United States Department of Labor
Employees' Compensation Appeals Board

J.H., Appellant	)	
and	)	**Docket No. 10-193**
	)	**Issued: October 13, 2010**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINSTRATION MEDICAL CENTER, Iowa City, IA, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 26, 2009 appellant, through his attorney, filed a timely appeal from the May 23 and September 24, 2009 merit decisions of the Office of Workers' Compensation Programs reducing his wage-loss benefits based on his actual earnings. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly determined that appellant's actual earnings as an electrician fairly and reasonably represented his wage-earning capacity as of January 17, 2009.

FACTUAL HISTORY

This case has previously been before the Board. In a January 29, 2008 decision, the Board reversed a May 16, 2007 Office hearing representative's decision terminating wage-loss compensation.[1] The Board found that the reports of Frank S. Gersh, Ph.D., a treating clinical

[1] Docket No. 07-1743 (issued January 29, 2008).

psychologist, and Dr. Charles Carroll, an attending family practitioner, were insufficient to establish that appellant's disability causally related to the accepted conditions of depressive reactive anxiety had ceased. The facts and history contained in the prior decision are incorporated by reference.[2]

The evidence of record contains W2 forms for the year 2007, pay stubs from 2008, a March 25, 2008 statement regarding dates of employment from May 2006 to March 2008, an undated statement detailing the dates and amount of leave without pay and a form noting separation effective February 1, 2008.[3] Appellant stated that he worked as a police officer for the employing establishment from December 30, 2001 to June 25, 2006 and as a housekeeping aide for the period June 26, 2006 to February 1, 2008; as an ore apprentice millwright for ST Cotter Turbine Services, Inc. for the period June 4, to July 15, 2007; as a pre-apprentice millwright for Millwright Services, Inc. for July 7, 2007; as a pre-apprentice millwright for Newell Machinery Co., Inc. for the period August 8 to 12, 2007 and as an operator for BFC Electric Company, LLC for the period August 13, 2007 to March 25, 2008, the date of the statement. The W2 forms reflect that appellant earned $904.64 working for the employing establishment; $13,334.67 working for BFC Electric Company, LLC; $4,043.90 working for ST Cotter Turbine Service, Inc.; $441.23 working for Newell Machine Co., Inc. and $242.00 working for Millwright Service, Inc. Pay stubs reflect employment with Olney Electric, LLC from June 8 to November 22, 2008 and BFC Electric for the period December 17, 2007 to June 1, 2008. In an undated statement, appellant reported intermittent use of leave without pay for the period May 23, 2006 through November 23, 2008 as well as a quarter hour of being absent without leave on May 17, 2006 for the employing establishment.[4]

In an April 26, 2008 report, Dr. Kishore J. Thampy, a second opinion physician Board-certified in psychiatry and forensic psychiatry, diagnosed major depression with paranoid features and mild attention deficit disorder. He opined that appellant continued to have residuals of his accepted employment psychiatric condition. In a May 29, 2008 work capacity evaluation for psychiatric/psychological conditions, Dr. Thampy indicated appellant was not capable of working an eight-hour day due to issues of anger, paranoia and anxiety.

On October 6, 2008 the Office referred appellant to Dr. James L. Gallagher, a physician Board-certified in psychiatry and forensic psychiatry, to resolve the conflict in the medical opinion evidence between Dr. Gersh and Dr. Thampy, a second opinion Board-certified psychiatrist with a subspecialty certification in forensic psychiatry, regarding appellant's

[2] On June 13, 2006 appellant, then a 40-year-old police officer, filed an occupational disease claim alleging that on May 23, 2006 he first realized his stress was due to harassment and retaliation at work and his being a whistleblower. He noted he was first aware of his condition on May 24, 2004. May 23, 2006 was the date appellant noted when he first realized his condition had been caused or aggravated by his employment. By decision dated October 12, 2006, the Office accepted appellant's claim for depressive reaction and anxiety reaction, not to exceed May 16, 2006. The compensable factor was appellant's reaction to the termination of his employment by the employing establishment effective April 11, 2005.

[3] Appellant submitted evidence from Iowa Workforce Development and a bank statement reflecting unemployment payments for December 17, 19 and 26, 2008 and January 2, 9 and 16, 2009.

[4] Appellant submitted claims for wage-loss compensation for the period May 5, 2006 through November 23, 2008.

treatment. In a November 6, 2008 report, Dr. Gallagher agreed with Dr. Thampy's diagnoses of major depression with paranoid features and attention deficit disorder and that appellant was not capable of working an eight-hour day due to his anxiety, diminished concentration and depression.

By decision dated March 23, 2009, the Office reduced appellant's compensation by 73 percent based on his actual earnings as an electrician in the private sector effective January 17, 2009. It noted that appellant's employment with BFC was from August 14, 2007 to May 6, 2008 and from June 1 to November 22, 2008 for Olney Electric, which was more than 60 days. The Office found that his actual earnings were $593.06 a week and that the current weekly pay rate for his date-of-injury job was $813.38. It noted that appellant's medical compensation benefits continued.

In a March 23, 2009 report, Dr. Gersh noted diagnoses of generalized anxiety disorder, major depressive disorder and hyperactivity/attention deficit disorder. He reported appellant's symptoms were consistent with the diagnosis of post-traumatic stress disorder (PTSD) although this was not one of the diagnoses made by him. Dr. Gersh reported that appellant had "difficulty with sleeping, anger and poor concentration" and the belief "that he may not be able to have a career."

