U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LRA V. AI and DEPARTMENT OF THE NAVY,
MILITARY SEAFLIFT COMMAND PACIFIC, Oakland, CA

Docket No. 98-1563; Submitted on the Record;
Issued July 27, 2000

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's wage-loss compensation effective August 18, 1996 based on his capacity to perform the duties of a tractor-trailer truck driver.

On December 18, 1986 appellant, then a 41-year-old oiler, filed an occupational disease claim alleging that he sustained depression causally related to factors of his federal employment. He stopped work on November 18, 1986 and did not return. The Office accepted appellant's claim for precipitation of major depressive disorder.

In a psychiatric work restriction evaluation dated March 23, 1994, Dr. Martin E. Gutride, a psychologist and appellant's attending physician, rated appellant's level of impairment as "very slight" but found that "the stress of 'directing, controlling and planning' could set him back at this point." Dr. Gutride further stated, "This evaluation has been completed with the knowledge that [appellant] is seeking an educational program for himself, not a return to work (which is a long range goal). In my opinion he is ready for education/training."

In a psychiatric work restriction evaluation dated March 31, 1994, Dr. Peter Weiser, a psychiatrist, found that appellant had a moderate or marked level of impairment and noted that appellant "feels he will need retraining to function at the job."

By letter dated May 25, 1994, appellant requested vocational rehabilitation.[1] The Office referred appellant to a rehabilitation counselor in August 1994. The rehabilitation counselor recommended that appellant begin a training program as a heating and air conditioning technician.

In a report dated November 1, 1994, Dr. Martha B. Mahaffrey, a clinical psychologist, noted that appellant's "last psychiatric hospitalization was June 26 through July 16, 1993.

[1] The Office previously referred appellant to a rehabilitation counselor in March 1988; however, he was subsequently hospitalized due to his psychiatric condition and rehabilitation efforts ceased.

During the past year he has made substantial improvement in his mental status." Dr. Mahaffrey approved appellant's "current pursuit for vocational rehabilitation in the area of environmental control technologist with refrigeration and air conditioning technologist emphasis."

On January 20, 1995 the Office approved training for appellant in the area of heat and air conditioning installation.

In a report dated March 29, 1995, Dr. Mahaffrey opined that appellant's mental health was stable and that he could undertake vocational rehabilitation and employment.

On August 31, 1995 an Office rehabilitation specialist related that "[appellant] was unable to deal with the demands of the previous technical training program due to his psychiatric impairment." He noted that the rehabilitation counselor recommended that appellant receive training to be a truck driver which "will be less demanding from a technical point of view and will require less interaction with others." The Office authorized truck driving school for appellant. The record indicates that appellant successfully completed truck driving school and obtained his commercial license.

By letter dated January 25, 1996, the Office issued a notice of proposed reduction of compensation based on its determination that he could earn wages as a tractor-trailer truck driver. The Office provided appellant 30 days within which to submit additional factual or medical information.

Appellant submitted a work restriction evaluation dated January 29, 1996, received by the Office on February 13, 1996, from Dr. Ronald R. Fox, a psychiatrist, who diagnosed major depression, recurrent, post-traumatic stress disorder of childhood onset, alcohol dependence in remission for four years and to rule out schizoaffective disorder. Dr. Fox indicated that appellant took medication which was "likely to induce sedation and reduce coordination." He opined, "At this time [appellant] is functionally disabled for a minimum of the next 12 months. Dr. Fox at this time does not appear ready for meaningful rehabilitation."

By letter dated January 30, 1996, appellant stated that he tried to get a job as a truck driver but had problems with the companies wanting more information regarding his medical history. He indicated that reducing his compensation would cause "financial hardship."

By decision dated August 19, 1996, the Office finalized its reduction of appellant's compensation effective August 18, 1996. In a decision dated October 25, 1996, the Office denied appellant's request for a hearing as untimely. By decision dated January 30, 1997, the Office denied review of its prior decision. Appellant appealed to the Board but subsequently requested that his appeal be dismissed in order for him to request reconsideration. The Board dismissed appellant's appeal on June 20, 1997.[2]

In a letter dated June 29, 1997, appellant, through his attorney, requested reconsideration. By decision dated October 15, 1997, the Office denied modification of the August 19, 1996 decision.

[2] Order dismissing appeal, Docket No. 97-1188 (issued June 20, 1997).

The Board has duly reviewed the case record and finds that the Office did not meet its burden of proof to establish that the selected position of tractor-trailer truck driver represented appellant's wage-earning capacity.

Under section 8115(a) of the Federal Employees' Compensation Act[3] wage-earning capacity is determined by the actual wages received by an employee are the earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity or if the employee has no actual earnings, the wage-earning capacity is determined with due regard to the nature of the employee's injury, the degree of physical impairment, his or her usual employment, age, qualifications and other factors, and circumstances which may affect wage-earning capacity in the employee's disabled condition.[4]

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.[5]

Although a claims examiner may rely upon a rehabilitation counselor's opinion as to whether a job is reasonably available and vocationally suitable, the claims examiner has the responsibility to determine whether the medical evidence establishes that appellant is able to perform the job, taking into consideration medical conditions due to the accepted work-related injury and any preexisting medical conditions.[6] The medical evidence of record at the time of the Office's loss of wage-earning capacity determination does not establish that appellant was able to perform the duties of tractor-trailer truck driver.

The Office apparently relied upon the March 23, 1994 report from Dr. Gutride in finding that appellant could perform the duties of the selected position as it is the only medical report referred to by the Office in either its notice of proposed reduction of compensation or final decision. However, Dr. Gutride's March 23, 1994 report is insufficient to establish that appellant was capable from a medical standpoint of performing the duties of a truck driver. In his report, Dr. Gutride specifically approved only further education and training for appellant rather than a return to work. Thus, the Office erred in relying on this medical report in determining appellant's wage-earning capacity.[7]

[3] 5 U.S.C. § 8115(a).

[4] *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

[5] *Albert C. Shadrick*, 5 ECAB 376 (1953).

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

[7] In a report dated November 1, 1994, Dr. Mahaffrey, a psychologist, approved appellant's training as an air

Further, subsequent to the Office's notification of its proposed termination of compensation, appellant submitted a January 29, 1996 work restriction evaluation from Dr. Fox, a psychiatrist, who noted that appellant took medication which could cause sedation and reduce coordination. Dr. Fox diagnosed major depression, recurrent, post-traumatic stress disorder of childhood onset, alcohol dependence in remission for four years, and to rule out schizoaffective disorder. He found appellant functionally disabled and not ready for rehabilitation. The Office did not determine whether the effects of appellant's medication, his major depression, or his preexisting post-traumatic stress disorder prevented him from performing the duties of the selected position. There is no indication that the Office provided a job description to any physician of record and sought an opinion regarding whether appellant was capable of performing the position of tractor-trailer truck driver. Accordingly, the Board finds that appellant's wage earning was not determined with due regard to his degree of impairment as provided in section 8115(a).

The decision of the Office of Workers' Compensation Programs dated October 15, 1997 is hereby reversed.

Dated, Washington, D.C.
July 27, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

conditioning technician; however, the Office rehabilitation specialist subsequently found that appellant was unable to perform the training program due to his psychiatric impairment. She indicated, in an memorandum dated March 29, 1995, that appellant could perform vocational rehabilitation and employment; however, she provided no history of injury, diagnosis or findings on examination. Thus, Dr. Mahaffrey's statement is not sufficiently detailed or explained to constitute rationalized medical evidence sufficient to meet the Office's burden of proof to reduce appellant's compensation benefits.