



was hit on the passenger side by another motor vehicle.<sup>2</sup> He stopped work on May 28, 2008 and received disability compensation on the daily and periodic rolls.

In October 2008 OWCP referred appellant to Dr. Clark Race, a Board-certified orthopedic surgeon, for a second opinion examination and evaluation regarding his physical condition and capacity to work. In a December 2, 2008 report, Dr. Race noted that appellant complained of chronic pain and memory problems since the accident. He diagnosed chronic pain syndrome post motor vehicle accident with cervical, thoracic and lumbar strains, right knee contusion, reactive depression, and chronic pain development. Dr. Race found appellant's prognosis to be guarded because of chronic pain and he recommended that appellant undergo a functional capacity evaluation.

A functional capacity evaluation was performed on December 19, 2008. In a supplemental report on December 23, 2008, Dr. Race noted that the functional capacity evaluators recommended that appellant avoid lifting, carrying, pushing, or pulling more than 20 pounds, avoid bending, lifting, or working from floor level. The evaluation also suggested that appellant avoid repetitive use of awkward postures, stooping, kneeling, and crawling, and avoid extensive periods of standing, walking and repetitive climbing. Dr. Race concluded that appellant did not meet the requirements of his previous position and that the restrictions noted on the functional capacity evaluation were appropriate.

Appellant returned to limited-duty work for the employing establishment in February 2009 but he stopped work in April 2009.

In an April 9, 2009 report, Dr. Helo Chen, an attending osteopath and Board-certified family practitioner, stated that appellant needed a high back chair with lumbar support to maintain his limited-duty work. Appellant later asserted that the employing establishment did not provide him with such a chair. Electromyogram and nerve conduction testing from early 2009 was consistent with an acute ongoing chronic bilateral L4 radiculopathy and right-sided L5 and S1 radiculopathy. Magnetic resonance imaging (MRI) scan testing of the right knee from that period showed focal bone contusion involving the medial femoral condyle consistent with direct trauma.

In a June 23, 2009 report, Dr. Robert E. Cantu, an attending Board-certified psychiatrist, indicated that the May 28, 2008 work accident resulted in a psychiatric disability that prevented appellant from returning to work in any capacity for the next six months.

In a July 7, 2009 report, Dr. Chen disagreed with Dr. Race's opinion because appellant had neurological and other physical complications as a result of his May 28, 2008 work injury which had not been addressed. He recommended that appellant start physical therapy to help with strength, conditioning, and pain control. Dr. Chen stated that appellant could not return to work in any capacity.

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<sup>2</sup> Appellant previously underwent right shoulder surgery in the late 1990s and early 2000s related to his participation in rodeos.

In August 2009 OWCP referred appellant to Dr. Grant McKeever, a Board-certified orthopedic surgeon, for a second opinion examination and updated evaluation regarding his physical condition and ability to work. In a September 21, 2009 report, Dr. McKeever described appellant's May 28, 2008 work injury and reported his examination findings. Based on his examination, Dr. McKeever diagnosed chronic lumbosacral syndrome and chronic thoracic spine syndrome. Given appellant's orthopedic condition, Dr. McKeever saw no reason why appellant could not return to his preinjury job without difficulty. He found that appellant appeared to have nonorthopedic difficulties which would prohibit him from working and he recommended continued psychiatric care.

In an October 19, 2009 report, Dr. Cantu stated that appellant met the clinical criteria for post-traumatic stress disorder, depression and chronic pain disorder. He reported that appellant's conditions had responded to medication.

In October 2009 OWCP referred appellant to Dr. Henry Hare, Jr., a Board-certified psychiatrist and neurologist, for a second opinion regarding his emotional condition. In a November 9, 2009 report, Dr. Hare stated that appellant's mood and affect were intense and anxious but appropriate. Appellant appeared mildly depressed, but his speech was coherent and his concentration, judgment, abstraction and memory were good. Dr. Hare diagnosed adjustment disorder with mixed anxiety and depressed mood chronic (mild) under Axis I, obsessive compulsive personality disorder under Axis II, and multiple orthopedic injuries with residual pain under Axis III.<sup>3</sup> He described appellant as very rigid and severely compulsive who saw everything in black and white and was unable to negotiate, which led to occupational problems. Dr. Hare felt appellant was totally disabled psychiatrically due to an extreme preoccupation with health and pain. He stated that appellant was competent to do his usual job but that he was totally disabled as long as he was fearful of returning to work.

