



## **FACTUAL HISTORY**

This case was previously before the Board. In an August 21, 2007 decision,<sup>1</sup> the Board reversed in part the Office's August 11, 2006 decision with regard to the denial of appellant's recurrence of disability claim for the period August 20 to October 25, 2004 and affirmed the decision with regard to the rescission of his compensation for the period January 17 to 21, 2005.<sup>2</sup> The relevant medical and factual evidence is set forth.

On April 10, 2007 the Office found a conflict in the medical opinion evidence. Dr. Michael S. McManus, an attending Board-certified occupational medicine physician, advised that appellant's employment-related conditions had reached maximum medical improvement and he could work full time with permanent restrictions. Dr. Richard E. Hall, an Office referral physician, opined that appellant's employment-related conditions had resolved and he was capable of performing his regular work duties with no restrictions. On May 1, 2007 the Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Donald D. Hubbard, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a May 18, 2007 medical report, Dr. Hubbard reviewed a detailed history of appellant's employment injuries, medical treatment and family background. He listed his bilateral feet, hand, elbow and shoulder symptoms. On physical examination, Dr. Hubbard noted essentially normal findings with a positive Tinel's sign over the left median nerve at the wrist, right shoulder pain and mild tenderness of the bilateral lateral epicondyle. By history, he diagnosed pain to appellant's right shoulder, lateral upper arm, bilateral elbow/proximal forearm and distal upper arm, bilateral feet and low back. Dr. Hubbard advised that appellant's bilateral elbow and arm condition was secondary to his accepted bilateral lateral epicondylitis. He advised that appellant's bilateral foot condition was secondary to arthritis. Dr. Hubbard noted numbness, tingling and pins and needles sensations in appellant's bilateral upper extremity, by history. He stated that appellant sustained the same condition in the right anterolateral/posterolateral to mid thigh area of the lower extremity which was possibly related to his history of low back pain. Dr. Hubbard further diagnosed bilateral carpal tunnel syndrome and bilateral wrist flexor tenosynovitis secondary to the accepted employment-related injuries. He stated that appellant potentially sustained unrelated left C6 radiculitis. Dr. Hubbard diagnosed right glenohumeral joint instability by history and stated that it was partially confirmed on physical examination.

Dr. Hubbard advised that appellant continued to experience residual pain and/or neurologic complaints consistent with but not diagnostic of his work-related conditions. The objective findings on physical examination suggested that the employment-related conditions resolved on or about December 23, 2004. Dr. Hubbard noted, however, that the positive Tinel's

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<sup>1</sup> Docket No. 06-2135 (issued August 21, 2007).

<sup>2</sup> On April 17, 2003 appellant, then a 42-year-old welder, filed an occupational disease claim alleging bilateral epicondylitis of the elbows, bilateral wrist flexor tenosynovitis and bilateral carpal tunnel syndrome caused by constant use of his hands and arms in flexed and articulated positions. The Office accepted his claim. Appellant was removed from employment effective April 7, 2006 as he was unable to perform his work duties due to medical reasons.

sign over the median nerve at the wrist/deep transverse carpal ligament was representative of reinnervation of the median nerve to that level which was consistent with progressive resolution of the left carpal tunnel syndrome. He advised that further medical treatment was not necessary as appellant had consistently refused surgical intervention. Dr. Hubbard recommended repeat electrodiagnostic testing to determine whether the upper extremity conditions had resolved. He stated that there was no specific problem hindering appellant's recovery except possibly his awareness that significant worsening of his upper extremity conditions may occur with resumption of his full-time work duties as a welder. In a May 18, 2007 work capacity evaluation (Form OWCP-5c), Dr. Hubbard found that appellant was unable to perform his regular work duties as a welder based on objective findings. There was a high risk of temporary or permanent aggravation if appellant had no restrictions. Dr. Hubbard advised that appellant could perform work duties, eight hours a day, with restrictions on no repetitive use of the wrists and elbows, pushing and pulling more than 50 pounds up to four hours a day or use of vibratory tools and power gripping.

