

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EDWARD F. ROJA and DEPARTMENT OF THE NAVY,
MARE ISLAND NAVAL SHIPYARD, Vallejo, CA

*Docket No. 02-1978; Submitted on the Record;
Issued December 20, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation effective October 13, 1996, based on his capacity to perform the duties of a sales manager.

In this case, appellant, then a 22-year-old sheet metal mechanic, was in an apprentice program when he was subjected to a series of events at the employing establishment arising on or about July 13, 1988. He filed a claim for benefits which the Office accepted for adjustment disorder with mixed emotional features and with work inhibition. Appellant stopped work on or about July 14, 1989 and has not returned to federal employment. The Office paid compensation for temporary total disability.

In a letter dated August 12, 1993, Dr. Robert G. Braun, a psychiatrist and appellant's treating physician, approved the rehabilitation counselor's suggestion for appellant to start training at The University of Texas at San Antonio (UTSA) in a two-year program with a vocational goal of a B.B.A. degree in international business. Dr. Braun additionally reviewed the jobs of entry level of manager-exports, entry level of manager sales management and other types of entry level jobs in the field of business administration in the San Antonio area and opined that those jobs were within appellant's medical restrictions.

On August 17, 1993 the Office authorized appellant's vocational rehabilitation training plan. The plan was a two-year college training program with a B.B.A. degree in international business administration. Appellant was not able to return to work with the previous employer or his previous occupation and his physician recommended that appellant obtain his B.B.A. degree. It was noted that the physician had approved the occupations appellant will qualify for at the completion of the training. Vocational testing indicated that appellant has the capacity to complete the training and the rehabilitation counselor indicated that appellant has 70 hours of college already. Counseling and guidance were also provided.

In a rehabilitation status report of April 8, 1996, the rehabilitation counselor advised the Office that appellant dropped a course and will not graduate as scheduled at the end of the current spring semester. Appellant did not notify the rehabilitation counselor in advance that he was having problems in the course so that a tutor could be provided. In addition, there have been several delays in the training program already due to dropping course work. Therefore, further training expenses were not authorized and placement services will commence at the end of this spring semester. It was noted that should appellant wish to continue in school to complete the degree, it would be at his own expense.

In a rehabilitation status report dated May 20, 1996, the rehabilitation counselor stated that appellant did not complete his degree this semester as planned and lacked one three-hour course which he dropped in the spring semester. Vocational objectives were previously identified and placement services have been authorized for 90 days.

In a vocational rehabilitation report dated July 31, 1996, the vocational rehabilitation counselor issued a report summarizing his efforts to find suitable employment for appellant within his indicated restrictions and noted that placement was not successful. It was further noted that appellant was thinking of taking his last three hours of college courses this fall in order to secure his degree. The rehabilitation counselor provided undated Form CA-66 reports for the positions of office manager and sales manager, jobs listed in the Department of Labor's *Dictionary of Occupational Titles*, which he determined reasonably reflected appellant's ability to earn wages and which the treating physician had approved. In a final report of August 26, 1996, the rehabilitation counselor noted that placement efforts were not successful and that the case was closed.

By notice of proposed reduction dated September 11, 1996, the Office advised appellant of its proposal to reduce his compensation because the factual and medical evidence established that he was no longer totally disabled and that he had the capacity to earn wages as a sales manager¹ at the weekly rate of \$400.00 in accordance with the factors outlined in 5 U.S.C. § 8115.² The Office calculated that appellant's compensation rate should be adjusted to \$218.50

¹ The job description for the position of sales manager, DOT # 163.167.018, indicated that appellant: "manages sales activities of establishment: directs staffing, training and performance evaluations to develop and control sales program. Coordinates sales distribution by establishing sales territories, quotas and goals and advises dealers, distributors and clients concerning sales and advertising techniques. Assigns sales territory to sales personnel. Analyzes sales statistics to formulate policy and to assist dealers in promoting sales. Reviews market analyses to determine customer needs, volume potential, price schedules and discount rates and develops sales campaigns to accommodate goals of company. Directs product simplification and standardization to eliminate unprofitable items from sales line. Represents company at trade association meetings to promote product. Coordinates liaison between sales department and other sales-related units. Analyzes and controls expenditures of division to conform to budgetary requirements. Assists other departments within the employing establishment to prepare manuals and technical publications. Prepares periodic sales report showing sales volume and potential sales. May direct sales for manufacturer, retail store, wholesale house, jobber or other establishment. May direct product research and development. May recommend or approve budget, expenditures and appropriations for research and development work.

