United States Department of Labor
Employees' Compensation Appeals Board

JAMES P. McGONAGLE, Appellant	)	
and	)	**Docket No. 05-400**
	)	**Issued: September 9, 2005**
DEPARTMENT OF THE NAVY, PHILADELPHIA NAVAL SHIPYARD, Philadelphia, PA, Employer	)	

Appearances:
James C. Higgins, Jr., Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 6, 2004 appellant filed a timely appeal of the September 8, 2004 merit decision of the Office of Workers' Compensation Programs, which affirmed a June 30, 2003 loss of wage-earning capacity determination. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of appellant's claim.

ISSUE

The issue is whether the Office properly determined that the selected position of cashier II represented appellant's wage-earning capacity.

FACTUAL HISTORY

Appellant, a 54-year-old former marine pipe fitter, has an accepted occupational disease claim for depression, single episode, and aggravation of preexisting panic disorder, which arose

on or about January 1, 1988.[1] He stopped work on February 23, 1993 and the Office paid appropriate wage-loss compensation.

In a report dated February 21, 2001, Dr. Bonnie L. Stewart, Ph.D., an attending clinical psychologist, advised that she had recently discussed with appellant the possibility of engaging in vocational rehabilitation as part of his effort to resume working.[2] According to Dr. Stewart, appellant agreed to attempt vocational rehabilitation. However, she expressed reservations because of the possibility that appellant's paranoid ideation and panic attacks might become more intense depending on the type of treatment he received during vocational rehabilitation. She began treating appellant in August 1999 he was experiencing severe panic attacks several times a day. At that time, appellant also evidenced persuasive paranoid ideation for most daily activities. He was unable to walk to his mailbox alone, unable to go to the store by himself, and had difficulty going to the store when accompanied by his wife. Dr. Stewart explained that over the past year and a half appellant's panic attacks had decreased to approximately four times per week and his paranoid ideation had decreased. Within the last month, appellant was able to resume driving independently. Dr. Stewart attributed appellant's improvement in part to changes in medication, behaviorally focused treatment and group therapy. She advised that continued medical support and psychotherapy while attempting vocational rehabilitation were essential to appellant's success.

In an April 25, 2001 work capacity evaluation (Form OWCP-5c), Dr. Stewart indicated that appellant was unable to resume his prior duties as a pipe fitter because a return to work in small spaces would likely trigger additional panic attacks. She noted that appellant was capable of working four hours per day with an anticipated increase to an eight-hour workday after approximately six months. Appellant could not immediately work eight hours per day because initially being away from familiar environments would likely trigger panic attacks. Dr. Stewart noted that appellant would need time to recover and receive treatment until he adjusted to the changes. She also noted that appellant had gained weight and lost conditioning and would need to become "work hardened." Other than precluding a return to pipe fitting, Dr. Stewart did not specify what types of work appellant could or could not perform. And she did not identify any physical or environmental limitations other than the need for work hardening.

Based on Dr. Stewart's April 25, 2001 work capacity evaluation, the Office referred appellant for vocational rehabilitation in July 2001. On February 18, 2002 appellant was

[1] Appellant filed his emotional condition claim on November 22, 1993. The Office accepted that appellant was a large man (6 feet 4 inches tall and 290 pounds) who found it difficult to extricate himself from tight areas while performing his pipe fitter duties. He had been stuck in bilges and had to remove clothing in order to back out. The Office also accepted that appellant had worked in tanks when the lights went out and he had to feel his way out of the tank. Additionally, appellant's head (size 8) occasionally became trapped between pipe flanges because the space in which he was working was so small. Also, due to the size of his head, appellant's hardhat sat high on top of his head, which failed to protect him adequately and resulted in an injury to his forehead. Lastly, the Office accepted that appellant was constantly reminded that he had several on-the-job injuries and should be careful. He was called clumsy by supervisors and threatened with being given time off if he sustained another injury.

