

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of THOMAS O. DONAGHUE and DEPARTMENT OF TRANSPORTATION,  
FEDERAL AVIATION ADMINISTRATION, Oberlin, Ohio

*Docket No. 95-2613; Submitted on the Record;  
Issued March 2, 1998*

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DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined appellant's wage-earning capacity based upon the selected position of case worker.

In 1975, appellant then a 39-year-old air traffic controller, sustained an emotional condition, anxiety disorder, due to his job as an air traffic controller. Appellant was assigned to a light-duty position on July 13, 1976 but was reinstated to his air traffic controller position on May 27, 1984. On June 10, 1987 appellant retired and filed a recurrence of disability claim which was accepted by the Office and he began receiving compensation benefits for temporary total disability.

In a report dated March 13, 1992, Marvin Wasman, Ph.D., stated that appellant continued to manifest symptoms of an anxiety disorder and was unable to perform his air controller position. He stated:

"I feel that [appellant] could not successfully function in a real work environment. He might perform adequately in a situation involving minimal stress, supportive supervision, and considerable control over how a job should be completed. Unfortunately, there are few, if any, opportunities for such employment."

In a report dated September 9, 1992, Ann Tremblay, a rehabilitation counselor, stated that she had researched jobs for appellant that were considered to be low stress jobs. She noted that she had taken into consideration appellant's education, past work experience, and his job skills and noted that possible positions included production clerk, sales representative, case worker, probation officer, veteran representative, social services aide, and substance abuse counselor. Ms. Tremblay noted that she had conducted a labor market survey and found 40 case manager positions, 40 substance abuse counselor positions, 6 counselor positions, 6 probation officer positions, and 28 case worker positions within a reasonable driving distance of

appellant's residence and stated that appellant had the experience or educational credentials to qualify for these positions.

In a report dated November 9, 1992, Ms. Tremblay stated that the positions of case worker, family case worker and substance abuse counselor fell within appellant's medical limitations which recommended low stress employment, that he was qualified for these positions due to his previous training, and that these occupations existed in the labor market in sufficient numbers so that it was reasonable to expect that appellant would find employment.

In a report dated February 8, 1993, Dr. Harvey N. Chapin, appellant's attending psychiatrist, stated his opinion that appellant was not capable of maintaining a job because of his level of anxiety and because of his strong feeling that he would not be able to do any kind of work satisfactorily. He noted that appellant's anxiety increased when he thought about being trained for a new position.

In a report dated April 14, 1993, Ms. Tremblay noted that appellant had followed through on job leads provided by the rehabilitation service but apparently was fairly reluctant to complete any job placement activities on his own behalf and that he was convinced he was not employable and could not handle the stress, particularly in case management positions. She stated that she had located seven job openings for which appellant was qualified and were considered to be a reasonable commuting distance from appellant's residence. Ms. Tremblay stated that the 7 positions included family case worker and case worker positions in the salary range of \$400.00 to \$500.00 per week and that it was determined that appellant was qualified for these positions as he possessed a bachelor's degree in psychology. She stated that, although appellant had not been hired for any of the positions for which he had applied, it was felt that such positions were reasonably available within his area.

In a report dated November 8, 1993, Dr. Chapin summarized his course of treatment of appellant and stated that it was very difficult to say whether appellant could perform any job due to his level of anxiety.

In an undated report, Dr. L. Jerome Fink, a psychiatrist and an Office referral physician, provided a history of appellant's condition and the results of a mental status examination and diagnosed a long-standing depression and anxiety disorder and indicated that appellant could not perform his air traffic controller position. In a supplemental report, Dr. Fink stated that he was unable to determine what type of employment might be suited to him.

By letter dated September 28, 1994, the Office advised appellant that it proposed to reduce his compensation benefits for wage loss on the grounds that the evidence of record established that he was no longer totally disabled from all work and had the capacity to earn wages as a case worker at the rate of \$562.50 per week which translated to an ability to earn 47 percent of his former wages. The Office stated that the medical evidence of record established that appellant was able to perform the duties of a case worker. The Office stated that the factual evidence of record, as represented by the rehabilitation counselor's reports and findings, supported that the position of case worker fairly depicted appellant's wage-earning capacity and was within his medical restrictions. The Office noted that a case worker collected data, created files, maintained and reviewed records based upon interviewing clients with various problems,

evaluated the nature and degree of each situation, counseled those needing assistance, aided individuals in the use of available resources, and directed them to appropriate programs within the community. The Office stated that appellant had the skills, education and actual experience to perform this low stress job which was being performed in sufficient numbers within his commuting area as to make it reasonably available. The Office noted that the average weekly wage for the position was \$562.50. The Office stated that the position of case worker fairly represented appellant's wage-earning capacity. The Office provided a work sheet which showed its calculation of appellant's loss of wage-earning capacity calculated according to the *Albert C. Shadrick* decision.<sup>1</sup>

By letter dated October 7, 1994, appellant stated that he did not feel that he had the ability to perform the position of case worker.

In a memorandum to the file dated October 17, 1994, Mr. Goodspeed noted that the rehabilitation counselor had completed a "VDARE" analysis of appellant's skills, experience and education and that this analysis was a nationally recognized method of establishing a worker's qualifications for employment and that the results of the evaluation showed that appellant was qualified for the positions of case worker, social services aide, substance abuse counselor, and veterans representative. Mr. Goodspeed noted that appellant had a bachelor's degree in business and psychology and that he met the qualifications for these positions. He noted that job availability meant that jobs were performed in reasonable numbers in the worker's community so that there were multiple places to apply for employment but that specific job openings were not a requirement for determining that a job was available. He noted that in appellant's case, availability was established September 9, 1992 based on statistical data provided by the Michigan Employment Security Commission and that an actual survey was conducted to locate employers and that at least seven job openings were identified. Mr. Goodspeed noted that the existence of job openings substantiated the survey results and established the availability of the positions.