² 5 U.S.C. § 8115.

using the *Shadrick*³ formula. The Office indicated that appellant's salary on July 14, 1989, the date he began receiving compensation for temporary total disability, was \$560.40 a week, that his current adjusted pay rate for his job on the date of injury was \$706.40 and that appellant was currently capable of earning \$400.00 a week, the rate of a sales manager. The Office, therefore, determined that appellant had a 57 percent wage-earning capacity, which when multiplied by 3/4 amounted to a compensation rate of \$180.74. The Office found that, based on the current consumer price index, appellant's current adjusted compensation rate was \$218.50. The Office stated that the case had been referred to a vocational rehabilitation counselor, who had located a position as a sales manager, which he found to be suitable for appellant given his work restrictions and was available in appellant's commuting area. The Office allowed appellant 30 days in which to submit any contrary evidence.

By letter dated October 5, 1996, appellant contested the proposed reduction of compensation, contending that there had been no effort made to determine the kind of work environment which would be most appropriate in accommodating his condition. He further stated that he had no interest in sales, has never had any success in sales and could not comprehend how he would be able to make a living in sales. The record indicates that this letter was postmarked October 7, 1996 and received by the Office on October 22, 1996.

By decision dated October 11, 1996, the Office advised appellant that it was reducing his compensation effective October 13, 1996 because the weight of the medical evidence showed that he was no longer totally disabled for work due to effects of his employment injury and that the evidence of record showed that the position of sales manager was suitable both medically and vocationally and represented his wage-earning capacity.

Appellant requested reconsideration numerous times and submitted additional medical evidence from Dr. Braun.

In a report dated October 21, 1996, Dr. Braun stated that the focus of appellant's therapy was to channel appellant's anger, a primary manifestation of the injustices and unfair practices he endured while employed as a sheet metal mechanic at the employing establishment. Based on psychodiagnostic testing and impression, Dr. Braun confirmed the previous diagnosis of an adjustment disorder with work inhibition. He further noted that it was deemed that appellant's intellectual and academic capabilities would be of greater benefit to him and, subsequently, to local state and federal economies if his "retraining" were towards the attainment of a baccalaureate degree. His fluency in two languages further strengthened that belief. Dr. Braun stated that appellant's school performance during the first six semesters was exemplary and he seemed to be overcoming his biggest hurdle, accepting the role of student in the social strata of university life. Dr. Braun stated that the analog of superior to subordinate, *i.e.*, having little voice with which to appeal to the capricious arbitrariness that can permeate a college campus, was close to appellant's Navy experience. Dr. Braun noted that appellant's anxiety rose and performance fell during appellant's seventh semester and that he had advised appellant that he was reacting to normal school pressures and that the course of treatment followed would enable

³ *Albert C. Shadrick*, 5 ECAB 376 (1953); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.814.2 (April 1995).

him to persevere. Appellant chose to discontinue treatment and then returned two weeks later. Dr. Braun opined that appellant had had a series of anxiety reactions which culminated in a panic attack. He further stated that appellant's voluntary return to therapy and his initiative to complete his studies were interpreted as major strides towards the resolution of conflict with authority. Dr. Braun opined that there has not been a status change since he started school.

In a report dated December 18, 1996, Dr. Braun stated that his letter of August 12, 1993 might have been misinterpreted. He advised that his letter (of August 12, 1993) alluded to the attainment of a bachelor's degree in business administration as an important prerequisite to entry into the management field. Dr. Braun stated that appellant has yet to have his degree conferred upon him. He reiterated his previous contention that appellant's decisions to discontinue therapy and not maintain the quality of his previous academic performances were consistent with the characteristic behavior of a person with appellant's history who suffers clinically remarkable anxiety or panic attacks. Dr. Braun opined that the present decrease in financial support jeopardizes the success of an ambitious venture which is on the verge of being concluded.

