

J. **Level Two Appeal Item Number Ten (10)**

The transferable skills analysis dated January 22, 2007 performed by Cigna employee Ms. XXXX, upon which Cigna relied in making the adverse determination on January 30, 2007, is materially flawed. Ms. XXXX's transferable skills analysis is replete with transpositions, omissions, errors and withheld information. In addition, Ms XXXX is not a licensed physician and her analysis oversteps ethical boundaries of competence.

1. Ms. XXXX transposed the wording from the peer review report into her transferable skills analysis (the "TSA") to "support" a conclusion that is both incorrect and oversteps Ms. XXXX's boundary of competence. As has been discussed throughout this appeal, Dr. XXXX and Dr. XXX have not rendered a decision that Mr. XXXX is able to perform sedentary activity. Rather, they have put forth a "theory" and concluded that Mr. XXXX "is not able" to do so because he is not "able to get back and forth to work." Ms. XXXX is not a medically licensed physician. She is not qualified to reject, overrule or cherry-pick the opinion and/or decipher the amphiboly of two physicians regarding Mr. XXXX's ability or inability to perform sedentary activity. Mr. XXXX must be conclusively released to work by a physician before a transferable skills analysis has any meaning. The two physicians have not conclusively released Mr. XXXX to work and Ms. XXXX is not qualified to do so within her boundary of competence. Ms. XXXX is also not a mind-reader and as such she can not conclusively and ethically decipher the amphiboly inserted into the peer review report by Dr. XXXX.

The Code of Professional Ethics for Rehabilitation Counselors dictates that overstepping one's boundary of competence is an ethical violation:

Rehabilitation counselors will practice only within the boundaries of their competence, based on their education, training, supervised experience, state and national professional credentials, and appropriate professional experience. Rehabilitation counselors will demonstrate a commitment to gain knowledge, personal awareness, sensitivity, and skills pertinent to working with a diverse client population. Rehabilitation counselors will not misrepresent their role or competence to clients.

Additionally, the CRCC's Ethics Committee has instructed Rehabilitation Counselors to discontinue services until conflicts (amphiboly) are resolved in advisory 10/06(2).

The Committee considered a request for an advisory opinion with regard to two dilemmas with the first pertaining to the appropriate course of action to take when there are conflicting opinions about a client's ability to return to work, as determined by a treating physician and a physician conducting an IME. The Committee responded that it would be outside of the scope of practice of a CRC to determine which set of restrictions or recommendations apply. Further, a CRC would need to limit or discontinue services until the conflict is resolved so as to

be able to recommend and conduct appropriate job placement activities that are not harmful to the client. Should such a situation arise, the CRC would need to inform the client of the conflict and disclose to the client the need to alert the referral source so that the conflict may be resolved. The client should also be advised of any limitations, delays or discontinuation of services. (A.1.c., A.3.a., D.1.a.)

It should also be noted that making a decision to return a patient to work carries legal implications that are detailed in Dr. XXXX's reference manual *Disability Evaluation: Second Edition* – Demeter, Stephen, Anderson, Gunmar B.J:

“...the physician who fills out these forms bears liability for potential malpractice if his or her patient is returned to the workplace, is placed in an inappropriate job (on the basis of the physician's recommendations), and reinjures himself while appropriately performing the activities of his job....Be careful and know what you are authorizing/recommending”

Dr. XXXX in his letter to Karol Johnson dated March, 2007 and in communication with Mr. XXXX has made it legally clear that he does not authorize Mr. XXXX to return to work in the employment positions posited in Ms. XXXX's transferable skills analysis and the adverse determination letter dated January 30, 2007:

I am in receipt of a copy of your letter regarding XXXX dated January 30, 2007. Please be advised that your statements and inferences contain inconsistencies with my prior communication with Cigna regarding this patient...

Thomas clearly has significant physical disability which is compounded severely by the chronic opioid issues noted above. The suggestion that employment options that require clear sustained mental faculties are an option for him is inconsistent with the above previously stated facts.

