks as recommended. The vocational counselor noted that appellant satisfied the two to four-year specific vocational preparation requirement as he had extensive prior experience in his former employment as a claims authorizer. She determined that the position was performed in sufficient numbers as to be reasonably available in appellant’s commuting area.

Appellant noted that he was unsuccessful in securing employment during the 90-day period he was provided job leads and employment services, stating that employer’s were favoring a younger workforce. The Board has held that the fact that a claimant is unable to secure employment does not establish that the constructed position on which the wage-earning capacity determination is based is not vocationally suitable.¹⁵ Appellant did not challenge the selected position on the basis that it was not medically suitable and the evidence of record establishes his physical ability to perform the sedentary duties of manager, credit and collection.

The Office properly computed appellant’s wage-earning capacity under the *Shadrick* formula. It compared the current pay rate for the job held when injured of \$1,349.85 with the weekly wage rate of the constructed position of \$930.37 to find that appellant had a 69 percent wage-earning capacity. Appellant has not contended that the Office’s calculations under *Shadrick* were in error. The Board finds that the Office properly considered the availability of suitable employment, appellant’s physical limitations, his usual employment and qualifications, age and nature of injury in determining that the manager of credit and collection position represented his wage-earning capacity.

CONCLUSION

The Board finds that the constructed manager of credit and collection position represents appellant’s wage-earning capacity.

¹⁵ See *Lawrence E. Price*, 54 ECAB 590 (2003).

ORDER

IT IS HEREBY ORDERED THAT the April 7, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 1, 2010
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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