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

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| **M.A., Appellant** | ) | |
| **and** | ) | **Docket No. 07-349** |
| | ) | **Issued: July 10, 2008** |
| **DEPARTMENT OF THE NAVY, BREMERTON NAVAL HOSPITAL, Bremerton, WA, Employer** | ) | |

*Appearances:*
*John Goodwin, Esq.*, for the appellant
*No appearance*, for the Director

Oral Argument December 18, 2007

## DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

### ***JURISDICTION***

On April 23, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated October 27, 2006 reducing his compensation. Pursuant to 20 C.F.R. §§ 501.2 and 501.3, the Board has jurisdiction over the merits of this case.

### ***ISSUE***

The issue is whether the Office properly reduced appellant's compensation effective April 17, 2005 based on its determination that the constructed position of general office clerk represented his wage-earning capacity.

On appeal, appellant's representative contends that his loss of wage-earning capacity (LWEC) was erroneously based on stale medical evidence; that the position offered was outside the scope of appellant's restrictions; and that the determination of reasonable availability was improperly based on availability of full-time, rather than part-time, positions.

## ***FACTUAL HISTORY***

On July 26, 1998 appellant, a 49-year-old cook, filed an occupational disease claim alleging that he injured his back on July 19, 1998 when he fell from a bench. His claim was accepted for a herniated disc at L5-S1. On February 5, 1999 he underwent an L5-S1 microdiscectomy and debridement by Dr. John F. Howe, a Board-certified neurosurgeon. Following surgery, appellant had complaints of persistent S1 radiculopathy into the left leg. A July 14, 1999 magnetic resonance imaging scan revealed scarring at L5-S1 with no recurrent disc herniation and mild degenerative disc disease.

Appellant was followed postsurgery by Dr. Michael S. McManus, Board-certified in occupational medicine, whose examination of May 18, 1999 noted appellant's complaint of intermittent aching in the lower lumbar region with intermittent paresthesias of the left leg. He indicated that appellant's present symptoms were stable and unchanged for the prior six weeks. Appellant was released to return to full-time limited duty at the employing establishment under specified work restrictions.

Appellant was followed for radicular symptoms into his left leg. Examination by Dr. McManus on February 1, 2000 noted sensation was grossly decreased in the left lower extremity in the S1 dermatome with decreased tone in the left calf muscle. He reduced appellant to six hours of limited duty with lifting restricted to a maximum of 20 pounds and 30 out of 60-minute limitations on sitting, standing, stooping and bending. In an April 13, 2000 report, Dr. Howe noted that the chance of success for further surgery was approximately 30 percent. He stated that the risk of injury to the nerve, increasing dysesthesias and paresthesias, was a major concern. Dr. Howe noted that appellant was ambivalent about further surgery and that he should accept a level of disability commensurate with his abilities. Appellant was referred back to Dr. McManus for a disability rating and ongoing medical management.

On May 1, 2000 appellant was examined by Dr. McManus, who noted a well-healed surgical scar over the low back. He provided findings on physical examination and noted decreased sensation along the S1 distribution. Dr. McManus advised that appellant could not return to his date-of-injury job as a cook and kitchen supervisor. He noted that appellant was being continued in temporary, light duty at the employing establishment and his status was now considered as "fixed and stable." In an OWCP-5 work capacity form, Dr. McManus noted that appellant's restrictions were now permanent. He found that appellant could work six hours a day, subject to lifting a maximum of 20 pounds with specified hourly restrictions on standing, sitting, twisting and climbing. In subsequent examinations of June 5 and July 6, 2000, Dr. McManus reported findings on examination and reiterated appellant's work restrictions of May 1, 2000.[1]

On July 26, 2000 the Office noted that appellant was being accommodated in his part-time light-duty work at the employing establishment. Although paid for six hours a day, it was learned that he actually worked approximately one hour a day as a cashier. The Office also noted that the employing establishment would not be able to develop a permanent position based

[1] On July 5, 2000 Dr. McManus provided an impairment rating, finding eight percent impairment to the left leg. Appellant received a schedule award based on this rating.

on his limitations. Appellant continued working at the employing establishment until he was removed on December 11, 2000. He was placed on the periodic rolls in receipt of compensation for total disability as of December 12, 2000.

