United States Department of Labor
Employees' Compensation Appeals Board

J.A., Appellant	)	
and	)	**Docket No. 07-1143**
	)	**Issued: February 22, 2008**
DEPARTMENT OF LABOR, MINE SAFETY & HEALTH ADMINISTRATION, Pikeville, KY, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 21, 2007 appellant filed an appeal from decisions of the Office of Workers' Compensation Programs dated September 25, 2006 and February 27, 2007. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office met its burden of proof to terminate appellant's medical benefits for his accepted bipolar disorder on September 25, 2006; and (2) whether the Office properly determined that appellant's actual wages as an office automation clerk fairly and reasonably represented his wage-earning capacity.

FACTUAL HISTORY

On April 16, 1980 appellant, then a 30-year-old coal mine inspector, sustained an injury to his low back when he fell backwards striking his back on a toilet. The claim was initially accepted for a herniated disc at L5-S1 for which he had surgery in 1981 and 1991. On

October 21, 1999 the Office found that the selected position of Cashier II fairly and reasonably represented appellant's wage-earning capacity and his compensation was adjusted accordingly. Appellant came under the care of Dr. Jay V. Narola, a psychiatrist, who diagnosed bipolar disorder aggravated by the April 16, 1980 employment injury and advised that he was totally disabled. By decision dated June 29, 2000, an Office hearing representative vacated the October 21, 1999 decision and remanded the case to the Office for a second opinion evaluation regarding the cause of appellant's diagnosed bipolar disorder. Appellant was then referred to Dr. Riaz Uddin Riaz, a Board-certified psychiatrist, who opined that appellant's psychiatric condition was aggravated by the April 16, 1980 employment injury and on October 5, 2000, the Office expanded the accepted conditions to include consequential aggravation of bipolar disorder. He was returned to full compensation. By reports dated April 15 and June 23, 2003, Dr. Tamara L. Musgrave, Board-certified in internal medicine, diagnosed lumbar radiculopathy.

The Office continued to develop the claim and on June 29, 2004 referred appellant to Dr. Daniel D. Cowell, a Board-certified psychiatrist, for a second opinion evaluation. In a July 21, 2004 report, Dr. Cowell provided results of mental status examination and diagnosed bipolar disorder, pain disorder and anxiety disorder. He advised that appellant should be able to handle employment suited to his physical limitations if his mood disorder were stabilized. In a psychiatric work capacity evaluation dated August 31, 2004, Dr. Cowell advised that appellant could work part time and on September 2, 2004 opined that his psychiatric condition was no longer aggravated by employment factors.

The Office found that a conflict in medical evidence had been created between the opinions of Drs. Narola and Cowell regarding whether the work-related aggravation of appellant's bipolar disorder had resolved and on May 25, 2005 referred him to Dr. Robert P. Granacher, Board-certified in psychiatry, for an impartial evaluation. By report dated July 12, 2005, Dr. Granacher noted the history of injury and his review of the medical record. He reported that appellant had three psychiatric hospitalizations and provided psychological testing and mental status examination results. Dr. Granacher diagnosed bipolar affective disorder, type I, presently in remission and cognitive disorder, due to adverse effects of bipolar illness upon his brain, unrelated to a compensable back injury in 1980. He advised that there was no evidence of a medical disorder affecting appellant's current mental state and no evidence that his 1980 back injury aggravated his bipolar illness. Dr. Granacher stated that there was a low relative risk known for a back injury causing bipolar illness and back injury was not considered in the differential diagnosis of the onset of the condition. He opined that appellant had a spontaneous onset of bipolar illness, unrelated to a back injury, noting that his first documented bipolar illness was probably about 1985 when he was first admitted to a psychiatric hospital and that this five-year interval from his back injury to psychosis all but ruled out any form of temporal relationship between his back injury and his subsequent psychiatric condition. Dr. Granacher found no objective findings at the time of his examination of a seriously-impairing mental illness and opined that appellant could work in areas in which he was trained, educated or experienced to perform. He noted that there was a cyclical component to appellant's psychiatric condition and he could have future episodes and recommended continued treatment with Dr. Narola. In a supplementary report dated September 20, 2005, Dr. Granacher reiterated that appellant's April 16, 1980 work injury did not aggravate his bipolar illness which was probably genetic or spontaneous in origin and not related to the employment injury.

