

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT J. REID and DEPARTMENT OF THE NAVY,
PHILADELPHIA NAVAL SHIPYARD, Philadelphia, PA

*Docket No. 01-2002; Submitted on the Record;
Issued September 3, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly determined that the position of credit clerk reasonably represented appellant's wage-earning capacity.

The Board finds that the Office's wage-earning capacity determination was improper.

Section 8115(a) of the Federal Employees' Compensation Act¹ provides that if actual earnings of the employee do not fairly and reasonably represent his wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity as appears reasonable under the circumstances is determined with due regard to a number of factors, including the nature of his injury; the degree of physical impairment; his usual employment; his age; his qualifications for other employment; the availability of suitable employment; and other factors or circumstances which may affect his wage-earning capacity in his disabled condition. The Office did not properly take all of these factors into account in this case.²

In the present case, the Office relied on a December 30, 1998 opinion by a rehabilitation counselor that the position of credit clerk was physically and vocationally suitable for appellant and totally disregarded the medical evidence of record which contained the results of appellant's I.Q., intelligence, psychological and psychiatric testing conducted both prior to and following the rehabilitation counselor's assessments and rehabilitation efforts, as reported by Dr. M. Patrick Jarrell and Dr. Charles J. Vander Kolk.

In this case, the Office accepted that on April 2, 1985, appellant, then a 31-year-old sandblaster who had been working with paints and paint removers, developed contact dermatitis on both of his upper extremities. He was left with chronic exfoliative dermatitis and mild

¹ 5 U.S.C. § 8115(a).

² See generally, 5 U.S.C. § 8115(a); A. Larson *The Law of Workers' Compensation* § 57.22 (1989).

eczematization that was aggravated by chemicals, moisture, sweat and by working in humid, wet environments.

Psychological evaluation and testing on December 1, 1993 was reported by Dr. Jarrell, a clinical psychologist at the doctoral level, as revealing that appellant had a verbal IQ of 73, a performance IQ of 85 and a full scale IQ of 78, which placed him in the borderline range of intellectual functioning. The verbal and performance IQ difference was felt to possibly indicate organicity.³ Dr. Jarrell opined that these scores suggested that appellant had difficulties with verbal skills/tasks and was likely to excel in activities that required more visual/spatial versus verbal ability. He found that appellant functioned at low levels in reading, spelling and arithmetic and specifically that he performed at the third grade level in reading, below third grade level in spelling and at the fifth grade level in arithmetic and recommended vocational training. Dr. Jarrell advised appellant's rehabilitation counselor of his deficiencies by letter dated December 16, 1993.

Appellant underwent rehabilitation, based upon his ability and on January 14, 1997 was noted to have completed training at Trident Technical College, earning a certificate in child care management rendering him capable of earning approximately \$10,900.00 per year as a child-care attendant. This was the extent of appellant's training. Intellectual demands for the position of child-care attendant were noted to include: reasoning Level 3 -- apply commonsense understanding to carry out instructions in written, oral or diagrammatic form; math level 1 -- add and subtract two-digit numbers; multiply and divide 10s and 100s by 2, 3, 4, 5; and language level 2 -- Passive vocabulary of 5,000 -- 6,000 words; read stories, look up unfamiliar words; write compound and complex sentences; and speak clearly and distinctly using present, perfect and future tenses. Activities were noted to include wheeling handicapped children to classes and elsewhere; securing children in equipment, chairs, slings or stretchers, hoisting children into baths or pools; monitoring children using life support equipment and calling for medical assistance when necessary; and helping children to walk, board buses, put on prosthetic appliances, eat, dress, bathe and perform other activities as needed.

The Office originally attempted to reduce appellant's compensation based upon his ability to perform the duties of a child-care attendant, but apparently appellant objected claiming that such a position was not suitable to his partially disabled condition as he had to work in a wet or humid environment and the Office ceased efforts and requested that the rehabilitation counselor provide suitable alternatives.

