



or relied on the opinion of Dr. David Tobolowsky, a Board-certified psychiatrist and second opinion physician selected after Dr. Storper. Alternatively, counsel contends that Dr. Tobolowsky's opinion created a conflict with Dr. Vassall's opinion, warranting an impartial medical evaluation.

### **FACTUAL HISTORY**

This is appellant's second appeal before the Board in this case. By decision and order issued November 12, 1998,<sup>2</sup> the Board set aside a November 13, 1995 OWCP decision denying appellant's claim for an emotional condition and remanded the case for development of the medical evidence. The law and the facts of the case as set forth in the Board's prior decision and order are incorporated by reference.

By decision dated March 19, 1999, OWCP accepted that appellant sustained major depression on or before December 2, 1993 due to factors of his federal employment.<sup>3</sup>

In a March 26, 1999 claim for compensation (Form CA-7), appellant noted that he had worked as a sales associate in a private-sector fishing equipment store beginning on October 26, 1998. OWCP issued compensation for total disability for the period July 25, 1997 to October 25, 1998.

By decision dated July 20, 1999, OWCP determined that appellant's actual earnings of \$240.00 a week as a private-sector sales associate properly represented his wage-earning capacity. It issued monetary compensation benefits beginning on October 26, 1998 based on appellant's actual earnings.

In an August 3, 1998 letter, appellant requested reconsideration. He submitted a July 28, 1999 report from Dr. Robert S. Watine, an attending Board-certified internist, stating that he advised appellant not to return to work due to severe anxiety and depression.

By decision dated August 25, 1999, OWCP denied modification of the July 20, 1999 wage-earning capacity determination. It found that Dr. Watine's report was insufficient to establish that the accepted major depression had worsened such that appellant could no longer perform the duties of a sales associate.<sup>4</sup>

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<sup>2</sup> Docket No. 96-1041 (issued November 12, 1998).

<sup>3</sup> OWCP based its acceptance on the opinion of Dr. Larry Benovitz, a Board-certified psychiatrist and second opinion physician, selected after the Board remanded the case to OWCP. In a February 23, 1999 report, Dr. Benovitz opined that appellant sustained major depression resulting from stress due to reorganization at the employing establishment and a resultant increase in his supervisory duties.

<sup>4</sup> OWCP continued to develop the medical record. It obtained a May 9, 2000 second opinion from Dr. Gary S. Magid, a Board-certified psychiatrist, who advised that appellant could not return to work at the employing establishment due to severe anticipatory anxiety. In a January 16, 2002 report, Dr. Watine stated that appellant remained "fearful over the potential that he might have to return to the [employing establishment]. Due to this fear, he has needed to cut back his hours at his present job." Dr. Watine diagnosed dysthymic disorder, anxiety and stress syndrome.

In affidavits of earnings and employment (Form EN1032) dated from March 26, 1999 to July 21, 2005, appellant noted that he continued to work as a sales associate in a sporting goods store, and from October 31, 2001 to March 30, 2002 and January to April 2003 for an athletic organization.

On May 19, 2006 OWCP referred appellant, the medical record and a January 26, 1999 statement of accepted facts to Dr. Henry Storper, a Board-certified psychiatrist, for a second opinion examination. The statement of accepted facts discussed the evidence in appellant's cause through May 1994. OWCP instructed Dr. Storper to use the statement of accepted facts as the only factual framework for his opinion. In a June 5, 2006 report, Dr. Storper reviewed the statement of accepted facts, noting that appellant had "a retirement date of July 1997 and ha[d] not been back to work." He diagnosed major depression that continued to be causally related to appellant's federal employment. Dr. Storper opined that appellant was totally disabled for work but might be able to be retrained to perform some type of work tasks at home by himself.

Appellant did not work after December 2007.

On March 26, 2008 OWCP referred appellant, the medical record and the January 26, 1999 statement of accepted facts to Dr. Tobolowsky, a Board-certified psychiatrist, for a second opinion examination. It instructed Dr. Tobolowsky to use the statement of accepted facts as the only factual framework for his opinion. The statement of accepted facts included a March 31, 2000 addendum describing appellant's date-of-injury job. In an April 14, 2008 report, Dr. Tobolowsky noted that, after leaving the employing establishment, appellant worked for five years as a sales associate, reducing his schedule to part time as "he could n[o]t handle it. He has n[o]t worked elsewhere since then." Dr. Tobolowsky opined that appellant continued to have work-related major depression. He stated that appellant was "capable of full-time employment in a very low stress situation not requiring good short-term memory."<sup>5</sup>

In a March 24, 2010 report, Dr. Robert V. Vassall, an attending Board-certified psychiatrist, found appellant totally disabled for work due to continuing severe major depressive disorder.