OWCP requested that Dr. Hare clarify his November 9, 2009 report. In a January 29, 2010 supplemental report, Dr. Hare added that appellant had an adjustment disorder with anxiety and depression and an obsessive compulsive personality disorder. The adjustment disorder, anxiety, and depression were related to the work injury, but his obsessive compulsive personality disorder was nonindustrial. Dr. Hare found that, because of his rigid personality, appellant could only return to work if all of his conditions were met.

In April 2010, OWCP expanded the claim to accept unspecified anxiety, and a depressive disorder due to the May 28, 2008 work injury. The acceptance was based on the reports of Dr. Hare and a March 24, 2010 report of an OWCP medical adviser.

OWCP again requested that Dr. Hare clarify his opinion. In a May 20, 2010 report, Dr. Hare stated that appellant could return to full-duty work with no restrictions relative to musculoskeletal issues. He also indicated that, if appellant was accommodated for his physical complaints, there was no psychiatric reason he could not return to work.

In June 2010 OWCP determined that there was a conflict between Dr. Cantu and Dr. Hare regarding appellant's psychiatric condition and referred appellant to Dr. Andrew

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<sup>3</sup> Dr. Hare did not perform a physical examination of appellant.

Brylowski, a Board-certified psychiatrist and neurologist, for an impartial medical examination and evaluation.

In an August 19, 2010 report, Dr. Brylowski described appellant's factual and medical history and detailed the findings of the evaluation he conducted on that date. Appellant stated that he felt he was suffering depression and anxiety due to his May 28, 2008 work injury and that he had problems with his short and long-term memory following the accident. He reported that he had nightmares about it almost every day. Appellant stated that he argued with his father and acted-out violently with his fiancé. He reported that he had suicidal ideations without any plan.

Dr. Brylowski noted that appellant reported pain over his entire body as well as feelings of numbness from his earlobes to his fingers and toes. Appellant reported that his pain was about the same day or night. Dr. Brylowski indicated that, upon examination, appellant had some limitation of motion of his neck and right shoulder and muscle strength was 4/5 in the quadriceps and hamstrings of his right knee. He stated that appellant had weakness in many muscle groups that could not be explained. Dr. Brylowski found appellant's subjective complaints were out of proportion to objective findings.

In response to a question regarding whether anxiety and depressive conditions prevented appellant from working in any capacity, Dr. Brylowski stated "no" and noted, "The claimant has been dealing with symptoms of anxiety and depression for a significant portion of his life. They appear to have been exacerbated by this injury." He advised that appellant's anxiety and depressive symptoms appeared to rise to the level of an adjustment reaction with anxiety and depressed mood features. Dr. Brylowski stated that some of appellant's symptoms were consistent with his preexisting diagnoses and his use of psychiatric medicines. He noted, "There is no psychiatric condition (Axis I or Axis II) related to the work injury with symptoms of anxiety and depression that is preventing him from returning to work in any capacity. Adjustment reaction with anxiety and depression symptoms can be treated concurrent with employment."

In his August 19, 2010 report, Dr. Brylowski found that appellant could return to work for eight hours per day from a psychiatric point of view but he could not return to his regular-duty position and that he would require light-duty work. He reported that he could not find a severe primary anxiety or depressive disorder related to the work injury and that adjustment reaction with mixed anxiety and depressed mood appeared to continue. Objective findings were consistent with symptom over reporting and long-standing psychiatric pathology. Dr. Brylowski recommended a neurosurgical consultation for appellant's low back, with verification of examination findings, and noted that a neurosurgeon might want to perform a myelogram. He stated that his opinion was based on objective findings on physical examination and retrospective reexamination of some of the medical records and that those findings supported the possibility of a right knee condition or a low back condition or both.

OWCP determined that there was a conflict between Dr. Chen and Dr. McKeever regarding the nature of appellant's physical condition and referred appellant to Dr. Frank L. Barnes, a Board-certified orthopedic surgeon, for an impartial examination.

In an October 26, 2010 report, Dr. Barnes described the May 28, 2008 work accident and appellant's medical history. He noted that, after the accident, appellant complained of pain in his entire spine, right shoulder and right knee. Appellant also reported that he experienced short-term and long-term memory loss since the accident. Dr. Barnes stated that an MRI scan of appellant's lumbar spine showed a right-sided disc herniation at L5-S1 which indented the nerve root and that an MRI scan of his thoracic spine showed a right T8 disc protrusion contacting the spinal cord. Dr. Barnes detailed the findings of the physical examination he conducted on October 26, 2010 and diagnosed closed-head injury with symptoms of poor memory, thoracic disc herniation, and lumbar disc herniation.