Dr. XXXX was asked to clarify his amphiboly on a return/ability to work and he has failed to respond conclusively. Cigna has not presented any conclusive evidence that Dr. XXXX has authorized Mr. XXXX to work or that he disagrees with Dr. XXXX's letter dated March 2007. Returning Mr. XXXX to work at the occupations suggested by Ms. XXXX in her transferable skills analysis is beyond Ms. XXXX's boundary of competence. She is not a licensed physician. Moreover if evidence that Dr. XXXX disagreed with Dr. XXXX's letter dated March, 2007 exists then Ms. XXXX would be bound by the ethical advisory noted above until the conflict was resolved.

2. The TSA is replete with material errors and omissions:

- Cigna selectively withheld the findings of Cigna's Registered Nurse Karen Haley and Cigna's Independent Vocational Expert Ms. XXXX from the materials given to Ms. XXXX to review in performing the TSA. Ms. XXXX also was not

provided any information on Mr. XXXX's award of SSDI by the Social Security Administration.

- Ms. XXXX lists a DOT Code 274.157.010 and Occupational title "Sr. Account Manager" that do not match. There is no such DOT occupational title as "Sr. Account Manager." In addition the DOT Code 274.157.010 which Ms. XXXX listed in the TSA has an SVP rating of "5" not the "8," and it is a "Light" strength rating not "sedentary." As Dunn and Growick note in their article *Transferable Skills analysis in vocational rehabilitation: Historical foundations, current status and future* (Journal of Vocational Rehabilitation, 2000), the foundation of a TSA is obtained by analyzing and understanding the "skills and characteristics associated with occupations the worker has performed." As Dunn and Growick's article adds "the suggested method for determining transferability of skill involves identifying the interest categories associated with previous work and comparing these to other occupations within the same category which are within the residual capacities of the worker." If Ms. XXXX could not get the data and information correct for Mr. XXXX's past work experience, then it is irrefutably that Ms. XXXX did not, and could not, perform a credible transferable skills analysis pursuant to accepted standards. The entire transferable skills analysis is based on fatally flawed, erroneous and miscalculated past work information and identifies DOT "managerial" or "supervisory" occupations that do not have an ONET crosswalk to 274.157.010. Accordingly, Cigna's reliance upon Ms. XXXX's meritless TSA mandates the reinstatement of Mr. XXXX's improperly denied benefits.
- Ms. XXXX injected the word "anything" into the record where it does not exist. Dr. XXXX and Dr. XXXX agree that Mr. XXXX is "unable to do any standing..." In the TSA, however, Ms. XXXX materially mischaracterizes this clear and unequivocal medical opinion, in stating in the TSA Mr. XXXX is "unable to do anything standing." The inability to *stand* – as posited by Dr. XXXX and Dr. XXXX – is far a field from Ms. XXXX's assertion Mr. XXXX is unable to perform tasks standing. As such, Ms. XXXX analyzed an entirely different, and much less onerous, physical limitation on Mr. XXXX's ability to work and travel than that which the physicians identified.
- Mr. XXXX does not meet the definition of "sedentary" in the Dictionary of Occupational Titles.
- Each of the occupations listed by Ms. XXX is a managerial or supervisory position; however, Mr. XXXX has no employment experience whatsoever in managing or supervising employees. It defies logic that an employer would hire him in an upper level employment position, particularly since, as the record shows, Mr. XXXX's disability has kept him out of the workforce for *ten* (10) years and is prescribed "heavy doses" of narcotic pain medication to help his ability to function without excruciating pain. It is nothing more than a bald

