

E. Level Two Appeal Item Number Five (5)

The adverse determination letter dated January 30, 2007 letter states that “the medical information supports limitations and restrictions that would allow Mr. Reilly to function within a sedentary level.” This statement is contradicted by the Peer Review Report, the Dictionary of Occupational Titles, Cigna’s Independent vocational expert Ms. XXXX, Cigna’s Registered Nurse Claim Manager Ms. Karen Haley, Mr. XXXX’s treating physician Dr. XXXX and Cigna’s Peer Review Physician Dr. XXXX.

The adverse determination letter dated January 30, 2007 lists the following notes from the peer review report and provides six managerial and supervisory occupations from the Dictionary of Occupational Titles generated by the transferable skills analysis. Notably, Cigna selectively omitted the opening part of Dr. XXXX and Dr. XXXX’s “theory” from the adverse determination letter to facilitate the formation of Cigna’s flawed benefit denial:

[Dr. XXXX agrees that **theoretically** this patient **would be able** to perform sedentary activities] “**were he able** to get back and forth to work but **he is not able** to drive because of the inability to move his legs and also because of his ongoing use of Oxycontin.” (Emphasis added)

If Mr. XXXX “were able...but he is not...” these “would be” his work capacities:

Mr. XXXX is able to sit at a desk but would require **frequent** position changes every 10 to 15 minutes. He is **unable to do any standing**, climbing, balancing, stooping, kneeling, crawling or crouching. He would be able to frequently lift or carry up to 10 pounds but would not be able to lift or carry anything for a distance more than approximately 2 feet. (Emphasis added)

The following [Dictionary of Occupational Titles] occupations were identified:

contract administrator, advertising manager, circulation manager, sales manager, commercial-instructor SUP, merchandise manager and supervisor, order takers

Cigna’s position is in the adverse determination is faulty for the following reasons:

1. As noted throughout this appeal Dr. XXXX and Dr. XXXX do not say Mr. XXXX is able to perform sedentary work they say he “would be able.” The two physicians agreed on a “theory” that inextricably and logically tied the physical and mental ability to get to and from work to the physical and mental ability to perform “sedentary activity” and have concluded Mr. XXXX “is not able.” The words “ability” and “able” are defined as the physical, mental or legal power to perform and marked by intelligence, knowledge, skill, or competence. Neither physician has released Mr. XXXX to perform sedentary work because “he is not able”. The logic according to Dr. XXXX and Dr. XXXX is as follows:

If Mr. XXXX “were able” (physically or mentally) to get to and from work *then* Mr. XXXX “would be” able to perform sedentary activity

If Mr. XXXX is not able (physically or mentally) to get to and from work *then* Mr. XXXX would not be able to perform sedentary activity.

2. Even if Mr. XXXX met the criteria established in Dr. XXXX and Dr. XXXX’s theory the limitations listed in the adverse determination letter and in the peer review report conflict with Dictionary of Occupational Titles definition of “sedentary work.” As noted above the limitations and restrictions “were he able” to perform sedentary work contained in the adverse determination letter and determined by Dr. XXXX and Dr. XXXX include the following:

Mr. XXXX is able to sit at a desk but would require **frequent** position changes every 10 to 15 minutes. He is unable to do any standing... (Emphasis added)

The Dictionary of Occupational Titles defines a “position change” as alternate periods of sitting and standing/walking; “occasional” activity is defined as up to 1/3 of the time; “frequent” activity is defined as 1/3 to 2/3 of the time. The Dictionary of Occupational Titles defines “sedentary work” as follows:

S-Sedentary Work - Exerting up to 10 pounds of force occasionally (Occasionally: activity or condition exists up to 1/3 of the time) and/or a negligible amount of force frequently (Frequently: activity or condition exists from 1/3 to 2/3 of the time) to lift, carry, push, pull, or otherwise move objects, including the human body. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are **required only occasionally** and all other sedentary criteria are met. (Emphasis added)

The limitations and restrictions are in conflict with the Dictionary of Occupational Titles definition of sedentary work which is clear regarding “only occasional” position change. It does not say “frequent” position change. Mr. XXXX’s limitations and restrictions “were he able” to perform sedentary work are inconsistent with the definition of “sedentary work” in the Dictionary of Occupational Titles therefore any Dictionary of Occupational Title occupational alternatives listed in the adverse determination letter and/or generated by a flawed transferable skills analysis are unequivocally invalid.

It should not come as any surprise to Cigna that Cigna’s contrived position in the adverse determination letter is inconsistent with the peer review report and the Dictionary of Occupational Titles. Cigna’s own experts and Mr. XXXX’s treating physician have neither indicated that Mr. XXXX is “able” to perform sedentary work nor that his limitations/restrictions, “were he able” to perform sedentary work, meet the definition of full time sedentary work in the Dictionary of Occupational Titles. These experts cited numerous reasons including a “theory,” the “frequent” position change discussed above,

the inability to do any standing, the inability to move legs, the length of time out of the workforce (ten years), heavy doses of narcotic medications, issues with travel, stairs and mobility. However, Cigna has recklessly, and in its own self interest, disregarded these opinions over the past year to deny Mr. XXXX his benefits:

1. **Ms. XXXX, independent licensed vocational expert disagrees with Cigna –**

Cigna's own independent licensed Vocational Expert disagrees with Cigna's claim in the adverse determination letter that "the medical information supports limitations and restrictions that would allow Mr. XXXX to function within a sedentary level" and also disagrees that the DOT management or supervisory positions noted in the adverse determination letter represent viable employment possibilities given Mr. XXXX's last employment was ten years distant.