On September 26 2000 appellant was treated by Dr. McManus, who listed findings on physical examination. Dr. McManus noted that there was no change in appellant's permanent work restrictions. He reiterated that appellant's work restrictions were permanent in reports dated December 13, 2000 and February 12, 2001, again characterizing appellant as fixed and stable with occasional paresthesias and weakness in the left leg. Dr. McManus noted mild atrophy of the left calf.

In 2001, appellant was referred to vocational rehabilitation. The record reveals that plans were made for a transferable skills assessment and career training. The Office authorized prevocational training in computer skills, which appellant completed on July 19, 2001. On June 27, 2001 Dr. McManus met with the rehabilitation patient-management team in conference to go over issues related to appellant's treatment. Examination by Dr. McManus during this period noted appellant's frustration with chronic pain, loss of his job and a pending divorce. He was referred for psychological consultation. Dr. McManus again reiterated appellant's physical restrictions were permanent as described on May 1, 2000.

In order to adjust to returning to work in a community setting, appellant entered a volunteer program in October 2001 as a food service worker providing nutrition services at two regional senior centers. Dr. McManus approved the program on October 2, 2001, noting that there were no changes to appellant's physical restrictions. The record indicates that appellant worked in the program, starting at two hours a day, twice a week. When examined on November 27, 2001, he noted that he was participating in the program without any difficulty and found the activity enjoyable and within his physical capabilities. On January 8, 2002 Dr. McManus again noted appellant's complaint of intermittent radicular pain along the S1 dermatome. He advised that appellant could continue his activities under the specified work restrictions. On January 15, 2002 appellant was rated as superior in performance by the supervisor of the Senior Nutrition Program. Unfortunately, there were no permanent employment opportunities with the program.

During the spring of 2002, the rehabilitation program commenced job search placement with employers in the Bremerton area. Appellant was seen every other month by Dr. McManus. On May 10, 2002 Dr. McManus stated that appellant was involved in a move which had aggravated symptoms down the left lower extremity. He diagnosed chronic left S1 radiculopathy and noted that there was no change in appellant's work restrictions. On June 24, 2002 the rehabilitation counselor noted that job placement efforts were not successful. Rehabilitation was closed as of October 7, 2002.

The September 24 and November 25, 2002 reports of Dr. McManus described appellant's continuing residuals of pain aggravated by certain movement in an S1 pattern. He listed findings on physical examination and recommended that appellant continue with home exercise and weight control measures. Dr. McManus stated that appellant had already been "determined at maximal medical improvement and has permanent work restrictions, no change."

On November 6, 2002 the Office proposed to reduce appellant's compensation, finding that he had the capacity to perform the duties of a host/hostess. It found that the duties of the constructed position conformed to the physical restrictions set by Dr. McManus and was reasonably available in his commuting area. The Office noted that appellant's work restrictions had been set by the physician as of May 1, 2000, were considered permanent and had not changed as of his most recent examination. By decision dated December 30, 2002, the Office finalized the wage-earning capacity determination.

On January 28, 2003 appellant, through counsel, requested a hearing before an Office hearing representative, which was held on November 18, 2003. During this period, Dr. McManus' office submitted reports reiterating appellant's work restrictions. However, on November 25, 2003, Dr. McManus noted that appellant returned and described a recent hearing regarding his return to work as a host/hostess at restaurants. Appellant stated that the position would require frequent ambulation and standing. Dr. McManus noted that appellant had been rated at maximal improvement and he would review the treatment records in order to provide a response. In a November 26, 2003 report, he stated:

> "[Appellant] has recently brought to my attention the fact that he has been approved for the occupation of host/hostess in restaurant (DOT 310.137-010). I have reviewed the physical capacities required to perform this job. This job would include frequent and prolonged walking and standing. However, as you are aware, [he] has a chronic left S1 radiculopathy. For this he has permanent work restrictions as of May 1, 2000. These permanent work restrictions include no standing for more than 30 minutes per hour. In addition, he is limited to working a maximum of six hours per day. This would mean his total time standing would be limited to three hours per workday. For these reasons, I feel [appellant] does not have the physical capacity to perform the job of restaurant host/hostess…."