[2] Dr. Stewart treated appellant in conjunction with Dr. Judith B. Yantis, a Board-certified psychiatrist. In her most recent report dated May 26, 1999, Dr. Yantis diagnosed major depression in partial remission, panic disorder and chronic post-traumatic stress disorder.

employed as a home health aide, however, his employer released him less than a week later in part because he fell asleep during a training class. Although the Office authorized the resumption of job placement assistance, appellant had a debilitating stroke on March 29, 2002 and was unable to continue. Because the effects of appellant's nonemployment-related stroke prevented him from participating in the job placement process, the Office requested and received a final report from its rehabilitation counselor. The report identified several currently available part-time positions that were suitable to appellant's employment-related psychiatric condition.

On June 4, 2002 the Office issued a notice of proposed reduction of compensation. The Office advised appellant that the medical and factual evidence demonstrated that he was only partially disabled and that he had the capacity to earn part-time wages of $12.20 an hour as a cashier II.[3] The Office also indicated that appellant had a 30-day period within which to respond prior to a reduction of compensation. No additional information was received. On July 9, 2002 the Office issued a final decision reducing appellant's compensation based on his ability to earn part-time wages in the position of cashier II.

Appellant requested an oral hearing, which was held on March 12, 2003. He submitted treatment notes from various therapists and counselors he had seen from June 1998 through January 2003.[4] Appellant also submitted an October 16, 2002 report from Dr. Patrick J. McDonough, a psychiatrist, who diagnosed major depression, severe, recurrent with mood congruent ideation and severe panic disorder with agoraphobia. Dr. McDonough stated that he was not able to detect any indication of hallucinations, but appellant was depressed, though not suicidal. He also noted that appellant expressed feelings of helplessness and sadness. Dr. McDonough also reported that appellant had angry, paranoid suspicious ideation that he is being watched if he goes out of the house. He recommended that appellant continue under the care of Drs. Yantis and Stewart, noting that he had been making some progress before the onset of the stroke. He also indicated that appellant was still disabled before the onset of the stroke.

In a February 15, 2003 report, Dr. Christina L. Herring, a Board-certified psychiatrist, diagnosed major depressive episode in partial remission, panic disorder and paranoid disorder, not otherwise specified. She explained that, if major depressive disorder and panic disorder were appellant's only diagnoses, then partial disability would be a consideration. However, Dr. Herring noted that appellant continued to have a severe psychotic disorder even when he was taking antipsychotic medication. Appellant did not have agoraphobia, but instead he was paranoid and his thinking was tangential, circumstantial and at times bizarre. Dr. Herring further stated that these symptoms were not a result of appellant's cerebral vascular accident. She noted that as early as 1990 appellant reportedly worried that people were watching him. And during a 1992 hospitalization appellant cried constantly and believed the "FBI [Federal Bureau of Investigation] was watching him" and the hospital staff could "read his mind." He also believed

[3] The Cashier II position was clerical in nature and classified as light duty. It involved receiving cash from customers or employees in payment for goods or services and recording the amounts received. Appellant could also be expected to operate an adding machine or cash register, make change, cash checks and issue receipts to customers.

[4] Appellant's psychologist, Dr. Stewart stopped treating him in February 2002, however, he continued to receive counseling with two of Dr. Stewart's colleagues at Psychology and Counseling Associates, P.C.

that the "television was talking only to him." Dr. Herring explained that, although appellant pursued psychiatric treatment and seemed to want to work, he was totally disabled. She also testified at the March 12, 2003 hearing.

By decision dated June 30, 2003, the Office hearing representative affirmed the July 9, 2002 decision.

Appellant requested reconsideration on April 12, 2004. Dr. Herring provided another report dated February 4, 2004 wherein she explained that appellant's paranoid delusions continued and made it impossible for him to work. Dr. Herring also noted that appellant's delusions remained untouched by treatment since 1992 despite antipsychotic medication.

In a decision dated September 8, 2004, the Office denied modification. The Office found that appellant's paranoid disorder was not employment related and the medical evidence showed that appellant's accepted conditions were only partially disabling.