On April 28, 2006, Ms. XXXX of XXXX LLC performed an Independent transferable skills analysis at Cigna's behest 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 added the following regarding Mr. XXXX's ability to work in a managerial or supervisory position after a ten year absence from the workforce, "It appears the claimants 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).

Please note that every occupation listed in the adverse determination letter dated January 30, 2007 represents managerial or supervisory employment. Cigna's adverse determination dated January 30, 2007 is therefore in conflict with the views of its own independent, licensed and certified vocational expert. 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 nothing would have changed in her opinion. Moreover, Ms. XXXX use of the terms "would not appear to allow" (prevent engaging in) and "employment" are consistent with the correct definition of disability contained in the policy.

2. **Ms. Karen Haley RN, Cigna Registered Nurse Claim Manager disagrees with Cigna**

Cigna's own Registered Nurse disagrees with Cigna's claim in the adverse determination letter that the above "limitations and restrictions of sedentary work activities are appropriate" and disagrees that the management or supervisory positions noted in the adverse determination letter represent viable employment possibilities given Mr. XXXX's use of Oxycontin.

On January 11, 2007 Ms. Haley RN correctly read the peer review report and rendered her medical opinion in the Cigna Acclaim Notes (consistent with the Dictionary of Occupational Titles regarding "occasional" activity) that "the provided medical records are sufficient to support restrictions and limitations that would **prevent** sedentary activity during the time period in question." In addition Ms. Haley rendered the opinion "because of cx's [Mr. XXXX's] use of OxyContin he would be **unable to work**. (Emphasis added)

Cigna's adverse determination dated January 30, 2007 therefore ignores Ms. Haley and is in conflict with the Dictionary of Occupational Titles.

3. Dr. XXXX, Orthopedic Specialist, disagrees with Cigna

Dr. XXXX, Mr. XXXX's treating physician, disagrees with Cigna's claim in the adverse determination letter that "sedentary work activities are appropriate." As discussed above Dr. XXXX has not released Mr. XXXX to work at a sedentary level because he "is unable" to get back and forth to work. He has noted the "physical disability" and "chronic opioid issues" as the two reasons for Mr. XXXX inability to do so. Additionally Dr. XXXX established the limitation of "frequent" position change which is inconsistent with the DOT definition of sedentary work. On March, 2007 Dr. XXXX evaluated the adverse determination letter dated January 30, 2007 and wrote the following to Ms. Karol Johnson in March, 2007.

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

I refer you to my letter dated April 13, 2006 to Ms. Latonya Puckett wherein I state "XXXX remains on chronic opioid treatments (chronic oxycontin) which may impair his judgment relating to work and travel" and my letter dated May 3, 2006 to Ms. Latonya Puckett wherein I state "Please also note XXXX remains on chronic opioid treatments (chronic oxycontin) which may impair his judgment relating to work and travel. This is an extremely severe issue and needs to be taken into account for any type of job activity using mental skills."

XXXX 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.

Cigna's adverse determination dated January 30, 2007 is therefore in conflict with the views of Dr. XXXX and the Dictionary of Occupational Titles. The occupations listed in the adverse determination letter are incompatible with his diagnosis.

4. Dr. XXXX, Cigna's Peer review Physician, disagrees with Cigna

On January 4, 2007 Dr. XXXX conducted a Peer Review with Dr. XXXX. In his written report, Dr. XXXX did not indicate his disagreement with any of the restrictions and limitations put forth by Dr. XXXX. Rather, he essentially reiterated the same limitations and restrictions that Dr. XXXX diagnosed, including the restriction/limitation regarding "frequent position changes with changing positions every 10 to 15 minutes" "unable to do any standing" "inability to move his legs" and "heavy doses of Oxycontin." As noted throughout this appeal Dr. XXXX and Dr. XXXX constructed a logical argument regarding the ability to perform sedentary duties that Mr. XXXX does not meet because they have said he does not possess the physical and mental "ability" to get back and forth to work:

If Mr. XXX "were able" (physically and mentally) to get to and from work then Mr. XXXX "would be" able to perform sedentary activity

If Mr. XXXX "is not able" (physically and mentally) to get to and from work then Mr. XXXX "would not be able" to perform sedentary activity.

Additionally, Dr. XXXX is fully aware that Mr. XXXX does not meet the Dictionary of Occupational Titles definition for sedentary work, even "were [Mr. XXXX] able" to get to and from work. Dr. XXXX referenced the manual *Disability Evaluation: Second Edition* – Demeter, Stephen, Anderson, Gunmar B.J. in his report. The book defines "sedentary activity" along with "occasional activity" and "frequent activity" as it pertains to the Dictionary of Occupational Titles throughout the book (see pages 674-6,755,757,882,883...). Dr. XXXX was therefore cognizant of the implication of using the word "frequent" when discussing position change.

Cigna's adverse determination dated January 30, 2007 is therefore in conflict with the views of Dr. XXXX and the Dictionary of Occupational Titles.

In conclusion, as Dr XXXX stated in his May 3, 2006 letter, Cigna has "ignored, cherry-picked," and disregarded the views of four separate experts and the criteria established in the Dictionary of Occupational Titles to recklessly deny Mr. XXXX his benefits. The adverse determination is therefore arbitrary, capricious and invalid and must be reversed.