U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT L. HOFFMAN and U.S. POSTAL SERVICE,
POST OFFICE, Palm Desert, CA

Docket No. 99-270; Submitted on the Record;
Issued October 18, 2000

DECISION and ORDER

Before MICHAEL E. GROOM, A. PETER KANJORSKI,
VALERIE D. EVANS-HARRELL

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's wage-loss compensation based on a determination that the position of substance abuse counselor represented his wage-earning capacity.

On September 23, 1988 appellant, then a 47-year-old distribution clerk, filed a notice of traumatic injury and claim for compensation alleging that he injured his back at work while stooping over and boxing mail. The Office accepted the claim for a subluxation of the lumbar spine at levels L3-4 and L5, as well as a lumbosacral strain syndrome superimposed on degenerative disc disease at L5-S1. Appellant received continuation of pay and returned to limited duty on October 27, 1988. He was subsequently terminated from his position effective March 22, 1989, on the grounds that he was physically unable to perform his required work duties with or without accommodation. Appellant was placed on the daily rolls and began receiving compensation for wage loss. He has not worked since March 22, 1989.[1]

Appellant initially sought treatment for his back injury with Dr. Rick W. Foster, a chiropractor. In a report dated September 29, 1988, Dr. Foster noted that appellant had been pulled from his regular front desk duties on September 23, 1988 to box mail in boxes one foot from floor in a constant stooping position, which aggravated his low back. He reported right and left kemp sign, reduced lumbar range of motion. He diagnosed subluxaation of L3-4, L-5 and noted that appellant had an L-3 compression fracture from a prior work-related injury. Dr. Foster further noted that a concurrent condition of discogenic degeneration. Appellant was prescribed a course of spinal manipulation and physical therapy.

[1] The record indicates that appellant has several prior work-related back strains. The Office also accepted a claim filed by appellant for a temporary aggravation of a preexisting psychiatric condition. The case was closed on February 5, 1986.

In a CA-17 form dated October 21, 1988, Dr. Foster diagnosed discogenic subluxation complex at L3-4 and L5. He advised that appellant could return to work for eight hours a day in a limited-duty position under permanent restrictions that he lift no more than 20 pounds, that he avoid prolonged standing and that he sit no more than 2 hours in a supportive chair with interval rest for 15 minutes at a time.

In a report dated October 25, 1988, Dr. Ronald B. Lamb, a Board-certified orthopedic surgeon, noted that appellant was last treated for back pain in 1985. Dr. Lamb opined that appellant suffered from degenerative disc disease that was provoked by the physical requirements of his job including extremes of lifting, pushing, pulling and twisting. Dr. Lamb agreed with Dr. Foster that appellant should be placed on permanent light duty.

The Office referred appellant for an evaluation with Dr. Leonard M. Kalfuss, a Board-certified orthopedic surgeon, on June 20, 1989. In a report dated June 28, 1989, Dr. Kalfuss outlined appellant's medical history and work injury. After discussing his physical findings and objective testing, he opined that "the residuals of the injury of [September 23, 1988] consist of an aggravation of his preexisting lumbosacaral condition and, is apportioned at approximately 20 percent due to that specific event." Dr. Kalfuss attributed appellant's back condition, in part, to his work duties, noting that "continuing trauma, superimposed upon apparent four individuals specific work injuries, [was] responsible" for aggravating his preexisting degenerative back disease. He opined that appellant's temporary aggravation had ceased and that appellant had returned to his preinjury level with only a slight acceleration of the degenerative process causally related to the September 23, 1988 event. Dr. Kalfuss concluded that appellant was capable of working eight hours per day with a lifting restriction of no more than 50 pounds.

In order to facilitate a return to work, the Office placed appellant in a rehabilitation program in November 1989. As part of his rehabilitation, appellant completed a two-year college program and received a certificate of proficiency in alcohol and drug studies on June 4, 1993.

In order to ascertain appellant's physical capacity for work, the Office referred appellant to Dr. Edwin S. Stempler a Board-certified orthopedic surgeon. In a report dated January 23, 1996, he stated that appellant had "a repeated stress injury, work related, that started in 1969 and continued until the time he was discharged." Dr. Stempler opined that appellant's chronic trauma of specific work injuries were the causative factor for his symptom complex. He recommended that the Office obtain an magnetic resonance imaging (MRI) to determine the exact nature and extent of the disc degenerative changes and whether there was any protrusion or other spinal stenosis that has occurred in that region. Dr. Stempler further recommended that appellant continue physical therapy. According to Dr. Stempler, appellant was able to perform light work with lifting up to 20 pounds and no prolonged standing.[2]

