

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT C. CARLSON and DEPARTMENT OF THE NAVY,
NAVAL SEA SYSTEMS COMMAND, Bremerton, WA

*Docket No. 02-1974; Submitted on the Record;
Issued November 18, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, COLLEEN DUFFY KIKO,
WILLIE T.C. THOMAS

The issue is whether the selected position of light-truck driver represented appellant's wage-earning capacity.

Appellant's claim was accepted for a left brachial plexopathy and mild bilateral thoracic outlet syndrome for injuries arising from work duties on or about August 7, 1992 and appellant, a 31-year-old painter, eventually returned to a light-duty position. As of August 17, 1997, appellant stopped working as the employing establishment was unable to provide suitable light duty.

The Office of Workers' Compensation Programs referred appellant for vocational training on December 24, 1997. He underwent physical and vocational testing, completed a course of instruction in professional diesel truck driving with an overall score of 91 percent. Dr. Kaj Johansen, a Board-certified vascular surgeon and appellant's treating physician, received a copy of the occupational and physical requirements for the tractor-trailer truck driver position and, on March 21, 2000, advised that appellant could perform this job based on the described physical demands. Appellant obtained two separate trucking positions, one as a long distance truck driver and one as a short-haul truck driver, but had voluntarily resigned from both positions. It was noted that appellant wished to obtain a more short-haul job locally. In a June 20, 2000 medical note, Dr. Johansen noted that appellant had problems being able to sustain a driving position for a long time and thus, quit long-haul trucking. He stated that with further exercise, strengthening, hardening, short-haul driving would be okay. The rehabilitation specialist found that as appellant was capable of locating employment and had voluntarily resigned from two trucking positions, it was appropriate to close rehabilitation services.

On September 6, 2000 the Office issued a notice of proposed reduction of compensation based on its determination that appellant had the capacity to earn wages as a truck driver, light. The Office noted that Dr. Johansen had indicated on June 19, 2000 that short-haul trucking was more appropriate to appellant's restrictions as it allowed the most frequent changes of position.

Accordingly, the Office found that the position of truck driver, light was more appropriate for appellant both medically and vocationally.

A September 11, 2000 medical report from Dr. Steffan R. Tolles, a Board-certified family practitioner, indicated that appellant's workers' compensation case needed to remain open as he was going to be seen for further thoracic outlet syndrome treatment and was going to undergo a psychiatric consultation for situational anxiety and depression.

On October 12, 2000 the Office reduced appellant's wage-loss compensation on the basis of his capacity to earn \$359.32 per week as a light-truck driver.

Appellant requested a hearing, which was held on May 16, 2001. By decision dated July 24, 2001, the hearing representative found that the Office met its burden of proof in reducing appellant's compensation. The hearing representative specifically noted that although the Office had never issued a formal decision on the issue of whether appellant's psychological condition was causally related to the affects of the accepted injury, the May 1, 2000 report of Dr. Robert Olsen, a Board-certified psychiatrist, supported that appellant did not have any disability for work as a result of his psychological condition. The hearing representative further determined that the testimony provided by Michael Boltwood, Ph.D, a clinical psychologist, was of little probative value.

The Board finds that the selected position of light-truck driver represented appellant's wage-earning capacity.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened to justify termination or modification of compensation.¹ If a claimant is no longer totally disabled, but has residual partial disability, the Federal Employees' Compensation Act² provides that monthly monetary compensation shall be paid equal to 66 2/3 percent of the difference between monthly pay and wage-earning capacity.³

Under section 8115(a) of the Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity.⁴ If the actual earnings do not fairly and reasonably represent wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, his degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect his wage-earning capacity in his disabled condition.⁵

¹ *Raymond W. Behrens*, 50 ECAB 221, 222 (1999); *Bettye F. Wade*, 37 ECAB 556, 565 (1986).

² 5 U.S.C. §§ 8101-8193.

³ 5 U.S.C. § 8106(a).

⁴ 5 U.S.C. § 8115(a); *Penny L. Baggett*, 50 ECAB 559, 560 (1999).

⁵ *Richard Alexander*, 48 ECAB 432, 434 (1997); *Pope D. Cox*, 39 ECAB 143, 148 (1988).

Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.⁶ The job selected for determining wage-earning capacity must be reasonably available in the general labor market in the commuting area in which the employee lives.⁷

After the Office makes a medical determination of partial disability and specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by the Office or to an Office 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; this position must fit that employee's capabilities with regard to his physical limitations, education, age and prior experience.⁸ Once this selection is made, a wage rate and the availability of the selected position in the open labor market should be determined through contact with the state employment service or other applicable service.⁹

In this case, the Office selected the position of truck driver, light as being medically and vocationally suitable for appellant. The rehabilitation counselor reported that appellant had enlisted in the U.S. Marines to be a truck driver and drove trucks then. He was familiar with the occupation and believes it would be satisfying for him. Appellant had reported that he had military training in engine maintenance and repair which would also be helpful for a truck driver. Although Dr. Johansen had first approved of the position of tractor-trailer truck driver (No. 904.383-101) in his April 21, 2000 report, in a subsequent report of June 19, 2000, Dr. Johansen determined that short-haul trucking was more appropriate to appellant's restrictions as it allowed the most frequent changes of position. The rehabilitation counselor had indicated that appellant had graduated with a 91 percent average overall score for tractor-trailer on May 1, 2000 and demonstrated excellent work habits in his school attendance and above average performance. The certificate of proficiency confirming appellant's graduation date and overall score in truck driving training was of record. The record indicates that appellant accepted two truck driving positions and resigned from them voluntarily. Considering appellant's background, experience and training, the rehabilitation counselor stated that short-haul trucking was the most appropriate to appellant's medical restrictions since it allowed for the most frequent changes of position and stated that appellant could qualify for several positions and properly found appellant's skills and abilities to be transferable to the position of truck driver, light.