In letters dated December 29, 2010 through April 29, 2011, counsel requested that OWCP modify the July 20, 1999 wage-earning capacity determination as Dr. Storper and Dr. Vassall both found appellant totally disabled for work. Counsel also submitted chart notes from Dr. Vassall dated April 6, 2009 to May 12, 2010 finding appellant totally disabled for work due to the accepted major depression condition. He also provided Dr. Vassall's April 8, 2011 report diagnosing chronic, recurrent major depression that continued to be causally related to factors of appellant's federal employment.

By decision dated June 1, 2011, OWCP denied modification of the July 20, 1999 wage-earning capacity determination on the grounds that the evidence submitted did not establish that the original determination was in error, that appellant had been vocationally rehabilitated, or that

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<sup>5</sup> In an April 29, 2008 memorandum, OWCP noted that Dr. Tobolowsky's report did not indicate that the July 20, 1999 wage-earning capacity determination required modification.

the accepted major depression worsened such that he could no longer perform the sales associate position.

In a June 6, 2011 letter, counsel requested a review of the written record. He reiterated that Dr. Storper's June 5, 2006 report and Dr. Vassall's April 5, 2011 report both supported a material worsening of the accepted major depression.

By decision dated and finalized September 29, 2011, an OWCP hearing representative affirmed the June 1, 2011 decision. The hearing representative acknowledged that the statement of accepted facts provided both to Dr. Storper and Dr. Tobolowsky, dated January 26, 1999 with a March 31, 2000 addendum, omitted appellant's work as a sales associate beginning on October 25, 1998. The hearing representative found that Dr. Storper's opinion was not based on an accurate history as he did not mention appellant's private-sector employment in the patient history. The hearing representative found that Dr. Tobolowsky's opinion represented the weight of the medical evidence, because although it was based on an inaccurate statement of accepted facts, appellant informed Dr. Tobolowsky of his private-sector employment.

### **LEGAL PRECEDENT**

Once OWCP 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.<sup>6</sup> Under section 8115(a), 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. If the actual earnings do not fairly and reasonably represent his or her wage-earning capacity, or if the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, his or her 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.<sup>7</sup>

When OWCP makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an OWCP wage-earning capacity specialist for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open 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 labor market should be made through contact with the state employment service or other applicable service. Finally, application of the principles set forth in *Albert C. Shadrick*,<sup>8</sup> will result in the percentage of the employee's loss of wage-earning capacity.<sup>9</sup>

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<sup>6</sup> *David W. Green*, 43 ECAB 883 (1992).

<sup>7</sup> *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

<sup>8</sup> 5 ECAB 376 (1953).

<sup>9</sup> *Francisco Bermudez*, 51 ECAB 506 (2000); *James A. Birt*, 51 ECAB 291 (2000).

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous. The burden of proof is on the party attempting to show modification of the wage-earning capacity determination.<sup>10</sup>

### ANALYSIS

OWCP accepted that appellant sustained major depression on or before December 2, 1993. After leaving federal employment in 1997, appellant worked as a sales associate in the private sector beginning on October 26, 1998. OWCP issued a wage-earning capacity determination on July 20, 1999 based on appellant's actual earnings as a sales associate. It denied modification by August 25, 1999 decision as he did not establish a worsening of the accepted emotional condition such that he could no longer work as a sales associate, that the original rating was in error, or that he had been vocationally rehabilitated. Appellant continued working as a sales associate through July 2005, with intermittent periods of work for an athletic association.

On June 5, 2006 OWCP obtained a second opinion report from Dr. Storper, a Board-certified psychiatrist, who found appellant totally disabled for work due to continuing major depression. On April 14, 2008 it obtained another second opinion report from Dr. Tobolowsky, a Board-certified psychiatrist, who found that appellant could perform full-time, very low stress work not requiring good short-term memory. OWCP provided a statement of accepted facts to Dr. Storper and Dr. Tobolowsky that omitted appellant's private-sector employment. It had instructed both physicians that the statement of accepted facts should be the only factual framework for their opinions.