Dr. Narola continued to submit reports in which he advised that appellant could not work due to his diagnosed emotional condition and in an April 12, 2006 work capacity evaluation, Dr. Musgrave advised that appellant could not work due to severe pain with lumbar radiculopathy and noted that he was receiving pain medication three times daily.

By letter dated August 7, 2006, the Office proposed to terminate appellant's medical benefits for his diagnosed bipolar disorder on the grounds that his bipolar disorder was no longer aggravated by his accepted back condition. The claim remained open for medical and wage-loss benefits for the accepted back condition. On August 14, 2006 the Office referred appellant to Dr. Richard T. Sheridan, a Board-certified orthopedic surgeon, for a second opinion evaluation regarding his orthopedic condition. Appellant submitted additional treatment notes from Dr. Narola who on August 18, 2006 opined that, while it was possible that appellant had a genetic component or susceptibility of mental illness, his chronic pain condition led to his serious mental problems and advised that he needed to continue psychiatric treatment.

On September 25, 2006 the Office finalized the proposed termination of medical benefits for appellant's emotional condition. By report dated September 27, 2006, Dr. Sheridan noted his review of the medical record and appellant's complaints of constant low back pain and intermittent pain and paresthesias throughout the left lower extremity. He provided examination findings and advised that appellant's herniated disc was still active and that, while he could not return to work as a mine inspector, he could work with restrictions to his physical activity. In a work capacity evaluation dated September 28, 2006, Dr. Sheridan advised that appellant could work eight hours a day with a permanent eight-pound weight restriction.

On December 26, 2006 appellant returned to work as an office automation clerk.[1] By decision dated February 27, 2007, the Office reduced appellant's compensation based on its determination that his actual earnings of $663.54 per week as an office automation clerk, effective December 26, 2006, fairly and reasonably represented his wage-earning capacity.

LEGAL PRECEDENT -- ISSUE 1

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. After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment. The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition, which require further medical treatment.[2]

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

[1] An overpayment in compensation in the amount of $1,710.12 was paid in full by appellant.

[2] *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[3]

ANALYSIS -- ISSUE 1

The Board finds that the Office met its burden of proof to terminate appellant's authorization for medical treatment for his bipolar illness based on the opinion of Dr. Granacher, the impartial specialist, who opined that at the time of his examination there was no medical evidence that appellant's current bipolar illness was aggravated by the April 16, 1980 back injury. Dr. Granacher provided rationale for his opinion explaining that he did not believe that appellant's bipolar illness was caused or aggravated by the employment injury because there was a relative low risk for back injury and the induction of bipolar illness. He advised that at the time of his examination appellant was in remission. The Board finds his opinion sufficiently well rationalized to be accorded special weight.[4]

LEGAL PRECEDENT -- ISSUE 2

Section 8115 of the Federal Employees' Compensation Act[5] and Office regulations provide that wage-earning capacity is determined by the actual wages received by an employee if 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 the employee has no actual earnings, wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, his or her usual employment, age, qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect the wage-earning capacity in the disabled condition.[6] Generally, wages actually earned are the best measure of a wage-earning capacity, and in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.[7] Office procedures provide that the Office can make a retroactive wage-earning capacity determination if the claimant worked in the position for at least 60 days, the position fairly and reasonably represented his or her wage-earning capacity and the work stoppage did not occur because of any change in his injury-related condition affecting the ability to work.[8]

The formula for determining loss of wage-earning capacity, developed in *Albert C. Shadrick*, 5 ECAB 376 (1953), has been codified at 20 C.F.R. § 10.403. The Office calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the current pay rate for the date-of-injury job. Under *Shadrick*, the Office's determination

[3] *Manuel Gill*, 52 ECAB 282 (2001).

[4] *Id.*.

[5] 5 U.S.C. §§ 8101-8193.

[6] 5 U.S.C. § 8115; 20 C.F.R. § 10.520; *John D. Jackson*, 55 ECAB 465 (2004).