LEGAL PRECEDENT

An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.[5] Under section 8115(a) of the Federal Employees' Compensation Act, 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 the employee's wage-earning capacity or if the employee has no actual wages, the wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, the employee's 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.[6]

The Office must initially determine appellant's medical condition and work restrictions before selecting an appropriate position that reflects appellant's vocational wage-earning capacity. The medical evidence the Office relies on must provide a detailed description of appellant's condition.[7] Additionally, a wage-earning capacity determination must be based on a reasonably current medical evaluation.[8]

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 Department of Labor, *Dictionary of Occupational Titles*, or otherwise available in the open labor market, that fits the employee's capabilities with regard to

[5] 20 C.F.R. §§ 10.402, 10.403 (1999); *see Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

[6] 5 U.S.C. § 8115(a); *see Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

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

[8] *Carl C. Green, Jr.*, 47 ECAB 737, 746 (1996).

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.[9]

ANALYSIS

The Board finds that the Office failed to meet its burden in the instant case.[10] The July 9, 2002 decision was based on an almost 15-month-old work capacity evaluation (Form OWCP-5c) that was prepared by a psychologist, Dr. Stewart, who had last reported on appellant's condition approximately two months prior to her April 25, 2001 work capacity evaluation. Moreover, the report contains very few details about appellant's ongoing psychiatric condition or the type of work he was capable of performing. The only clearly defined parameters were that appellant should not work as a pipe fitter and he could work four hours to start, with the possibility of increasing to eight-hour days in approximately six months. The April 25, 2001 report is somewhat dated, extremely vague, unsubstantiated and of questionable probative value. Dr. Stewart stopped treating appellant in February 2002 and there appears to have been no effort on the part of the Office to obtain an updated report regarding appellant's psychiatric condition.

The medical evidence indicates that appellant is totally disabled by what has variously been described as paranoid ideation, mood congruent ideation and paranoid disorder. The Office, however, found that this condition was not employment related and, therefore, not relevant to a determination regarding the suitability of the selected position. Impairments that preexisted the employment injury, in addition to the injury-related impairments, must be taken into consideration in the selection of a job within the employee's work tolerance.[11] However, subsequently acquired impairments unrelated to the employment injury are excluded from consideration in the determination of the employee's work capabilities.[12] For example, appellant's March 29, 2002 stroke occurred after his accepted employment injury and was unrelated to his accepted condition. As such, the Office need not and did not factor in the effects of appellant's stroke in identifying a medically suitable position. With respect to appellant's paranoid disorder, the pertinent questions are whether the condition predated the accepted injury or whether it is related to the accepted injury. If either question is answered in the affirmative, then the cashier II position identified by the Office cannot be considered medically suitable.

While the medical evidence does not establish that appellant's disabling paranoid disorder is related to his accepted employment injury, the record establishes that the condition or at least some early symptoms of the condition predated appellant's accepted employment injury. Dr. Herring explained that appellant worried that people were watching him as early as 1990.

[9] *Albert C. Shadrick*, 5 ECAB 376 (1953); 20 C.F.R. § 10.403(d) (1999).

[10] Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits. *James B. Christenson*, 47 ECAB 775, 778 (1996).

[11] *William H. Woods*, 51 ECAB 619, 622 (2000).

[12] *Id.*

She also described instances during a 1992 hospitalization where appellant described being watched by the FBI and hospital staff reading his mind. Additionally, Dr. Herring noted that appellant believed the television was talking to him. In her most recent report dated February 4, 2004, Dr. Herring stated that appellant's delusions remained untouched by treatment since 1992 despite antipsychotic medication. Thus, the record indicates that appellant's paranoid ideations predated the November 22, 1993 filing and acceptance of the instant claim. As appellant is totally disabled by his paranoid disorder, the cashier II position identified by the Office is not considered medically suitable. Therefore, the Office failed to meet its burden to modify appellant's wage-loss compensation.[13]

CONCLUSION

The Office improperly determined that the selected position of cashier II represented appellant's wage-earning capacity.

ORDER

IT IS HEREBY ORDERED THAT the September 8, 2004 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 9, 2005
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

[13] *James B. Christenson*, *supra* note 10.