In a November 24, 2010 report, Dr. Barnes responded to OWCP's questions noting that appellant's neck, lumbar, thoracic, shoulder, and knee conditions did not prevent him from working eight hours per day in a sedentary capacity. Regarding a question about whether appellant's sprains and contusions had resolved, he stated that the acute sprain and contusions, in all medical probability, had resolved within six weeks of the accident. In a November 23, 2010 work restriction form, Dr. Barnes noted that appellant could work limited duty for eight hours daily, with restrictions, or squat or kneel.

In December 2010 OWCP asked Dr. Barnes to further clarify his work restrictions. In a December 23, 2010 work restriction form, Dr. Barnes indicated that appellant could perform limited-duty work for eight hours per day, with restrictions of walking for two hours per day, standing for one hour per day, operating a motor vehicle at work for two hours per day and lifting, pushing, or pulling up to 20 pounds. He could twist, bend, stoop, squat, or climb for one-half hour per day for each activity.<sup>4</sup> In January 2010 OWCP asked Dr. Barnes to clarify the number of hours that appellant could lift. In a January 10, 2011 work restriction form, Dr. Barnes stated that appellant could sit eight hours daily while performing limited duty for eight hours daily. He had restrictions of walking for two hours per day, standing for two hours per day, operating a motor vehicle at work for one hour per day and lifting 10 pounds for two hours per day. Appellant could not squat or climb.

In various 2010 and 2011 reports, Dr. Chen continued to note that appellant was totally disabled due to thoracic, lumbar, and right knee conditions.

In February 2011, appellant began to participate in OWCP-sponsored vocational rehabilitation efforts. A February 18, 2011 report noted that appellant stated that he had worked for a construction company as a manager from 1998 to 2003. Appellant indicated that he supervised a crew of 10 to 15 employees and coordinated mostly residential remodeling jobs and that his job included assigning crews and ensuring that they had materials for the job.

In April 2011 Edward Hernandez, appellant's vocational rehabilitation counselor at the time, indicated that he had basic computer skills in using Microsoft Office Word and he suggested that he undergo additional vocational training so that he would be able to use Microsoft Excel, Outlook, and Power Point.

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<sup>4</sup> Dr. Barnes indicated on the form that appellant's poor coordination, extremity atrophy and bilateral leg weakness and numbness prevented him from performing more strenuous work than sedentary work.

In an undated report, Beth Deans, a certified vocational evaluator, reported the findings of vocational testing she administered to appellant on May 19 and 20, 2011. She noted that appellant's general cognitive ability appeared to be considerably below the average range at the time according to the results of the differential aptitude test. Appellant scored in the low range on both the verbal and the numerical portions and his abstract reasoning and spatial scores. Ms. Deans indicated that vocational training or an apprenticeship would be achievable with appellant's high motivation. Appellant's best job matches between aptitudes and interests were park worker (booth), security guard, and retail sales clerk. He needed improvement in his academic skills to work as an insurance clerk, advertising manager or sales representative (farm and garden). Ms. Deans stated that appellant's constant pain and medications may have seriously affected his cognitive functioning and memory during the vocational testing and indicated that he appeared to need cognitive retraining before attempting any formal job training.

In a June 29, 2011 report, Mr. Hernandez stated that he had planned for appellant to participate in computer skills retraining, however the next available training was September 2011. Mr. Hernandez stated that appellant could perform the constructed position of construction estimator, a job listed in the Department of Labor's *Dictionary of Occupational Titles*. He stated that appellant's work history showed 10 years of work as a superintendent for a small construction company that involved scheduling construction projects, assigning work crews and purchasing supplies.

The construction estimator position involved analyzing blueprints, specifications, proposals, and other documentation to prepare time, cost, and labor estimates for construction-related projects and services. The construction estimator must review data to determine material and labor requirements and prepare estimates for planning, organizing and scheduling work. The job also involves preparing bids, selecting vendors or subcontractors and determining cost effectiveness. The construction estimator conducts special studies to develop standard hour and cost data and consults with clients, vendors, or others to discuss and formulate estimates and resolve issues. The physical demands of the construction estimator position, classified as sedentary in nature, included occasional lifting up to 10 pounds, frequent reaching and handling and occasional fingering. Appellant's vocational rehabilitation counselor performed a labor market survey on June 20, 2011 and found that the construction estimator position still was reasonably available in appellant's commuting area at a weekly wage of \$600.00.