In a January 20, 2004 decision, an Office hearing representative reversed the December 30, 2002 wage-earning capacity determination. He noted that appellant had been referred for vocational rehabilitation based on the restrictions prescribed by Dr. McManus in May 2000. The hearing representative found that the November 26, 2003 report of the physician established that the selected position of host/hostess exceeded appellant's work capacity.

The record reflects that appellant was subsequently reinstated on the periodic rolls in receipt of compensation for total disability. Rehabilitation efforts were also reopened, in which additional skills training was approved as a general office clerk. On February 11, 2004 the Office contacted Dr. McManus to address whether appellant remained capable of performing work as a volunteer reservation clerk or volunteer food server; whether the work restrictions in place since May 1, 2000 remained at present; whether appellant would be capable of working a modified position which conformed to the May 1, 2000 restrictions and whether he could perform the position of a cashier if it conformed to those restrictions. On February 12, 2004 Dr. McManus responded:

> "If the positions of volunteer food server or volunteer reservation clerk are within [appellant's] permanent work restrictions of May 1, 2000, I feel he is capable of

> performing these duties at this time. His permanent work restrictions as of May 1, 2000 are still in place and remain his permanent work restrictions and should be unchanged. Appellant could potentially perform the job of host/hostess if these duties were modified to conform to his permanent work restrictions dated May 1, 2000. He could potentially also perform the cashier job, again, with modifications to conform to his restrictions of May 1, 2000."

The rehabilitation counselor again contacted employers within appellant's commuting area; however, placement efforts were unsuccessful. On April 28, 2004 a labor market survey was conducted in the Kitsap and Pierce County areas for the position of general office clerk. The minimum qualifications for this position were a high school diploma, GED or experience in a general office environment. Typing speed was not an issue with any of the employers contacted, but two employers noted having an entrance test that including keyboard testing. The employers described the position as sedentary to light, with sitting primarily performed but the ability to frequently change positions. The minimum physical requirements included the ability to frequently reach below shoulder level and lift or carry up to 10 pounds.

A transferable skills analysis noted that appellant was able to stand for 30 minutes an hour with maximum standing per workday of three hours and work for six hours a day. He was able to push, carry and lift up to 20 pounds and sit for 30 minutes at a time. The vocational consultant noted that appellant's employment history included work as a cook leader at the Naval Hospital in Bremerton for five years; a commissary foreman for 13 years and while on limited duty, as a cashier. The analysis distinguished between light and sedentary job classifications and noted that a general office clerk involved sitting, with the ability to alternate between sitting, standing and walking. The vocational consultant determined that appellant had the physical capacity to perform the general office clerk or receptionist position. The positions of receptionist-general office clerk were found to be reasonably available in sufficient numbers within appellant's commuting area.

On September 21, 2004 the rehabilitation counselor found that the position of general office clerk met the light physical demands prescribed by Dr. McManus and required a 30-day to 3-month period of vocational preparation. She provided appellant with numerous job leads, both full and part time. It was noted that, within appellant's commuting area, 28,993 general office clerks were employed during 2003, with a 1.9 percent projected growth by 2005. In the short term, there were 1,237 annual average job openings for the position. Entry level pay for the position was $365.00 per week. On January 31, 2005 appellant was advised that the Office proposed to reduce his compensation based on his capacity to perform the duties of general office clerk. The Office found that the physical requirements of the position did not exceed his work tolerance limitations. It stated that appellant's salary on January 13, 2000, the date his disability recurred, was $874.13 per week; that the current adjusted pay rate for his job was $1,076.01 per week; and that he was currently capable of earning $273.90 per week, the rate of an entry level general office clerk, based on six hours of work a day. The Office then determined that appellant had a 25 percent wage-earning capacity, which resulted in an adjusted wage-earning capacity of $218.53 per week. It concluded that, based upon a 75 percent rate, appellant's new compensation rate was $437.07, increased by the cost of living to $489.00 per week and that his net compensation for each four-week period would be $1,956.00.

In an April 8, 2005 decision, the Office finalized the wage-earning capacity determination. It found that appellant had a 25 percent wage-earning capacity and that his compensation would be reduced effective April 17, 2005.