By letter dated October 16, 2007, the Office requested that Dr. Hubbard submit a supplemental report which clarified whether appellant's employment-related conditions had resolved and whether he could perform his regular work duties. It also requested that he schedule electrodiagnostic testing to confirm whether the bilateral carpal tunnel syndrome had resolved.

In a December 21, 2007 report, Dr. Hubbard stated that the findings on physical examination were unchanged from the May 18, 2007 examination, with the exception of a normal two-point discrimination four to five millimeters in the bilateral thumb and finger digits and bilateral positive Tinel's sign over the median nerves of the wrists at the sites of the deep transverse carpal ligaments. Dr. Hubbard reviewed the results of a December 10, 2007 electromyogram/nerve conduction velocity (EMG/NCV) study that was performed by Dr. Donald A. Bright, a Board-certified neurologist. It revealed moderate left and right carpal tunnel syndrome. Dr. Hubbard advised that appellant was capable of working as a welder with restrictions due to the unresolved bilateral carpal tunnel syndrome. In December 21, 2007 Form OWCP-5c, Dr. Hubbard restricted appellant to no repetitive use of his wrists and elbows up to two hours per day.

On January 4, 2008 the Office referred appellant to a vocational rehabilitation counselor.<sup>3</sup>

In a January 5, 2008 letter, appellant's attorney reviewed Dr. Hubbard's December 21, 2007 report. He requested that the Office include the prior recommended restriction on the use of vibrating tools.

On June 12, 2008 a vocational rehabilitation counselor identified the position of motor vehicle dispatcher as being within appellant's physical limitations, vocational skills and geographical area. The motor vehicle dispatcher position, as listed in the Department of Labor, *Dictionary of Occupational Titles (DOT)*, was classified as a sedentary position. The physical requirements included lifting up to 10 pounds occasionally, frequent reaching and talking,

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<sup>3</sup> On January 9, 2008 the employing establishment advised the Office that it could not provide appellant with employment based on his restrictions.

occasional handling, fingering and near acuity. No climbing, balancing, stooping, kneeling, crouching, crawling, feeling, taste/smelling, far acuity, depth perception, accommodation, color vision or field of vision was required. The counselor found that the computer courses appellant completed and his performance on general learning ability, verbal, clerical and organization skill testing met the specific vocational preparation. The counselor listed the average weekly earnings of a motor vehicle dispatcher ranging from \$11.76 to \$13.82 per week. The counselor determined that the position was available in sufficient numbers on a full-time and part-time basis in appellant's commuting area based on a labor market survey.

In an October 27, 2008 notice, the Office advised appellant that it proposed to reduce his wage-loss compensation because the medical and factual evidence of record established that he was no longer totally disabled. It found that he had the capacity to earn the wages of a motor vehicle dispatcher based on the restrictions set forth by Dr. Hubbard. Appellant was provided 30 days to submit additional evidence or argument in support of any objection to the proposed reduction.

In a November 25, 2008 letter, appellant contended that he was unable to perform the duties of a motor vehicle dispatcher. He was in too much pain and numbness caused him to drop items.

By decision dated December 12, 2008, the Office reduced appellant's compensation benefits effective December 21, 2008. Based on the formula in *Albert C. Shadrick*,<sup>4</sup> the Office determined that his compensation would be reduced to \$2,014.00 every four weeks. Appellant's salary on the date his disability recurred on April 7, 2006 was \$1,090.86 per week and the current adjusted pay rate for his job on the date of injury was \$1,155.07 per week as of October 22, 2008. He was found currently capable of earning \$470.70 per week, the pay rate of a motor vehicle dispatcher. The Office determined that appellant had a 41 percent wage-earning capacity or 59 percent loss of wage-earning capacity, which resulted in an adjusted wage-earning capacity of \$447.25 per week, or a loss of wage-earning capacity of \$643.61 per week. The Office concluded that, based upon a three-fourths compensation rate, appellant's new compensation rate was \$2,014.00 every four weeks, less health benefits premium of \$296.76, basic life insurance premium of \$17.70 and optional life insurance premium of \$26.52 for a net compensation every four weeks of \$1,673.02.