In a report dated October 17, 1997, Dr. Braun stated that appellant had completed his school requirements and was conferred with a bachelor's degree in business administration with a minor in foreign languages (Spanish). Dr. Braun advised that the therapeutic progress had been hampered by the persistent input of anxiety from appellant's perception that the decrease in his monthly compensation was an arbitrary decision that did not give full consideration to the uniqueness of his situation. He noted that further anxiety has resulted from the effects of the Office's decision. Dr. Braun stated that it was his understanding that the decision to modify appellant's compensation was based on the anticipated employment appellant would obtain after completion of his degree. He stated that he concurred with that decision but believed that it was executed prematurely. Dr. Braun suggested that an intermediate phase, such as an internship or residency, might have been permitted before appellant's compensation was modified to transition him from his university training to full-time employment.

In a report dated October 26, 1998, Dr. Braun stated that the psychological profile which led to appellant's workman's compensation identified his difficulties with supervisory authority as the crux of his problem. He stated that therapy revealed an almost lifelong history of emotionally painful consequences when others controlled appellant's behavior. The authority figure or figures in many of these situations was a person upon whom appellant thought he could trust. Dr. Braun described how and why appellant reacted to those situations and noted that an apparently fruitful cognitive restructuring approach has been taken in therapy. He stated that appellant has become a substitute teacher and noted that the experience serves as a work-hardening program and provides a beginning means for learning to cope with supervisory authority.

In a report dated March 15, 1999, Dr. Braun stated that "technically, [appellant] is able to perform the duties of a sales manager as stated in the job description.... What [the Office] does not address and has never addressed in any of its correspondence since 1996, is that [appellant's] problem never had anything to do with his ability to perform the duties of a position." Dr. Braun stated that appellant's problem was and is the difficulty he has dealing with authority figures. Therapy has suggested his problem might be attributed to childhood difficulties with his parents,

notably his father. In the specific instance of being a sales manager, Dr. Braun stated that appellant's problem would be in dealing with the direct supervision which he would be subjected to daily, without gradual exposure to supervision, as in an internship or a type of work-hardening program and it would be unlikely that appellant would be able to keep a sales manager's job for very long. He reiterated his belief that, if the Office had considered the work environment, rather than a job description in a void, the premature reduction in the rate of compensation would not have occurred. Rather, such a reduction might be considered for the first time in appellant's present situation. Dr. Braun further stated that it was conceivable that appellant's present state would have been reached far earlier had he not been subjected to the anxiety producing futility he has experienced since 1996.

In decisions dated October 24, 1997, February 9, 1998, February 9 and June 3, 1999 and June 23, 2002, the Office denied modification on the basis that appellant's arguments and the reports from Dr. Braun were insufficient to warrant any modification of its wage-earning capacity decision.⁴

The Board finds that the Office properly reduced appellant's compensation for total disability effective October 13, 1996, based on his capacity to perform the duties of a sales manager.

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 of benefits.⁵

In the present case, the Office properly found in its October 11, 1996 reduction of compensation decision that appellant was no longer totally disabled for work due to the effects of his employment injury. The Board notes that, although the record reflects that appellant's accepted emotional condition precluded him from returning to his usual job as a sheet metal mechanic, Dr. Braun indicated, in his August 12, 1993 letter, that appellant was able to perform alternative employment after the completion of a two-year program of obtaining a bachelor's degree in international business.

Although appellant did not receive his degree as planned,⁶ in a final report dated August 26, 1996, the vocational rehabilitation counselor issued a report stating that placement efforts in the suitable alternative employment positions identified had been unsuccessful. The vocational rehabilitation counselor had previously indicated, in a June 13, 1996 report, that appellant was able to work as a sales manager and was qualified for and could perform this work. It was noted that appellant had 150 hours of college and was only 3 to 6 hours short of obtaining a BBA degree. It was further noted that appellant had about ten years experience in

⁴ The record further reflects that appellant had previously appealed to the Board. On January 17, 1997 the Board had issued an Order Dismissing Appeal (Docket No. 97-590). On February 26, 2002 the Board issued an Order Remanding Case (Docket No. 00-207).

⁵ *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

⁶ Appellant dropped out of the training program three hours short of completing the selected degree plan.

working with people. The vocational rehabilitation counselor's job availability report indicated that the position was reasonably available for appellant in his local labor market and reasonably represented his wage-earning capacity.

The Office then properly followed established procedures for determining appellant's employment-related loss of wage-earning capacity.

Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions given the nature of the employee's injuries and the degree of physical impairment, his or her usual employment, the employee's age and vocational qualifications and the availability of suitable employment.⁷ Accordingly, the evidence must establish that jobs in the position selected for determining wage-earning capacity are reasonably available in the general labor market in the commuting area in which the employee lives. In determining an employee's wage-earning capacity, the Office may not select a makeshift or odd lot position or one not reasonably available on the open labor market.⁸

In the instant case, the rehabilitation counselor assigned to assist appellant in placement efforts identified two positions listed in the Department of Labor's *Dictionary of Occupational Titles*, appropriate for appellant based on the most recent work restriction evaluation obtained by both the Office and the rehabilitation counselor, Dr. Braun's August 12, 1993 report. Based on these restrictions, the Office selected a position as a sales manager which it found suitable for appellant, one of the two positions listed by the rehabilitation counselor which was most consistent with appellant's background.⁹ The Office used the information provided by the rehabilitation counselor of the prevailing wage rate in the area for a sales manager and established that jobs in the position selected for determining wage-earning capacity were reasonably available in the general labor market in the geographical commuting area in which the employee lived, as confirmed by state officials. Finally, the Office properly applied the principles set forth in the *Shadrick*¹⁰ decision to determine appellant's loss of wage-earning capacity.

The Office additionally found that the subsequent reports submitted by Dr. Braun were insufficient to modify the loss of wage-earning capacity decision. He alludes to the fact that appellant had not completed the training program nor had a period of transition in which to adopt to the new job duties when the Office issued its loss of wage-earning capacity decision. However, the fact that appellant had not completed his degree at the time the loss of wage-loss decision was issued fails to undermine the fact that appellant remained both physically and mentally capable of performing such position. The medical evidence received from Dr. Braun continues to support that appellant is physically and mentally capable of performing such

⁷ *Samuel J. Chavez*, 44 ECAB 431 (1993); *Hattie Drummond*, 39 ECAB 904 (1988); see 5 U.S.C. § 8115(a); A. Larson, *The Law of Workers' Compensation* § 57.22 (1989).

⁸ *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

⁹ Dr. Braun appeared to have no physical restrictions or restrictions based on appellant's emotional condition concerning the training program to enter into entry level management jobs, which he approved.

¹⁰ *Shadrick*, *supra* note 3.

position. Dr. Braun's statement, that it would be easier on appellant to have undergone a gradual easing into the position such as that found in an internship or work-hardening program prior to issuing the loss of wage-earning decision, is merely a preference on how the process should work. This fails to establish that appellant's condition had materially worsened or that he is mentally incapable of performing the position of sales manager.

The Board further notes that, in considering whether appellant is capable of performing the selected position, the Office must consider preexisting medical conditions.¹¹ In this case, the record is devoid of any medical evidence which definitely states that appellant's inability to deal with authority preexisted his employment injury or arose from or is causally related to his employment injury. The Board notes that Dr. Braun, in his report of March 15, 1999, asserted that, because of difficulty in dealing with authority figures, appellant would not be able to deal with the direct supervision he would be subjected to on a daily basis as a sales manager. He suggested that this difficulty with authority figures stemmed from appellant's childhood difficulties with his parents, notably his father. Dr. Braun's opinion is speculative in nature as he merely suggests that appellant's difficulty in dealing with authority figures arose from appellant's childhood difficulties. Moreover, although Dr. Braun stated that appellant was granted compensation due to his inability to cope with the biased or prejudicial supervision he faced while working as a sheet metal mechanic, Dr. Braun's opinion is speculative in what type of supervision appellant would be subjected to in alternative employment. Moreover, he offered no opinion on causal relationship of appellant's alleged preexisting condition and the employment injury. The fact that appellant was unable to tolerate discriminatory and biased supervision does not imply that appellant must work essentially unsupervised. The Board has held that speculative and equivocal medical opinions regarding causal relationship have no probative value.¹² Therefore, this report is insufficient to modify the Office's wage-loss decision.

The Office properly found that appellant was no longer totally disabled as a result of his employment injury and it followed established procedures for determining appellant's employment-related loss of wage-earning capacity. The Board, therefore, finds that the Office has met its burden of justifying a reduction in appellant's compensation for total disability.

¹¹ See *James Henderson, Jr.*, 51 ECAB 268 (2000).

¹² See *Alberta S. Williamson*, 47 ECAB 569 (1996); *Frederick H. Coward, Jr.*, 41 ECAB 843 (1990); *Paul E. Davis*, 30 ECAB 461 (1979).

The June 23, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
December 20, 2002

Alec J. Koromilas
Member

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member