On April 21, 2005 appellant requested a hearing before an Office hearing representative. Counsel contended that the "most recent physical examination for [appellant] was performed on May 1, 2000" and that the medical evidence upon which the Office relied was not reasonably current. He reiterated before the hearing representative that "an LWEC must be based on a current medical examination and a medical examination which is [six] years old is not current."

By decision dated October 27, 2006, the Office hearing representative affirmed the wage-earning capacity determination.

## ***LEGAL PRECEDENT***

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction of benefits.[2] 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.[3]

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 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*,[4] will result in the percentage of the employee's LWEC.[5]

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 Board has stated that the medical evidence upon which the Office relies must provide a detailed

[2] *David W. Green*, 43 ECAB 883 (1992).

[3] *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

[4] 5 ECAB 376 (1953).

[5] *Francisco Bermudez*, 51 ECAB 506 (2000); *James A. Birt*, 51 ECAB 291 (2000).

description of appellant's condition.[6] Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.[7]

## ***ANALYSIS***

The Office determined that the selected position of general office clerk represented appellant's wage-earning capacity as of April 17, 2005, based upon Dr. McManus' numerous reports, which outlined and affirmed his permanent work restrictions. The Board finds that the Office properly reduced appellant's compensation based on his ability to perform the duties of a general office clerk.

Appellant's counsel contends that the Office's wage-earning capacity determination was not based on a current medical examination establishing that the requirements of the constructed position were within his physical capabilities, stating that appellant was last examined on May 1, 2000. The Board finds that counsel for appellant is mistaken in characterizing the May 1, 2000 examination by Dr. McManus as his most recent medical examination. The medical evidence of record clearly demonstrates that appellant was followed by Dr. McManus after the surgery of February 5, 1999. Only when he determined that the chance for successful additional surgery was limited, did the attending physician first characterize appellant's work restrictions as "permanent" and his lumbar condition as "fixed and stable." The work restrictions delineated by Dr. McManus on May 1, 2000 have simply remained in effect since that time. His periodic reports, as noted, have repeatedly reinforced the extent of appellant's capacity for light-duty work. Dr. McManus recorded findings on physical examination and made reference to the diagnostic studies and Office treatment plans. In fact, counsel advised appellant to seek an additional opinion from Dr. McManus as to his capacity to perform the duties of a host/hostess. On November 26, 2003 Dr. McManus indicated that the frequent and prolonged walking required in such a position were not consistent with appellant's work restrictions. He again noted that the physical restrictions first set on May 1, 2000 were permanent and continuing. Again, on February 12, 2004 the attending physician reaffirmed that appellant had the capacity for work provided the duties of a selected position "were modified to conform to his permanent work restrictions dated May 1, 2000."

This case is analogous to *Selden H. Swartz*,[8] in which the employee's work restrictions were first set by his attending physician in April 1992. After considerable development of the claim, the Board affirmed an August 2000 wage-earning capacity determination. There was no evidence presented to establish that the attending physician ever modified the work limitations or

[6] *See William H. Woods*, 51 ECAB 619 (2000); *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

[7] *John D. Jackson*, 55 ECAB 465 (2004); *Carl C. Green, Jr.*, 47 ECAB 737, 746 (1996).

[8] 55 ECAB 272 (2004).

that the employee was totally disabled for work.[9] In *James Smith*,[10] the attending physician set forth the employee's work restrictions in medical reports dated March 31 and June 10, 1993. A final wage-earning capacity determination was not issued until September 29, 1999. Again, the Board relied upon the findings of the employee's attending physician as the best evidence of his capacity for work. The employee did not introduce any evidence to reflect that the attending physician ever changed the work restrictions or to establish that he remained totally disabled. The case law reflects that the Office will often develop rehabilitation plans following the receipt of work restrictions from the attending physician in an effort to return the employee to gainful employment. When such efforts fail, a constructed wage-earning capacity determination is developed. Such efforts do not necessarily lend themselves to discrete time periods and must depend on the particular needs of the injured employee.