On January 9, 2009 appellant requested an oral hearing before an Office hearing representative regarding the December 12, 2008 decision.

In a December 17, 2008 letter received on January 30, 2009, appellant's attorney contended that appellant was physically unable to perform the duties of a motor vehicle dispatcher. He stated that appellant increasingly experienced trouble performing repetitive tasks with his wrists and elbows, noting Dr. Hubbard's restriction on the use of his wrists and elbows to two hours a day. Counsel requested that Dr. Hubbard be provided a description of the constructed position to determine whether appellant could safely perform the job.

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<sup>4</sup> 5 ECAB 376 (1953).

In a March 25, 2009 decision, an Office hearing representative set aside the December 12, 2008 decision and remanded the case to the Office to obtain an opinion from Dr. Hubbard as to whether appellant could perform the physical requirements of the motor vehicle dispatcher position.

On April 28, 2009 the Office requested that Dr. Hubbard review the job description and physical requirements of a motor vehicle dispatcher and address whether appellant could perform the job within the restrictions he previously recommended.

In a May 21, 2009 report, Dr. Hubbard reviewed the description of the motor vehicle dispatcher position and advised that appellant could perform the duties of the constructed position. He stated that none of the necessitated duties of the position would aggravate any residual right or left upper limb condition or pose any risk of aggravation of the accepted upper extremity conditions. Dr. Hubbard related that activities such as repetitive use of the bilateral upper extremities were remarkably absent in the work activities of a motor vehicle dispatcher based on the description he reviewed.

In a May 15, 2009 report, Dr. McManus listed his findings on physical examination and diagnosed bilateral early/mild carpal tunnel syndrome and chronic bilateral lateral and medial epicondylitis of the elbows. He advised that appellant's permanent work restrictions were unchanged.

In a May 29, 2009 decision, the Office again reduced appellant's compensation effective December 21, 2008 based on his ability to work as a motor vehicle dispatcher. It found that the special weight of medical opinion was accorded to Dr. Hubbard. The Office applied the *Shadrick* formula and determined that appellant's compensation would be reduced to \$1,673.02 every four weeks.

### **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.<sup>5</sup>

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 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.<sup>6</sup> Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment

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<sup>5</sup> *William H. Woods*, 51 ECAB 619 (2000); *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

<sup>6</sup> *Samuel J. Chavez*, 44 ECAB 431 (1993).

conditions.<sup>7</sup> The job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives.<sup>8</sup>

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.<sup>9</sup> Finally, application of the principles set forth in *Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.<sup>10</sup> This has been codified by the regulations in 20 C.F.R. § 10.403(c).

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 impairment results from both injury-related and preexisting conditions, but not impairments resulting from post injury or subsequently acquired conditions.<sup>11</sup> 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 the employee may receive compensation.<sup>12</sup>

### ANALYSIS

Appellant received compensation for total disability due to his accepted bilateral epicondylitis of the elbows, bilateral wrist flexor tenosynovitis and bilateral carpal tunnel syndrome. He was removed from employment by the employer effective April 7, 2006 as he was unable to perform his work duties due to medical reasons. In finding that appellant was physically capable of performing the duties of a motor vehicle dispatcher as of December 21, 2008, the Office relied on the medical opinion and work capacity evaluation of Dr. Hubbard, the impartial medical specialist. The Board finds that the Office properly determined that appellant was physically capable of performing the duties of the constructed motor vehicle dispatcher position.

A conflict in the medical opinion arose between Dr. McManus, an attending physician, and Dr. Hall, an Office referral physician, regarding appellant's capacity for work.

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<sup>7</sup> *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

<sup>8</sup> *Id.* The commuting area is to be determined by the employee's ability to get to and from the work site. See *Glen L. Sinclair*, 36 ECAB 664, 669 (1985).

<sup>9</sup> *Karen L. Lonon-Jones*, 50 ECAB 293, 297 (1999).