Appellant attempted to find a job over the course of 90 days, but he was not successful in his job placement efforts. His vocational rehabilitation file was closed in late October 2011.

In a June 19, 2012 letter, OWCP advised appellant that it proposed to reduce his compensation based on his capacity to earn wages as a construction estimator. It noted that the opinion of Dr. Barnes showed that his physical condition did not prevent him from performing the construction estimator position<sup>5</sup> and that the opinion of Dr. Brylowski showed that his psychiatric condition did not prevent him from performing the position. OWCP noted that appellant's vocational rehabilitation counselor provided an opinion that he was vocationally

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<sup>5</sup> OWCP indicated that appellant's physical work abilities were described by the work restrictions form that Dr. Barnes completed on January 10, 2011.

capable of working as a construction estimator. Appellant was provided 30 days from the date of the letter to submit evidence and argument challenging the proposed action.

Appellant submitted a July 9, 2012 report in which Dr. Chen stated that he could only work for four hours per day due to his multiple medical problems. Dr. Chen indicated that appellant continued to suffer from pain in his neck, upper back, lower back, right shoulder and right knee and that he also had anxiety and depressive disorders.

Appellant's vocational rehabilitation counselor performed another labor market survey on September 2, 2013 and found that the construction estimator position still was reasonably available in appellant's commuting area at a weekly wage of \$600.00. The position had the same duties and physical requirements as it did in June 2011.

In a September 24, 2013 decision, OWCP reduced appellant's compensation effective October 10, 2013 based on his capacity to earn wages as a construction estimator. It indicated that the weight of the medical evidence continued to rest with the opinions of the impartial medical specialists Dr. Barnes and Dr. Brylowski, respectively.

### **LEGAL PRECEDENT**

Once OWCP accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.<sup>6</sup> OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>7</sup>

Under section 8115(a) of FECA, 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 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 his or her injury, his or her degree of physical impairment, his or her usual employment, his or her age, his or her qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect his or her wage-earning capacity in his or her disabled condition.<sup>8</sup> Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.<sup>9</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>10</sup> The fact that an employee has been unsuccessful in obtaining work in the

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<sup>6</sup> *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

<sup>7</sup> *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

<sup>8</sup> *See E.W.*, Docket No. 14-584 (issued July 29, 2014); 5 U.S.C. § 8115(a).

<sup>9</sup> *Albert L. Poe*, 37 ECAB 684, 690 (1986).

<sup>10</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).

selected position does not establish that the work is not reasonably available in his commuting area.<sup>11</sup>

In determining wage-earning capacity based on a constructed position, consideration is given to the residuals of the employment injury and the effects of conditions which preexisted the employment injury.<sup>12</sup> In determining wage-earning capacity based on a constructed position, consideration is not given to conditions which arise subsequent to the employment injury.<sup>13</sup>

When OWCP makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by OWCP or to an OWCP wage-earning capacity specialist for selection of a position, listed in the U.S. Department of Labor, *Dictionary of Occupational Titles* or otherwise available in the open labor market, that fits that 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 other applicable service. 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.<sup>14</sup>

Section 8123(a) of FECA provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."<sup>15</sup> When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.<sup>16</sup> In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.

The Board has held that stale medical evidence cannot form the basis for current evaluation of residual symptomology, disability determination, or other medical determinations.

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<sup>11</sup> See *Leo A. Chartier*, 32 ECAB 652, 657 (1981).

<sup>12</sup> See *Jess D. Todd*, 34 ECAB 798, 804 (1983).

<sup>13</sup> *N.J.*, 59 ECAB 397 (2008).

<sup>14</sup> See *Dennis D. Owen*, 44 ECAB 475, 479-80 (1993); *Albert C. Shadrick*, 5 ECAB 376 (1953).

<sup>15</sup> 5 U.S.C. § 8123(a).

<sup>16</sup> *William C. Bush*, 40 ECAB 1064, 1075 (1989).