In a report dated October 25, 1994, Dr. Chapin related that appellant felt that the Office did not understand the severity of his psychiatric illness and the reasons for his inability to be employed as a counselor. He stated that he had examined appellant on three occasions since October 1993 and that his level of anxiety was about the same on each occasion. Dr. Chapin related that appellant's anxiety heightened when he received notices from the Office stating that he should work as a counselor. He related that appellant had no experience or training in that field. Dr. Chapin stated:

"It is my impression that [appellant] continues to have a degree of anxiety which fluctuates from time to time and it becomes much worse when it is suggested that he work at a job for which he has never been trained."

By decision dated November 10, 1994, the Office adjusted appellant's compensation benefits on the grounds that the medical evidence of record showed that he was no longer totally disabled for work due to the effects of his October 14, 1975 employment injury. The Office

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<sup>1</sup> 5 ECAB 376 (1953).

noted that its wage-earning capacity decision took in consideration such factors as appellant's actual earnings, his disability, training, experience, age and the availability of work in the area where he lived and that it was found that the position of case worker fairly represented appellant's wage-earning capacity. The Office determined that appellant's wage-earning capacity was \$497.14, that his loss in earning capacity per week was \$846.48, and that his new compensation rate would be \$564.32 (2/3 times \$846.46), increased by cost of living adjustments to \$708.25 with a new compensation rate each 4 weeks of \$2,833.00.

By letter dated November 21, 1994, appellant requested an examination of the written record.

In a decision dated April 13, 1995, an Office hearing representative affirmed the Office's November 10, 1994 decision on the grounds that the evidence of record established that the selected position of case worker fairly represented appellant's wage-earning capacity.

The Board finds that the Office has not met its burden of proof in reducing appellant's compensation benefits.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.<sup>2</sup>

Under section 8115(a) of the Federal Employees' Compensation Act,<sup>3</sup> wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity, or the employee has no actual earnings, his wage-earning capacity is determined with due regard to 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.<sup>4</sup> Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.<sup>5</sup> The job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives.<sup>6</sup>

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by the Office or 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 that employee's capabilities with regard to his physical limitations,

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<sup>2</sup> *Bettye F. Wade*, 37 ECAB 556 (1986); *Ella M. Garner*, 36 ECAB 238 (1984).

<sup>3</sup> 5 U.S.C. § 8115(a).

<sup>4</sup> *Pope D. Cox*, 39 ECAB 143 (1988); see 5 U.S.C. § 8115(a).

<sup>5</sup> *Albert L. Poe*, 37 ECAB 684 (1986); *David Smith*, 34 ECAB 409 (1982).

<sup>6</sup> *Id.*

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.

In the present case, the Office referred appellant's case to a rehabilitation counselor who determined that appellant could perform the selected position of case worker based upon the criteria set forth above. However, the medical evidence of record does not establish that appellant could perform this position and therefore the Office has not met its burden of proof in reducing appellant's compensation benefits based upon the selected position of case worker.

In a report dated March 13, 1992, Dr. Wasman, opined that appellant might perform adequately in a situation involving minimal stress, supportive supervision, and considerable control over how a job should be completed. However, there is no indication that Dr. Wasman reviewed a description of the selected case work position and determined that this position met the criteria set forth in his report and whether appellant could, in fact, perform this job. Therefore, this report does not establish that appellant was capable of performing this selected case worker position.

In a report dated February 8, 1993, Dr. Chapin, appellant's attending psychiatrist, stated his opinion that appellant was not capable of maintaining a job because of his level of anxiety. He noted that appellant's anxiety increased when he thought about being trained for a new position. As Dr. Chapin did not indicate that he had reviewed a description of the duties of the case worker position and as he did not opine that appellant could perform this job, this report does not suffice to meet the Office's burden of proof.

In a report dated November 8, 1993, Dr. Chapin stated that it was very difficult to say whether appellant could perform any job due to his level of anxiety. Therefore, this report is insufficient to establish that appellant could perform the case worker position.

In two undated reports, Dr. Fink, a psychiatrist and an Office referral physician, provided a history of appellant's condition and the results of a mental status examination and diagnosed a long-standing depression and anxiety disorder and stated that he was unable to determine what type of employment might be suited to appellant. Therefore, this report does not establish that appellant was able to perform the selected position of case worker.

In a report dated October 25, 1994, Dr. Chapin related that appellant had no experience or training as a counselor and related that appellant's anxiety became worse when the Office suggested that he perform a job for which he had no training. This report does not suffice to meet the Office's burden of proof that appellant was able to perform the selected position of case worker.

As the Office has failed to establish that the selected position of case worker was within appellant's medical restrictions related to his employment-related anxiety disorder, it has failed to meet its burden of proof in modifying his compensation benefits.

The April 13, 1995 and November 10, 1994 decisions of the Office of Workers' Compensation Programs are reversed.

Dated, Washington, D.C.  
March 2, 1998

Michael E. Groom  
Alternate Member

Bradley T. Knott  
Alternate Member

A. Peter Kanjorski  
Alternate Member