<sup>10</sup> See *William H. Woods*, *supra* note 5; *Shadrick*, *supra* note 4.

<sup>11</sup> *Sherman Preston*, 56 ECAB 607 (2005).

<sup>12</sup> *John D. Jackson*, 55 ECAB 465 (2004).

Dr. McManus opined that appellant could work full time with permanent restrictions. Dr. Hall opined that appellant could perform his regular work duties with no restrictions.

In a May 18, 2007 report, Dr. Hubbard found that, although appellant's continuing residual pain and neurologic complaints were not fully demonstrated by objective findings on physical examination, they were consistent with the accepted employment-related conditions. He advised that physical examination findings suggested that appellant's employment-related conditions had resolved as of December 23, 2004. Dr. Hubbard opined that appellant could perform his work duties as a welder on a full-time basis. In a work capacity evaluation, Dr. Hubbard stated that appellant could work eight hours a day within restrictions specified of no repetitive use of his wrists and elbows, no pushing and pulling more than 50 pounds up to 4 hours a day and no use of vibratory tools and power gripping. The Office subsequently requested that Dr. Hubbard clarify his opinion as to whether appellant's employment-related conditions had resolved and whether he was able to perform his regular work duties.

In a December 21, 2007 report, Dr. Hubbard reviewed the results of recent diagnostic studies and opined that appellant could perform duties as a welder with restrictions due to unresolved bilateral carpal tunnel syndrome. In an accompanying form, he restricted appellant to no repetitive use of wrists and elbows up to two hours a day. Following remand by an Office hearing representative, the case was sent back to Dr. Hubbard to review the description of the contractual motor vehicle dispatcher position and an opinion on whether appellant could perform such duties.

In a May 21, 2009 report, Dr. Hubbard reviewed the motor vehicle dispatcher description and advised that appellant was capable of performing the constructed position. He stated that none of the duties of the position would aggravate any of the residual right or left upper extremity conditions or pose any risk of aggravation of his employment-related upper extremity conditions. Dr. Hubbard stated that the position did not involve repetitive use of the bilateral upper extremities which could cause or aggravate appellant's established overuse conditions. The Board finds that Dr. Hubbard's thorough and well-rationalized opinion is based on a complete and accurate factual and medical background and is entitled to special weight accorded an impartial medical specialist. His opinion establishes that appellant has the physical capacity to perform the motor vehicle dispatcher position.

Dr. McManus advised that appellant had bilateral early/mild carpal tunnel syndrome and chronic bilateral lateral and medial epicondylitis of the elbows. He stated that appellant's permanent work restrictions were unchanged. Dr. McManus did not address the issue of whether appellant could perform the duties of the motor vehicle dispatcher position. Moreover, he was part of the conflict in medical opinion for which appellant was referred to Dr. Hubbard.<sup>13</sup> The Board finds that the opinion of Dr. McManus is insufficient to overcome the well-rationalized medical opinion of Dr. Hubbard.<sup>14</sup>

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<sup>13</sup> See *Jaja K. Asaramo*, 55 ECAB 200 (2004) (submitting a report from a physician who was on one side of a medical conflict that an impartial specialist resolved is generally insufficient to overcome the weight accorded to the report of the impartial medical examiner or to create a new conflict).

<sup>14</sup> *Michael Hughes*, 52 ECAB 387 (2001).

The vocational rehabilitation counselor determined that appellant was able to perform the position of motor vehicle dispatcher. The counselor opined that, based on his experience, training and a labor market survey, he was well qualified for the position of motor vehicle dispatcher and that sufficient positions were reasonably available in his commuting area and met the physical restrictions established by Dr. Hubbard.

The Office considered the proper factors, such as availability of employment and appellant's physical limitations, usual employment, age and employment qualifications in determining that the motor vehicle dispatcher position represented appellant's wage-earning capacity.<sup>15</sup> The weight of the evidence establishes that appellant had the requisite physical ability, skill and experience to perform the duties of motor vehicle dispatcher and that such a position was reasonably available within the general labor market of his commuting area.