For example, in the case of *J.A.*,<sup>17</sup> the Board held that medical reports from November 2010 were of limited probative value regarding the claimant's medical condition as October 2012.<sup>18</sup>

### ANALYSIS

OWCP accepted that on May 28, 2008 appellant sustained a concussion, sprains of his neck, thoracic region, lumbar region, right shoulder and upper arm, and contusions of his right knee and lower leg when his work vehicle was struck by another vehicle. It later accepted that he sustained anxiety and depressive disorder due to the May 28, 2008 work injury. Appellant stopped work on May 28, 2008 and received disability compensation. He returned to limited-duty work for the employing establishment in February 2009 but he stopped work in April 2009. Appellant received disability compensation on the periodic rolls.

OWCP reduced appellant's compensation effective October 10, 2013 due to his capacity to earn wages as a construction estimator. The determination that appellant was physically capable of working as a construction estimator was based on the opinion of Dr. Barnes, a Board-certified orthopedic surgeon who served as an impartial medical specialist. The determination that he was psychiatrically capable of working as a construction estimator was based on the opinion of Dr. Brylowski, a Board-certified psychiatrist and neurologist, who also served as an impartial specialist. OWCP found that these opinions constituted the weight of the medical opinion evidence with respect to appellant's physical and psychiatric medical conditions and that they resolved the conflicts in the medical opinion evidence with respect to these matters.

The Board notes that OWCP properly referred appellant to Dr. Barnes and Dr. Brylowski for impartial medical examinations.<sup>19</sup> However, OWCP improperly relied on their opinions to determine that appellant was physically and psychiatrically able to work as a construction estimator. In this case, the medical evidence upon which OWCP relied to determine appellant's ability to work as a construction estimator was stale.

Dr. Barnes' opinion regarding appellant's ability to work from an orthopedic standpoint was based on a physical examination of appellant conducted on October 26, 2010.<sup>20</sup>

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<sup>17</sup> Docket No. 13-1657 (issued February 3, 2014).

<sup>18</sup> See also *Keith Hanselman*, 42 ECAB 680 (1991); *Ellen G. Trimmer*, 32 ECAB 1878 (1981) (reports almost two years old deemed invalid basis for disability determination and loss of wage-earning capacity determination); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on a Constructed Position*, Chapter 2.816.4(d) (June 2013) (a wage-earning capacity determination must be based on a reasonably current medical evaluation).

<sup>19</sup> OWCP properly determined that there was a conflict in the medical opinion evidence regarding appellant's physical condition between Dr. Chen, an attending osteopath and Board-certified family practitioner, and Dr. McKeever, a Board-certified orthopedic surgeon, who served as an OWCP referral physician. It also properly determined that there was a conflict in the medical opinion evidence regarding appellant's psychiatric condition between Dr. Cantu, an attending Board-certified psychiatrist, and Dr. Hare, a Board-certified psychiatrist and neurologist, who served as an OWCP referral physician. See *supra* note 15.

<sup>20</sup> Dr. Barnes initially completed his narrative report and work restrictions evaluation form on October 26, 2010. He later completed work restrictions evaluation forms on November 23 and December 23, 2010 and January 10, 2011, but these were not based on any additional examination of appellant.

Dr. Brylowski's opinion regarding appellant's ability to work from a psychiatric standpoint was based on a psychiatric examination of appellant conducted on August 19, 2010. These opinions would not provide a reasonably accurate assessment of appellant's medical condition and ability to work around the time OWCP adjusted his compensation effective October 10, 2013. The Board has had occasion to evaluate the probative value of older medical reports and, because cases differ, it has never adopted a rigid standard. However, in *J.A.*,<sup>21</sup> the Board held that in that case medical reports from November 2010 were of limited probative value regarding the claimant's medical condition as October 2012.

The Board further notes that, although appellant had considerable experience in the construction field and his vocational rehabilitation counselor approved the position, there is evidence in the record that several physicians noted appellant's problems with short-term and long-term memory. Vocational testing from May 2011 suggested that appellant had cognitive ability considerably below the average range particularly with regard to skills needed for technical or administrative types of jobs.

### **CONCLUSION**

The Board finds that OWCP improperly reduced appellant's compensation effective October 10, 2013 based on his capacity to earn wages as a construction estimator.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the September 24, 2013 decision of the Office of Workers' Compensation Programs is reversed.<sup>22</sup>

Issued: September 4, 2015  
Washington, DC

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

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>21</sup> *See supra* note 17.

<sup>22</sup> Michael E. Groom, Alternate Judge, participated in the preparation of this decision but was no longer a member of the Board effective December 27, 2014.