The Board finds that appellant was physically capable of performing the duties of a truck driver, light. There is no medical evidence in the record that shows a change in the nature and extent of appellant's accepted conditions of left brachial plexopathy and mild bilateral thoracic outlet syndrome. Although the record contains an October 3, 2000 report of appellant's thoracic outlet evaluation, the report is devoid of any opinion indicating whether appellant's accepted conditions would affect his abilities to perform the duties of a truck driver, light.

⁶ *Dim Njaka*, 50 ECAB 425, 433 (1999); *Albert L. Poe*, 37 ECAB 684, 690 (1986).

⁷ *Philip S. Deering*, 47 ECAB 692, 699 (1996).

⁸ *Dorothy Lams*, 47 ECAB 584, 586 (1996).

⁹ *James R. Verhine*, 47 ECAB 460, 464 (1996); *Albert C. Shadrick*, 5 ECAB 376 (1953).

Moreover, the Office properly considered appellant's preexisting psychological conditions in determining whether appellant was capable of performing the selected position.¹⁰ The Office had determined that a conflict in medical evidence existed between Dr. Michael Friedman, a psychiatrist and Office referral physician, who opined that appellant's depression predated his work injury and Michael Boltwood, Ph.D., a psychologist, who opined that appellant's depression was due to a loss of role function which led to feelings of helplessness and hopelessness and consequent neurochemical changes. Accordingly, on April 17, 2000 appellant, along with a copy of his medical record, statement of accepted facts and questions was referred to Dr. Robert Olsen, a Board-certified psychiatrist, to resolve the conflict in medical opinion evidence. In a May 1, 2000 report, Dr. Olsen noted appellant's history of injury, medical and social history, reviewed the medical reports of record and provided the results from various psychological testing. He pointed out various deficiencies in the medical reports of record which appeared contrary to the actual events occurring in appellant's life and his medical record. Dr. Olsen opined that appellant's depression was rooted primarily in those factors which lead to the disintegration and destruction of his marriage, his ambivalent relationship with his former finance and his alcoholism. He further opined that appellant's claims of work injury and the associated pain, claimed disability and subsequent job loss were more related to those factors which destroyed his marriage than in the performance of his duties as a painter. In an attached OWCP-5a Form dated June 12, 2000, Dr. Olsen opined that from a psychological standpoint, appellant could work eight hours a day.

In situations where there are opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.¹¹ In this case, Dr. Olsen provided detailed factual and medical findings regarding the events in appellant's social and medical history and concluded that appellant did not have any disability for work as a result of his psychological condition. As Dr. Olsen's opinion is well rationalized and discussed the events occurring in appellant's personal life in addition to his work-related events and injuries, Dr. Olsen's opinion is sufficient to be accorded the determinative weight of an impartial medical examiner. The Board notes that although the Office never specifically ruled on the causal relationship of appellant's psychological condition, it had sufficiently developed the issue to demonstrate that appellant's psychological condition did not disable him for work. It is further noted that although Dr. Boltwood had testified at the hearing that appellant's psychological condition prevented him from working as a truck driver, the hearing representative had discredited the testimony finding that Dr. Boltwood provided little in the way of medical rationale to support his opinion, the opinion appeared largely based on appellant's own statement that he had symptoms which prevented him from driving a truck and Dr. Boltwood failed to base his opinion on a complete and accurate history. The Board finds that Dr. Boltwood's additional testimony is insufficient to overcome the weight accorded Dr. Olsen's report as the impartial specialist or to create a new conflict with same. Additional reports from a physician on one side of the conflict

¹⁰ See *James Henderson, Jr.*, 51 ECAB 268 (2000).

¹¹ *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

that is properly resolved by an impartial specialist are generally insufficient to overcome the weight accorded the impartial specialist's report or create a new conflict.¹²

The Board also finds that the Office considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment and age and employment qualifications, in determining that the position of truck driver, light represented appellant's wage-earning capacity.¹³ The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to work in this field in a light position and that such positions were reasonably available within the general labor market of appellant's commuting area. Therefore, the position of truck driver, light properly reflected appellant's wage-earning capacity.

The July 24, 2001 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
November 18, 2002

Michael J. Walsh
Chairman

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

¹² *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994); *Dorothy Sidwell*, 41 ECAB 857 (1990).

¹³ *See Donald W. Woodall*, 49 ECAB 415, 421 (1998) (finding that the Office followed its established procedures for determining that the position of gate guard represented appellant's wage-earning capacity).