[2] Appellant alleged that the Office provided Dr. Stempler with altered medical records in order "to throw a negative light on [his] case." Specifically, appellant alleged that pages 12-17 of the June 28, 1989 report by Dr. Kalfuss were altered. The Office stated, in a February 22, 1996 letter, however, that the report of Dr. Kalfuss had been received on July 7, 1989 and that the text of the report matched the pages of the reports marked as "altered" by appellant. The Office questioned from what source appellant received that the pages of the report marked as "original." The Board has reviewed the record and finds that the report of Dr. Kalfuss contained at pages

The Office authorized a rehabilitation specialist to provide job placement assistance to appellant for more than 120 days. A labor market research study was conducted indicating that the job of substance abuse counselor was being performed in sufficient numbers within a reasonable commuting distance from appellant's residence. The research also showed that, based on his educational background and proficiency certificate, appellant was qualified to compete for work as an intake counselor at several substance abuse centers with an approximate salary of $1,100.00 per month.[3]

According to the *Dictionary of Occupational Titles* (DOT 045.107-058), the position of substance abuse counselor is sedentary with "exerting up to 10 pounds of force occasionally or a negligible amount of force frequently to lift, carry, pull, or otherwise move objects, including the human body."

A job offer was made to appellant under an assisted return to work program for a position as a substance abuse counselor. Appellant, however, refused to accept the job offer because it was a live-in position. In refusing the job offer, appellant also alleged that he was not properly licensed by the State of California to perform the selected position and that he suffered from an emotional condition, which precluded his return to work.

On February 13, 1997 the Office issued a notice of proposed reduction of compensation stating that appellant had the capacity to earn wages as a substance abuse counselor at the rate of $253.85 per week and that the position of substance abuse counselor represented appellant's wage-earning capacity. The Office advised appellant that he had 30 days to submit additional evidence or argument relevant to his wage-earning capacity.

In a report dated February 28, 1997, James F. Skalicky, a licensed psychologist, noted that appellant was seen for symptoms of depressed mood, appetite disturbance, low self-esteem, anxiety and stress. He stated that "the altered medical reports and other issues associated with [the Office] were the main topics presented in therapy." Mr. Skalicky recommended that appellant continue with his therapy because he had regressed as a result of the uncertainty and problems with his medical records.[4]

In a letter dated March 13, 1997, appellant argued that he could not accept the offered job because he was not properly licensed by the State of California as a substance abuse counselor. He also argued that the position was outside his work restrictions because of the potential for physical harm if he were ever required to physically restrain patients in the job.

154-176 of the record does not appear to have been altered and was date-stamped as received on July 7, 1989. This date-stamp supports the authenticity of the report as written.

[3] Several substance abuse centers were contacted by the rehabilitation counselor and advised that appellant's certificate of proficiency in substance abuse would qualify him for an entry level position at $1,100.00 per week, although appellant would not necessarily have the title of counselor when first employed.

[4] Dr. Skalicky noted in a January 2, 1997 report that appellant's emotional state was precipitated by harassment and the "traumatic experience" he had at the postal service.

In a report dated March 24, 1997, the rehabilitation counselor stated:

> "Please be advised that the State of California does not license substance abuse counselors. Several educational facilities provide training to enable individuals to complete requirements for academic certification in substance abuse counseling. This qualifies the recipient for entry level employment as an alcohol/substance abuse counselor. After the individual obtains a certain level of experience, they qualify for certification by any number of private certifying organizations."
>
> "Employment as an alcohol/substance abuse counselor does not require these certifications. Rather employment experience can lead to certification."

On March 27, 1997 appellant filed a Form CA-2 notice of occupational disease and claim for compensation alleging that he sustained an emotional condition as a consequence of his work-related back injury.

Appellant submitted a March 27, 1997 report from Dr. Perry Maloff. He diagnosed a "major depressive episode with acute exacerbation" based on appellant's perception that the Office altered a 1989 medical report by Dr. Kalfuss.[5] Although Dr. Maloff considered appellant's perceptions to be correct, he did not specify, which evidence or what portions of Dr. Kalfuss' report was altered by the Office.

In a decision dated July 15, 1998, an Office hearing representative affirmed the Office's April 25, 1997 decision.

The Board finds that the Office properly determined that the position of substance abuse counselor represented appellant's wage-earning capacity.