The Board finds that the Office properly determined appellant's loss of wage-earning capacity in accordance with the *Shadrick* formula and codified at section 10.403 of the Office's regulations.<sup>16</sup> The Office found that appellant's salary when his disability recurred on April 7, 2006 was \$1,090.86 per week, that the current adjusted pay rate for his job on the date of injury was \$1,155.07 per week and that he was currently capable of earning \$470.70 per week, the rate of the motor vehicle dispatcher. It then determined that he had a 41 percent wage-earning capacity, which resulted in an adjusted wage-earning capacity of \$447.25. The Office then determined that appellant had a loss of wage-earning capacity of \$643.61 per week. It concluded that, based on a three-fourths rate, appellant's new compensation rate was \$2,014.00 every four weeks. The Office made deductions of \$296.76 for health benefits premium, \$17.70 for basic life insurance premium and \$26.52 for optional life insurance premium for a net compensation of \$1,673.02 each four-week period. The Board finds that the Office correctly applied the *Shadrick* formula to determine the position of motor vehicle dispatcher reflected appellant's wage-earning capacity effective December 21, 2008.<sup>17</sup>

On appeal, appellant contended that he was denied administrative due process as he was not provided with a prereduction notice prior to the May 29, 2009 decision. He contended that he had a valid property interest in his compensation benefits and should have been allowed to submit relevant evidence or argument in support of his entitlement to ongoing compensation. In *Lan Thi Do*,<sup>18</sup> the Board addressed *Raditch v. United States*.<sup>19</sup> The Board noted that a violation of procedural due process rights, such as the termination of compensation without pretermination notice, "requires only a procedural correction, not the reinstatement of a substantive right to which the claimant may not be entitled on the merits."<sup>20</sup> In the present case, the Board notes that any possible error of the Office in not providing a new prereduction notice to appellant prior to

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<sup>15</sup> *Loni J. Cleveland*, 52 ECAB 171 (2000).

<sup>16</sup> 20 C.F.R. § 10.403.

<sup>17</sup> *Elsie L. Price*, 54 ECAB 734 (2003); *Stanley B. Plotkin*, 51 ECAB 700 (2000).

<sup>18</sup> 46 ECAB 366 (1994).

<sup>19</sup> 929 F.2d 478 (1991).

<sup>20</sup> *Supra* note 18 at 375-76.

the May 29, 2009 decision was harmless. The record reflects that the Office issued a prereduction notice to appellant on October 27, 2008 on the grounds that the medical evidence established that he had the capacity to perform the duties of the motor vehicle dispatcher position. Appellant was given 30 days to respond to the proposed action. In a November 25, 2008 letter, he stated that he was unable to perform the constructed position due to pain and numbness which caused him to drop items. Based on the Office's October 27, 2008 prereduction letter, appellant was on notice that the Office proposed the reduction of his compensation benefits.

Moreover, appellant was represented by counsel throughout the claim process and arguments were presented regarding the weight of the medical evidence. Counsel argued that the restrictions set forth by Dr. Hubbard in his May 18 and December 21, 2007 reports did not comport with the duties of a motor vehicle dispatcher. He also requested that Dr. Hubbard review a description of the constructed position to determine whether appellant had the capacity to perform the duties thereunder. An Office hearing representative remanded the case for further development as requested by counsel. On remand, appellant had the opportunity to submit new medical evidence, which included Dr. McManus' May 15, 2009 report, in support of his contention that he was unable to perform the duties of the motor vehicle dispatcher. This evidence was considered by the Office and found to be insufficient to outweigh the special weight accorded to Dr. Hubbard's impartial medical opinion. The Board has reviewed Dr. McManus' report and finds that it is insufficient to overcome the opinion of Dr. Hubbard. The evidence of record does not establish a denial of administrative due process as contended.

### **CONCLUSION**

The Board finds that the Office properly reduced appellant's compensation effective December 21, 2008 based on its determination that the constructed position of motor vehicle dispatcher represented his wage-earning capacity.

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 29, 2009 decision of the Office of Workers Compensation Programs is affirmed.

Issued: September 20, 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