On July 1, 2009 Dr. Robert B. Wesner, a treating Board-certified psychiatrist, noted he has been treating appellant for his PTSD since December 29, 2008. He reported that appellant attempted a return to work on three separate occasions when his PTSD symptoms "became a major impediment to continuing the employment in each case."

On April 6, 2009 appellant's counsel requested a telephonic hearing before an Office hearing representative, which was held on July 7, 2009.

By decision dated September 24, 2009, the Office hearing representative affirmed the Office's March 23, 2009 loss of wage-earning capacity decision. He found that appellant worked full time for more than 60 days from August 14, 2007 to May 6, 2008 for BFC as an operator and from June 1 to November 22, 2008 for Olney Electric as an electrician and that the Office correctly calculated his pay rate. The hearing representative found that appellant submitted no evidence or argument to establish that the position was not suitable work. Further, he found the opinions of Drs. Gallagher, Gersh, Thampy and Wesner were insufficient to establish that he was unfit for the positions at BFC and Olney due to his accepted employment injury.

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 in benefits.[5] Under section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an

[5] *A.W.*, 59 ECAB ___ (Docket No. 08-306, issued July 1, 2008).

employee if such earnings fairly and reasonably represent his wage-earning capacity.[6] Generally, wages actually earned are the best measure of a wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, will be accepted as such measure.[7]

When an employee cannot return to the date-of-injury job because of disability due to work-related injury or disease, but does return to alternative employment with an actual wage loss, the Office must determine whether the earnings in the alternative employment fairly and reasonably represent the employee's wage-earning capacity.[8] The procedure manual notes that reemployment may not be suitable if the job is part time, seasonal or of a temporary nature.[9] After the employee has worked for 60 days, the Office will determine whether his actual earnings represent his wage-earning capacity. In doing so, it will apply the *Shadrick* formula in determining the claimant's monetary entitlement.[10]

The Federal (FECA) Procedure Manual provides that the Office can make a retroactive wage-earning capacity determination if appellant worked in the position for at least 60 days, the position fairly and reasonably represented his wage-earning capacity and the work stoppage did not occur because of any change in the injury-related condition affecting the ability to work.[11]

ANALYSIS

The Board finds that the Office did not properly determine appellant's wage-earning capacity. When the Office learns that an employee has returned to alternative work more than 60 days after the fact, the claims examiner may consider a retroactive loss of wage-earning determination. Such a determination is generally to be considered appropriate where an investigation reveals that appellant held private employment and had substantial earnings, which were not reported to the Office or were otherwise not used in adjusting compensation entitlement.[12]

The March 23, 2009 decision constitutes a retroactive wage-earning capacity determination. Appellant worked on BFC Electric Company LLC beginning August 13, 2007 and worked in this position until May 6, 2008 and worked for Olney Electric LLC beginning June 1, 2008 and worked in this position until November 22, 2008. He informed the Office of

[6] *M.A.*, 59 ECAB ___ (Docket No. 07-349, issued July 10, 2008); *Sherman Preston*, 56 ECAB 607 (2005). *See* 5 U.S.C. § 8115(a).

[7] *S.B.*, 59 ECAB ___ (Docket No. 07-346, issued April 23, 2008); *Lottie M. Williams*, 56 ECAB 302 (2005).

[8] See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (May 1997).

[9] *Id. See Connie L. Potratz-Watson*, 56 ECAB 316 (2005).

[10] *Id. See Albert C. Shadrick*, 5 ECAB 376 (1953). This has been codified by regulation at 20 C.F.R. § 10.403.

[11] *Id*. at Chapter 2.814.7 (October 2009). *See also K.S.*, 60 ECAB ___ (Docket No. 08-2105, issued February 11, 2009); *Selden H. Swartz*, 55 ECAB 272 (2004).

[12] *Id*. at Chapter 2.814.7(e).

his employment for 2006 through 2008 in statements dated March 25 and December 8, 2008. The Office reduced appellant's compensation in its March 23, 2009 decision finding that his actual earnings for BFC Electric Company LLC and Olney Electric LLC represented his wage-earning capacity as he held a position in each company for more than 60 days. It found only that these positions were suitable because he had demonstrated his ability to perform the duties for two months. The Office did not address how such employment fairly or reasonably represented appellant's wage-earning capacity or whether his subsequent work stoppage was due to his injury-related condition, as required by its procedures.[13] It based its wage-earning capacity on appellant's job at two different companies. The procedure manual specifically states that "[o]nly one job may ultimately form the basis of a wage-earning capacity determination."[14] The Office did not address appellant's employment with multiple employers during 2007 and 2008 or the positions at BFC Electric Company LLC and Olney Electric LLC as part of its adjudication. Accordingly, it did not fully consider all criteria for making a retroactive wage-earning capacity determination.[15]

CONCLUSION

The Board finds that the Office improperly determined appellant's wage-earning capacity. The Office did not follow its procedures in making a retroactive loss of wage-earning capacity decision.

[13] *Id. See also Ronald Litzler*, 51 ECAB 588 (2000) (Office procedures provide that a retroactive determination may be made where the claimant has worked in the position for at least 60 days, the employment fairly and reasonably represents wage-earning capacity and the work stoppage did not occur because of any change in the claimant's injury-related condition affecting his or her ability to work); *William M. Bailey*, 51 ECAB 197 (1999) (The claims examiner must ask the claimant for his reasons for ceasing work).

[14] *Id.* at Chapter 2.814.7(c)(1).

[15] *Id.* at Chapter 2.814.7(e); *see also Selden H. Swartz, supra* note 11.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 24 and May 23, 2009 are reversed.

Issued: October 13, 2010
Washington, DC

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

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

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