Section 8115(a) of the Federal Employees' Compensation Act provides that an injured employee who is unable to return to the position held at the time of injury, or to earn equivalent wages, but who is not totally disabled for all gainful employment is entitled to compensation based on loss of wage-earning capacity.[6] The wage-earning capacity of an employee is determined by actual earnings if actual earnings fairly and reasonably represent the wage-earning capacity.[7] If an employee has no actual earnings, wage-earning capacity is determined with due regard to the nature of the injury; the degree of physical impairment; usual employment; age; qualifications for other employment; the availability of suitable employment; and other factors or circumstances, which may affect wage-earning capacity in the disabled condition.[8] Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn wages

[5] By letter dated March 15, 1996, the Office denied allegations made by appellant that it tampered with appellant's medical evidence to make it appear that his back condition was less severe. The Office noted that the only report it received from Dr. Kalfuss was dated July 7, 1989.

[6] 5 U.S.C. § 8115(a); *see* 20 C.F.R. § 10.303.

[7] *Id.*

[8] *Mary Jo Colvert*, 45 ECAB 575 (1994).

and not on actual wages lost.[9] Further, a condition which develops following an employment injury and which is not a consequence of the employment injury is not to be considered in determining wage-earning capacity. [6]

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'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. 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.[10]

The selected position of substance abuse counselor is a position that is suitable based on the physical restrictions of appellant's work-related injury and his vocational training. The Office properly had appellant examined after his vocational training by Dr. Stempler, who reported that appellant could perform sedentary work with a lifting restriction of no more than 20 pounds. Because job placement efforts were unsuccessful, an Office rehabilitation specialist determined, based on numerous employer contacts, that appellant would be able to obtain a job as a substance abuse counselor given his two-year college degree and his certificate in the field of substance and alcohol abuse. The position of substance abuse counselor described under DOT is also consistent with the physical restrictions imposed by Dr. Stempler as appellant would perform no more than sedentary work with lifting up to 10 pounds.[11]

Appellant argues on appeal that he has been unable to obtain employment as a substance abuse counselor despite the efforts of the rehabilitation counselor and challenges the Office's determination that such a job is reasonably available to him. Appellant specifically notes that the one job offer he received was for a live-in position and he was unable to accept. Contrary to appellant's contentions, however, the fact that a claimant has not been successful in obtaining jobs in the selected position does not establish that the work is not reasonably available in the area.[12] The Office is not obligated to actually secure employment for appellant.[13] In accordance with the Office procedure manual, the Office is permitted to rely on the expertise of the rehabilitation counselor in finding whether a job is vocationally suitable and reasonably

[9] *Billy R. Beasley*, 45 ECAB 244 (1993).

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

[11] The record does not support appellant's contention on appeal that he is not physically capable of performing the job of a substance abuse counselor as the DOT description of the selected position does not indicate that appellant would be required to restrain patients in excess of his lifting capabilities as set forth in the report of Dr. Stempler.

[12] *Samuel J. Chavez*, 44 ECAB 431 (1993); *Leo A. Chartier*, 32 ECAB 652 (1981).

[13] *Phillip S. Deering*, 47 ECAB 692 (1996).

available in the geographic area that appellant resides.[14] Because there is no evidence that the rehabilitation specialist erred in conducting the labor market survey, the Board affirms the Office's finding that the position of substance abuse counselor is reasonably available to appellant in the open labor market under normal labor conditions.

The Board also notes that the record is insufficient to establish either that appellant had a preexisting emotional condition or a consequential emotional condition resulting from his work-related back injury[15] Dr. Maloff's opinion fails to establish that appellant sustained an emotional condition as a consequence of his employment injury, which would preclude him from performing the duties of the constructed position of substance abuse counselor. Contrary to appellant's argument, although he may have developed a depressive disorder, the condition resulted from appellant's perception of events occurring after the work injury and is not causally related to or a consequential injury resulting from the accepted back condition.

The Board concludes that the Office properly determined appellant's wage-earning capacity based on the position of substance abuse counselor. The Office also properly applied the *Shadrick* formula to ascertain the percentage of loss of appellant's wage-earning capacity and to consequently reduce appellant's compensation.

[14] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(b) (December 1995).

[15] The FECA Procedure Manual, Chapter 2.0814 (8)(d), provides that the Office is "responsible for determining whether the medical evidence establishes that the claimant is able to perform the job taking into consideration the medical conditions due to the work-related injury or any preexisting medical conditions." Medical conditions arising subsequent to the work-related injury or disease will not be considered.

The decision of the Office of Workers' Compensation Programs dated July 15, 1998 is hereby affirmed.

Dated, Washington, DC
October 18, 2000

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

Valerie D. Evans-Harrell
Alternate Member