U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BARNELL R. COUFAL and DEPARTMENT OF JUSTICE, FEDERAL PRISONS SYSTEMS, Fort Worth, Tex.

Docket No. 97-1305; Submitted on the Record;
Issued April 2, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that the position of "air conditioning technician" represented appellant's wage-earning capacity.

The Board has duly reviewed the case record and concludes that the Office did not meet its burden of proof to reduce appellant's compensation benefits.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.[1] If an employee's disability is no longer total, but the employee remains partially disabled, the Office may reduce compensation benefits by determining the employee's wage-earning capacity.[2]

In the present case, the Office accepted that appellant, a corrections counselor, sustained an acute post-traumatic stress disorder on January 28, 1988, as a result of inmate rioting at the employing establishment during November and December 1987. Appellant underwent vocational rehabilitation commencing in April 1989. Appellant elected to receive Office of Personnel Management benefits effective October 21, 1990. On June 3, 1996 appellant requested payment of Federal Employees' Compensation Act benefits. By decision dated June 24, 1996, the Office found that the position of "air conditioning technician" represented appellant's wage-earning capacity as of October 20, 1990 and reduced appellant's wage-loss compensation benefits accordingly. An Office hearing representative affirmed the wage-earning capacity determination on September 30, 1996. The Office denied modification of the prior decision, after merit review, on February 14, 1997.

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[1] *Gary R. Sieber*, 46 ECAB 215 (1994).

[2] 20 C.F.R. § 10.303(a).

When an injured employee is unable to return to the position held at the time of injury but is not totally disabled for all gainful employment, he or she is entitled to compensation for partial disability computed on loss of wage-earning capacity. In determining the compensation payable for partial disability, an employee's wage-earning capacity is determined by the employee's actual earnings if those earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent the employee's wage-earning capacity or if the employee has no actual earnings, the employee's wage-earning capacity shall be determined by the Office by selection of a job after having given due regard to the nature and degree of the employee's physical impairment, the employee's age and qualifications for other employment, the availability of suitable employment, and other factors or circumstances which may affect the employee's wage-earning capacity in his or her disabled condition.[3]

After the Office makes a medical determination of partial disability and of special work restrictions, it may refer the employee's case to an Office 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 labor 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 open labor market should be made through contact with the state employment service or other applicable service. Application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.[4] The Board has approved retroactive loss of wage-earning capacity determinations in appropriate cases, pursuant to regulatory authoritiy.[5] The Office's procedures clarify that retroactive wage-earning capacity determinations can be made using either actual earnings or a constructed position, in certain cases. Retroactive constructed loss of wage-earning capacity determinations should be considered only when the evidence clearly shows that partial rather than total disability existed prior to adjudication, and no compensation has been paid for the period of disability in question.[6]

The Board has previously found that the Office must initially determine appellant's medical condition and work restrictions before the Office can select an appropriate position which reflects appellant's vocational wage-earning capacity. The Board has stated that the medical evidence on which the Office relies must provide a detailed description of appellant's condition.[7] The Office's procedures require that medical suitability of the constructed position be carefully evaluated. The Office's procedure manual provides as follows:

> "The CE [claims examiner] is responsible for determining whether the medical evidence establishes that the claimant is able to perform the job, taking into

[3] *James R. Verhine*, 47 ECAB 460 (1996); *see* 5 U.S.C. § 8115(a).

[4] See *Hattie Drummond*, 39 ECAB 904 (1988); *Albert C. Shadrick*, 5 ECAB 376 (1953).

[5] *See Domenick Pezzetti*, 45 ECAB 878 (1994).

[6] Federal (FECA) Procedure Manual, Chapter 2.814.8(f) (December 1995).

[7] *Samuel J. Russo*, 28 ECAB 43 (1976).

> consideration medical conditions due to the accepted work-related injury or disease, and any preexisting medical conditions. (Medical conditions arising subsequent to the work-related injury or disease will not be considered.) If the medical evidence is not clear and unequivocal, the CE will seek medical advice from the DMA, [district medical adviser] treating physician, or second opinion specialist as appropriate."[8]

In the present case, the record does not reflect that the Office attempted to clarify appellant's medical status, as of October 20, 1990, to determine whether he could perform the duties of the selected position prior to the vocational determination of his wage-earning capacity.

In a report dated July 5, 1990, appellant's vocational rehabilitation counselor noted that vocationally, appellant's pursuit of placement in air conditioning refrigeration employment was suitable and appropriate as appellant had completed a two-year community college training program to become an air conditioning technician. The vocational counselor stated that in this particular case, however, appellant's weakened emotional state should be noted. He indicated that it would be advisable to place appellant in an on-the-job training program even though he had completed an academic program to become an air conditioning repairman and technician. Regarding appellant's ability to medically perform the position, the vocational rehabilitation counselor stated that this matter would be reviewed with appellant's treating psychiatrist. He noted that appellant was relapsing in his emotional health and would need to return under the care of a psychotherapist, and should certainly begin ongoing appointments with his treating psychiatrist, Dr. Harold B. Eudaly Jr.

In a report dated September 14, 1990, Dr. Eudaly, appellant's treating psychiatrist, reported that appellant's current diagnosis was major depressive disorder, recurrent and post-traumatic stress disorder, chronic, with poor prognosis. Dr. Eudaly noted that "the course of treatment to be followed is to try to keep this man from being totally dysfunctional to the point that he has to be permanently hospitalized through continued medication and supportive psychotherapy." Regarding appellant's work limitations, Dr. Eudaly noted that appellant was totally unable to be within several miles of the employing establishment without becoming almost completely immobilized with anxiety. He also noted that appellant had an onset of severe suicidal depression, following the recent hostage situation in Iraq, as at an unconscious level this situation reminded him of the hostages that were taken by the prisoners during the employing establishment riot. Regarding the cause of the diagnosed conditions, Dr. Eudaly stated that appellant had no preexisting conditions at the time of the injury, but that after he was sent to an extremely stressful situation regarding a prison riot, he sustained severe post-traumatic distress disorder followed by recurrent severe suicidal major depressive disorder.

There is no evidence of record that the Office requested Dr. Eudaly to address whether appellant could perform the "air condition technician" position as of October 20, 1990, given his accepted emotional condition. The Office nevertheless made a finding that appellant's only medical restriction in October 1990 was his inability to work near the employing establishment. The evidence of record, as noted by appellant's vocational rehabilitation counselor and

[8] Federal (FECA) Procedure Manual, Chapter 2.814.8(d) (December 1995).

Dr. Eudaly, was that appellant's emotional status was unstable during the months prior to October 1990. Although the vocational rehabilitation counselor requested that the Office clarify appellant's medical ability to perform the selected position, and the Office was procedurally required to do so prior to a loss of wage-earning capacity determination, the Office did not do so in this case.

The Office did not meet its burden of proof in this case because the medical evidence does not establish that as of October 20, 1990 appellant could clearly medically perform the duties of the constructed position, considering the medical conditions arising from his accepted employment injury (and any prior preexisting conditions).

The decisions of the Office of Workers' Compensation Programs dated February 14, 1997, September 30 and June 24, 1996 are hereby reversed.

Dated, Washington, D.C.
April 2, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member