assertion to think that an employer will hire Mr. XXXX off the street to be a manager or supervisor of other employees after a ten year absence from the workforce, with no previous work experience and while taking “heavy doses” of narcotic medication for pain. *Even Cigna’s own Independent Vocational Expert Ms. XXXX disagrees with Ms. XXXX’s conclusions.* On April 28, 2006, Ms. XXXX of XXXX LLC performed an Independent TSA that concluded (consistent with the Dictionary of Occupational Titles regarding “occasional” activity) that the restriction/limitation requiring the ability to move around from a simple sedentary position approximately 10-15 minutes for at least five minutes “would not be compatible with typical competitive work demands. Moving away from the workstation and walking for five minutes would not appear to be consistent with typical requirements for productivity and maintaining a work pace.” Additionally Ms. XXXX pointedly addressed the unlikelihood that Mr. XXXX would be able to transition from a decade lapse in employment into managerial/supervisory position: “It appears the claimant’s [Mr. XXXX’s] last employment was ten years distant....The advanced education would not appear to allow for direct entry into a **management or supervisory capacity, given the last date of employment.**” (Emphasis added). Any argument put forth by Cigna that Ms. XXXX’ independent conclusions are not applicable at this point in the appeal are null and void. Mr. XXXX has remained out of the workforce since Ms. XXXX made the comment therefore her conclusions are equally controlling at present.

- The attached occupational profiles from the BLS Occupational Outlook Handbook for Merchandise Manager, Sales Manager, Circulation Manager, Supervisor – Order Takers, Advertising Manager and Supervisor/Instructor (Tel & Tel, utilities, waterworks) listed in the TSA note job qualifications are incompatible with Mr. XXXX’s listed restrictions, limitations, narcotic medications and past work experience:
 - A. “Often work under great pressure”
 - B. “need physical stamina to keep up with the fast past nature of the work”
 - C. “firms prefer to hire applicants who are familiar with the merchandise”
 - D. “frequently required to work more than the 40 hour week ”
 - E. “Travel between home office, branch office, vendors offices...”
 - F. “have advanced through the ranks to before assuming supervisory duties”
 - G. “Long hours including evenings and weekends are common”
 - H. “Working under pressure”
 - I. “Substantial travel”
 - J. “acquire knowledge of management principles and practices through work experience
- Ms. XXXX apparently used a software program to generate the TSA and did not perform a Labor Market Survey. As the article *Use of transferable skills analysis software in forensic vocational rehabilitation: Does this common technique*

withstand a challenge under Daubert? (Journal of Vocational Rehabilitation, 2002) by Stephanie Sleister proves, without a labor market survey, Ms. XXXX's Transferable Skills Analysis is unreliable, at best, and most likely would not even be admissible in Court. The article states:

*The majority of research conducted on TSA software has focused on ease of use and whether these programs accurately assess transferable skills and earning capacities. To date, no research has examined whether these programs identify occupations that **actually exist** in the labor market.*

Despite the widespread use of these programs by vocational specialists and the reliance insurance carriers place on information generated by these programs to award or deny disability, it does not appear that use of these programs alone will withstand a Daubert challenge. A traditional labor Market Survey of employers should be conducted to determine whether occupations identified by the software actually exist within a certain labor market.

Id. Emphasis added.

Ms. XXXX has put forth absolutely no evidence that any of the occupations she listed in the TSA “actually exist in the labor market” for an individual taking heavy doses of narcotics, who has been kept out of the workforce for a decade, has no supervisory or managerial experience, is unable to stand and because of his continuing disability, has severe physical and mental limitations and restrictions.

The TSA oversteps Ms. XXXX's boundary of competence without a physician conclusively releasing Mr. XXXX to perform sedentary activity; was not performed by an independent expert operating within ethical guidelines; does not follow accepted practices regarding prior work experience; does not include a labor market survey; is inconsistent with the definition of sedentary in the Dictionary of Occupational Titles; is inconsistent with Mr. XXXX's limitations and restrictions according to the BLS Occupational Handbook; fails to address “heavy doses” of Oxycontin and is contradicted by Cigna's own independent Vocational Expert Ms. XXXX. In addition, Cigna eviscerated the last shred of credibility whatsoever from the TSA, assuming *arguendo*, if there ever was any, by playing “hide the ball” in selectively withholding medical and vocational opinions from Ms. XXXX, denying her a full and complete record upon which to conduct a valid TSA. Any denial of benefits based on Ms. XXXX's TSA dated January 22, 2007 is unequivocally erroneous and must be reversed.