Dr. McManus has been nothing, if not consistent, in defining appellant's work capabilities. His reports do not establish that appellant remains totally disabled for work. Rather, Dr. McManus has participated in the rehabilitation process, repeatedly emphasizing appellant's capacity for employment that conforms to the restrictions first set out on May 1, 2000. The Board gives great weight to the opinion of an employee's attending physician.[11] Such opinion is based on firsthand knowledge of the employee's physical condition and personal observation on examination. Such opinion is further buttressed when supported by a record demonstrating numerous examinations and consistency in the estimation of the employee's capacity for work. There is nothing inconsistent in the reports of Dr. McManus as to appellant's work capability. Simply put, there is no medical evidence from any other physician. The Board finds that the opinion of Dr. McManus constitutes the clear weight of the medical evidence. His opinion supports the Office's April 8, 2005 wage-earning determination.

Appellant's counsel argues that the physical requirements of the constructed position exceed his restrictions. His contention is without merit. Dr. McManus found that appellant could work six hours a day, subject to lifting a maximum of 20 pounds with specified hourly restrictions on standing, sitting, twisting and climbing. The position of general office clerk was characterized as sedentary to light, with sitting primarily performed but the ability to frequently change positions. The minimum physical requirements included the ability to frequently reach below shoulder level and lift or carry up to 10 pounds. The Board finds the physical requirements of the general office clerk position to be within appellant's restrictions, as delineated by Dr. McManus.

[9] *Accord Harley Sims, Jr.*, 56 ECAB 320 (2005) (August 28, 2002 wage-earning capacity decision supported by April 21, 2000 work-capacity evaluation of attending physician); *Richard Alexander*, 48 ECAB 432 (1997) (July 12, 1994 wage-earning capacity decision supported by December 10, 1992 work restrictions set by the attending physician); *James B. Christenson*, 47 ECAB 775 (1996) (October 11, 1994 wage-earning capacity decision supported by work restrictions first set by the attending physician on May 13, 1991). *See also Marilyn J. Carter*, 49 ECAB 661 (1998).

[10] 53 ECAB 188 (2001).

[11] *See August Weinhoft*, 1 ECAB 39 (1947); *accord Evelyn A. Cornwell*, 6 ECAB 144 (1953).

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 security guard position represented his wage-earning capacity.[12] The evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the duties of part-time general office clerk as of April 17, 2005 and that such a position was reasonably available within the general labor market of his commuting area. It was noted that within appellant's commuting area, 28,993 general office clerks were employed during 2003, with a 1.9 percent projected growth by 2005. In the short term, there were 1,237 annual average job openings for the position. Appellant's counsel argues that the conclusion that a position was reasonably available in the commuting area was based on availability of full-time, rather than part-time, positions. The record does not support this contention. Rather, it reflects that appellant was provided leads for and applied for, a number of part-time general office clerk positions in his commuting area.

The Board also finds that the Office properly determined appellant's LWEC in accordance with the formula developed in *Albert C. Shadrick*[13] and codified at section 10.403 of the Office's regulations.[14] The Office stated that his salary on, January 13, 2000, the date his disability recurred, was $874.13 per week; that the current adjusted pay rate for his job was $1,076.01 per week; and that he was currently capable of earning $273.90 per week, the rate of an entry level general office clerk, based on six hours of work a day. Entry level pay for the position was $365.00 per week. The Office then determined that appellant had a 25 percent wage-earning capacity, which resulted in an adjusted wage-earning capacity of $218.53 per week. It concluded that, based upon a 75 percent rate, appellant's new compensation rate was $437.07, increased by the cost of living to $489.00 per week, and that his net compensation for each four-week period would be $1,956.00. The Board finds that the Office correctly applied the *Shadrick* formula and therefore properly found that the position of part-time general office clerk reflected appellant's wage-earning capacity effective April 17, 2005.[15]

## ***CONCLUSION***

The Board finds that the Office properly reduced appellant's compensation, effective April 17, 2005, based on its determination that the constructed position of part-time general office clerk represented his wage-earning capacity.

[12] *Loni J. Cleveland*, 52 ECAB 171 (2000).

[13] *See supra* note 4.

[14] 20 C.F.R. § 10.403.

[15] *Elsie L. Price*, 54 ECAB 734 (2003); *Stanley L. Plotkin*, 51 ECAB 700 (2000).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the October 27, 2006 decision of the Office of Workers' Compensation Programs reducing appellant's compensation benefits is affirmed.

Issued: July 10, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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