[7] *Hayden C. Ross*, 55 ECAB 455 (2004).

[8] *Selden H. Swartz*, 55 ECAB 272 (2004).

rests on three variables: (1) claimant's base annual pay at the time of injury, the time disability began or the time compensable disability recurs; (2) the base annual pay for the same grade and step on the date the Office used to compare pay rates under *Shadrick*; and (3) claimant's base annual pay on the same date in her limited-duty position.[9] If any of the figures or calculations are incorrect or unreliable, then the Office did not properly determine appellant's wage-earning capacity.[10]

ANALYSIS -- ISSUE 2

Appellant returned to a modified full-time position, five days per week, on December 26, 2006 as an office automation clerk. The duties of the position were within the restrictions provided by Dr. Sheridan, who provided a second opinion evaluation for the Office regarding appellant's back condition.

The Board finds that appellant's actual earnings as an office automation clerk fairly and reasonably represent his wage-earning capacity. He returned to work on December 26, 2006 and continued working the position through February 27, 2007, the date the Office issued its loss of wage-earning capacity determination. Appellant worked in the position for more than 60 days and there is no evidence that the position was seasonal, temporary or make-shift work designed for his particular needs.[11] As there is no evidence that wages in his position did not fairly and reasonably represent his wage-earning capacity, they must be accepted as the best measure of his wage-earning capacity.[12]

The Board further finds that, after reviewing the calculations in the February 27, 2007 decision, the Office properly applied the *Shadrick* formula. In this case, the Office utilized appellant's weekly pay rate when his recurrent disability began on June 23, 1981 as the base pay, which amounted to $535.56.[13] The Office found that the current pay rate for appellant's date-of-injury position was $1,051.44 and that appellant had a wage-earning capacity of 60 percent. Utilizing the *Shadrick* formula, the Office computed appellant's wage-earning capacity in dollars

[9] *See Lottie M. Williams*, 56 ECAB 302 (2005).

[10] *See Loni J. Cleveland*, 52 ECAB 171 (2000).

[11] *See Elbert Hicks*, 49 ECAB (1998); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment*: *Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (July 1997).

[12] *See Loni J. Cleveland*, *supra* note 10.

[13] Section 8101(4) of the Act defines monthly pay for purposes of computing compensation benefits as the monthly pay at the time of injury or the monthly pay at the time disability begins or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater. 5 U.S.C. § 8101(4); *see R.S.*, 58 ECAB ___ (Docket No. 06-1346, issued February 16, 2007). In this case the Office utilized a pay rate for the date recurrent disability began or January 7, 1981 in calculating both appellant's wage-loss compensation and in determining his loss of wage-earning capacity in its February 27, 2007 decision. Appellant, however, returned to work after January 7, 1981 and did not stop work until June 23, 1981. His pay rate on June 23, 1981, however, was $27,849.00 annually, or $535.56 per week, the same as his weekly pay on January 7, 1981. Thus, the Office's error in using an incorrect date that recurrent disability began is deemed harmless. *See generally Joan F. Martin*, 51 ECAB 131 (1999).

by first multiplying the pay rate for compensation purposes, $535.56, by the percentage of wage-earning capacity or 60 percent. The resulting dollar amount of $321.34 was then subtracted from the pay rate for compensation purposes to obtain a figure of $214.22 for the loss of wage-earning capacity as of January 1, 2007. The Office then properly determined that, as appellant was married, he was entitled to compensation at the rate of three-fourths of that amount or $160.67. The compensation payable was then adjusted by the applicable cost-of-living adjustments, yielding weekly compensation of $344.00. The Board finds that, as the Office's mathematical calculations were correct, the February 27, 2007 decision properly determined that appellant's actual earnings as an office automation clerk fairly and reasonably represented his wage-earning capacity.[14]

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's medical benefits for his accepted bipolar disorder on September 25, 2006 and properly determined that appellant's actual wages as an office automation clerk fairly and reasonably represented his wage-earning capacity.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 27, 2007 and September 25, 2006 be affirmed.

Issued: February 22, 2008
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

[14] *Lottie M. Williams, supra* note 9.