The rehabilitation counselor, after noting appellant's difficulty with technical college final examinations, recognition of his learning disability, acknowledgment of his aid by the Disabled Students' Office and the provision of tutors for english and math, then, selected the position of credit clerk from the *Dictionary of Occupational Titles* and opined that it was suitable to appellant's partially disabled condition, noting that it did not require working in a wet, humid environment. This position was described as follows:

“Processes applications of individuals applying for loans and credit; [i]nterviews applicant to obtain personal and financial data and fills out application[s]; calls or

³ Organic brain damage or disease. See The Random House *College Dictionary*, Revised Edition, 1980, p.936.

writes to credit bureaus, employers and personal references to check credit and personal references; [e]stablishes credit limit, considering such factors as applicant's assets, credit experience and personal references, based on predetermined standards; notifies customers by mail, telephone or in person of acceptance or rejection of application. May keep record of file of credit transactions, deposits and payments and sends letters or confers with customers having delinquent accounts to make payments (collections clerk). May send form letters and brochures to solicit business from prospective customers. May adjust incorrect credit charges and grant extensions of credit on overdue accounts. May accept payment on accounts. May keep record of applications for loans and credit, using computer. May compute interest and payments, using calculator. May provide customer credit information or rating on request to retail stores, credit agencies or banks. May check value of customer's collateral, such as securities held for loan. May advise customer by telephone or in writing about loan or credit information. May assist customer in filling out loan or credit application." (Emphasis added.)

On February 22, 1999 the Office provided appellant notice of proposed reduction of compensation based upon the rehabilitation counselor's determination of his ability to perform the position of credit clerk. The Office found that his vocational preparation of two years at a technical college proved his basic aptitude.

Appellant disagreed with the proposed action and on March 5, 1999 he submitted another psychological and vocational evaluation performed on January 26, 1999, after his completion of his technical training program, by Dr. Vander Kolk, a clinical psychologist at the doctoral level. Dr. Vander Kolk found that on a reading test appellant could only pronounce a few of the words and that his score placed him below the third grade level. He indicated that people who read below the third grade level are considered functionally illiterate. Dr. Vander Kolk noted that appellant was able to perform very simple basic math functions such as add, subtract and do simple multiplication and division, but was unable to write out or multiply decimals, convert feet to inches, add mixed fractions, subtract mixed fractions, find the average of several numbers or do any percentage work. He concluded that, based upon the testing results, appellant would be capable of doing very simple inventory work and performing jobs which require the very basic skills of math and simple words and that he would not be suitable for jobs requiring any kind of analysis of written reports, manuals, use of decimals or percentages. He found that appellant would probably not be able to perform jobs where he had to write out reports or keep anything other than very simple records. Dr. Vander Kolk opined that IQ testing revealed that appellant was in the borderline range, above mentally deficient but below "dull" and particularly noted that appellant had problems with the "clerical section" of the test where he had to quickly identify items that were similar or different. He noted that appellant did extremely poorly when trying to identify quickly numbers that were different, how patterns were put together or identifying missing objects in pictures and recommended that appellant would function best in jobs which were very concrete and did not require a lot of independent reasoning or analysis of data on his part. Further deficiencies were also discussed. Dr. Vander Kolk additionally opined that appellant's skin breakouts caused him psychological distress where his functioning was further impaired, that he coped with stress with difficulty and that his permanent diagnosis included an

adjustment disorder with mixed emotional features with features of depression and preoccupation with health.

By decision dated June 30, 1999, the Office adjusted appellant's compensation finding that he had the ability to earn wages as a credit clerk. The Office advised that the vocational rehabilitation counselor, who was "an expert in the field of identifying suitable alternate employment," opined that appellant's "two-plus years of technical college courses⁴ have provided [him] with the aptitude needed for such a position."

In a letter dated July 26, 1999, appellant disagreed with the decision and he requested an oral hearing to correct the decision.

In a letter dated September 2, 1999, the Berkeley County School District indicated that appellant began employment with them as a child care attendant on August 9, 1999 earning \$8,368.74 per year.