In a December 29, 2010 letter, counsel requested modification of the July 20, 1999 wage-earning capacity determination based on Dr. Storper's finding of total disability, and on the opinion of Dr. Vassall, an attending Board-certified psychiatrist, who found appellant totally disabled for work from April 6, 2009 onward. OWCP denied modification by June 1, 2011 decision, finding that the medical evidence did not establish a worsening of the accepted condition. Following a review of the written record, it affirmed the June 1, 2011 decision on September 29, 2011, finding that Dr. Tobolowsky's opinion represented the weight of the medical evidence. OWCP acknowledged that the statement of accepted facts provided to Dr. Tobolowsky omitted appellant's private-sector employment, but that this defect was cured by appellant's mention of his sales associate job.

The critical issue in this case is appellant's capacity to work. The wage-earning capacity determination was based on his actual earnings as a sales associate. Therefore, appellant's private-sector work activities are relevant to the case. Appellant reported his work activities in periodic affidavits of earnings and employment. OWCP failed to include appellant's employment as a sales associate and for an athletic association in the statement of accepted facts provided to Dr. Storper and Dr. Tobolowsky. It acknowledged this omission in its

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<sup>10</sup> *S.M.*, 58 ECAB 166 (2006).

September 29, 2011 decision, yet found Dr. Tobolowsky's opinion represented the weight of the medical evidence. The Board finds, however, that this finding was in error.

To assure that the report of a medical specialist is based upon a proper factual background, OWCP provides information through the preparation of a statement of accepted facts.<sup>11</sup> When an OWCP medical adviser, second opinion specialist or referee physician renders a medical opinion based on a statement of accepted facts which is incomplete or inaccurate, the probative value of the opinion is seriously diminished or negated altogether.<sup>12</sup> In the present case, both Dr. Storper and Dr. Tobolowsky based their opinions on a statement of accepted facts that completely omitted appellant's private-sector employment. That appellant apparently mentioned some aspects of his sales associate work to Dr. Tobolowsky does not cure the defective statement of accepted facts, as the nature of the information appellant provided to the physician is unavailable and cannot be established as accurate. The Board notes that Dr. Tobolowsky mentioned nothing about appellant's work for the athletic association, indicating appellant's factual recitation was incomplete. As Dr. Storper and Dr. Tobolowsky's opinions are both based on an incomplete history, their reports are of diminished probative value.<sup>13</sup>

Once OWCP undertakes development of the medical evidence, it has the responsibility to complete the development in accordance with its procedures.<sup>14</sup> The case will be remanded for additional medical development, including selection of an appropriate specialist to provide a reasoned opinion, based on a complete, accurate statement of accepted facts, regarding appellant's work capacity. Following this and any additional development deemed necessary, OWCP will issue an appropriate decision in the case.

On appeal, counsel asserts that the June 5, 2006 opinion of Dr. Storper and the March 24, 2010 and April 5, 2011 reports of Dr. Vassall established that appellant was totally disabled for work. He contends that OWCP ignored or discounted Dr. Storper's opinion when it was received in 2006, and did not properly consider Dr. Vassall's reports. Counsel also asserts that OWCP should not have solicited or relied on the opinion of Dr. Tobolowsky as the weight of the medical evidence. Alternatively, he contended there was a conflict of medical opinion warranting selection of an impartial medical specialist. As noted, both Dr. Storper's and Dr. Tobolowsky's opinions are of diminished probative value as they are based on an incomplete statement of accepted facts. The case is remanded to OWCP for further development.

### **CONCLUSION**

The Board finds that the case is not in posture for a decision.

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<sup>11</sup> *Mirna Cruz*, Docket No. 06-183 (issued April 5, 2006).

<sup>12</sup> *A.R.*, Docket No. 11-692 (issued November 18, 2011).

<sup>13</sup> *Id.*

<sup>14</sup> *Richard F. Williams*, 55 ECAB 343 (2004).

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 29, 2011 decision of the Office of Workers' Compensation Programs is set aside, and the case remanded to OWCP for further development consistent with this decision.

Issued: June 11, 2012  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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