A hearing was held on January 5, 2000 at which appellant testified. By decision dated March 30, 2000, the hearing representative vacated the June 30, 1999 determination finding that the position of child care attendant should have been used to determine wage-earning capacity instead of the constructed position of credit clerk as appellant had actual earnings for greater than 60 days in the position.

Thereafter the Office determined that the hearing representative's decision was not correct as proper procedures were not followed and on September 5, 2000 it issued another decision affirming the June 30, 1999 hearing representative decision finding that appellant had the ability to earn wages as a credit clerk.

By decision dated September 5, 2000, the Assistant Branch Chief of the Branch of Hearings and Review advised appellant that he had rescinded the hearing representative's March 30, 2000 decision and affirmed the June 30, 1999 wage-earning determination.

By letter dated September 13, 2000, appellant, through his representative, disagreed and requested another oral argument.

By decision dated April 16, 2001, the Branch of Hearings and Review denied appellant's hearing request noting that a previous oral hearing on the issue in question had been conducted on January 5, 2000. The Office found that since appellant had previously received an oral hearing, he was not entitled by right to another hearing on the same issue and that, in its discretion, it had considered appellant's request and denied it as the issue could be equally well addressed by requesting reconsideration from the Office.

In a letter dated May 30, 2001, appellant, through his representative, requested reconsideration of the June 30, 1999 determination, arguing that appellant had accepted the

⁴ It took appellant two-plus years with the help of tutors and the aid of the disabled students office to earn a certificate as a child care attendant.

position of classroom assistant at Goose Creek High School in April 1999, which preceded the Office's June 30, 1999 wage-earning capacity determination.

By decision dated July 9, 2001, the Office denied modification of its September 5, 2000 decision finding that, although appellant signed a contract for the child care assistant prior to the wage-earning capacity determination, he did not earn actual wages as such until August 1999 after the wage-earning capacity determination based on a selected position was finalized. This appeal ensued.

Consideration of the totality of the evidence in this case, including the medical reports addressing appellant's intellectual vocational limitations, reveals that the position of credit clerk is not consistent with the findings or recommendations of appellant's evaluating psychologists as it requires multiple abilities that appellant does not possess and skills that he cannot perform. Therefore, although the position of credit clerk is within appellant's physical limitations, it is not within his mental, psychological and technical abilities, because the record reveals that he has significant intellectual limitations which were not improved by two-plus years of assisted and tutored technical school training, as revealed by the comprehensive January 26, 1999 report from Dr. Vander Kolk.

Although, generally, the determination of a rehabilitation counselor as to job suitability is given great deference by the Office,⁵ that fact does not obviate the Office's responsibility to consider the substance of all of the medical evidence of record in conjunction with the opinion of the rehabilitation counselor, particularly in a case where the medical and psychological evidence of record directly contradicts the rehabilitation counselor's conclusions. In this case the rehabilitation counselor failed to address the findings of such medical evidence and only provided a one sentence analysis, without rationale, supporting the vocational suitability⁶ of the position⁷ for appellant, without regard to its specific tasks and requirements. This opinion is therefore, inadequate to establish vocational suitability of a job requiring technical clerical and computation skills for a functionally illiterate individual.

⁵ As he or she is generally considered to be an expert in his/her field. *See generally Dorothy Jett*, (Docket No. 99-297, issued January 29, 2001), *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(b)(2). Although this section specifically refers to the opinion of a rehabilitation specialist, the Office in this case applied the principle to the opinion of the rehabilitation counselor.

⁶ Based only on the fact of appellant's assisted completion of a technical school certificate program in child care in two-plus years.

⁷ Which required, among other skills, the use of a computer and a calculator, analysis of data, particularly numbers, computation of charges, interest and payments, complex record keeping, writing of reports and other letters and interviewing skills.

The decisions of the Office of Workers' Compensation Programs dated September 5 and July 9, 2000 are hereby reversed; the decision dated April 16, 2001 is rendered moot.

Dated, Washington, DC
September 3, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member