U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of STEWART J. JEFFERY and DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Los Angeles, CA

Docket No. 03-1042; Submitted on the Record;
Issued September 2, 2003

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied modification of appellant's wage-earning capacity.

On August 5, 1985 the Office accepted appellant's claim for post-traumatic stress disorder (PTSD).[1] He began receiving temporary total disability benefits in approximately February 1986. On January 6, 1992 appellant started to work 20 to 25 hours a month for Quetzel Foods International Corporation which involved importing and selling products from Latin America at $1,600.00 a month.

By decision dated June 4, 1992, the Office adjusted appellant's wage-earning capacity to reflect his earnings of $400.00 a week as an importer/salesman.

Appellant submitted progress notes from his treating physician, Dr. Warren E. Trask, a Board-certified psychiatrist and neurologist, dated from May 15, 1999 to August 17, 2001. On July 2, 1999 he noted that appellant appeared very anxious and would be claiming Chapter 13 in 60 days and was getting further in debt to support the company. On September 10, 1999 Dr. Trask noted that appellant was "[g]oing into bankruptcy." On February 11, 2000 he noted that, since January 12, 2000 appellant had been deranged, "building up with Brenda" and appellant had multiple stressors. On March 14, 2000 Dr. Trask noted that appellant was trying to separate from Brenda but was still living with her and that he had a girlfriend in Laredo, Texas. On June 6, 2000 Dr. Trask noted that appellant felt that he was becoming "delusional." On July 31, 2000 he noted that appellant was thinking about grief and loss because his girlfriend was leaving him in a week. On March 30, 2001 Dr. Trask stated that appellant was not socializing, was staying at home and rarely left the house.

[1] The case is on appeal to the Board for the second time. In a decision dated September 28, 1984, the Board found that there was a conflict in the evidence and remanded the case for the Office to refer appellant with the statement of accepted facts and the case record to an impartial medical specialist to determine whether appellant had a work-related emotional condition. On remand the impartial medical specialist diagnosed work-related PTSD.

In a report dated August 19, 2001, Dr. Trask stated that appellant continued to display severe disorganizing anxiety in response to circumstances that resembled the original set of circumstances as an air traffic controller. He stated:

> "[M]inor events cause[d] a withdrawal reaction and [appellant] continues to ruminate and have intrusive thoughts about the [employing establishment] experience. This leads to much avoidance of situations because [appellant] could not think or was very paranoid, making links that are not rational. He is easily startled, hyper-vigilant, has trouble concentrating, especially when anxious and becomes fearful which further promotes his isolation. [Appellant] has become depressed in recent months during which time he cut off most of his ties and remained at home. His female relationship of several years and his small mail order business failed largely as a result of his PTSD symptoms during the last year. On at least one occasion I considered hospitalizing [appellant] in the last year."

Dr. Trask stated that appellant's symptoms intensified with most external stress or contact with people outside of two or three individuals. He stated that appellant's functioning level waxed and waned but recently had been deteriorating. Dr. Trask stated that he could not see appellant returning to his job or to any other job as a result of the exaggerated response to stimuli and his inability to overcome his hypervigilance and incapacitation when the associations occur. He stated that appellant's hypervigilance, isolation, avoidance, fear and anxiety have kept him severely restricted despite the use of medication and ongoing therapy. Dr. Trask stated that he did not anticipate appellant being able to return to work unless he pursued a very limited self-employed activity as he once did.

On December 14, 2001 appellant filed a claim for a recurrence of disability alleging that on August 22, 2000, he sustained a recurrence of the November 30, 1976 employment injury. In an attached statement dated November 12, 2001, appellant stated that he received his last check from Quetzal Foods International Corporation on December 9, 1998 and continued to participate in the company's activity to the extent possible given his deteriorating mental condition through August 22, 2000. He stated that after August 22, 2000 he did not return to work and so informed the Office explaining that he had a relapse. Appellant stated that he had been receiving medical treatment since his November 30, 1976 employment injury. He stated that he could only work limited hours, three to four hours a day for three to four days a week and most of his work was at home. Appellant stated that he was reluctant to make contact with people outside his home work environment, he took medication each day and sometimes the effects of the medication caused him to stop working. He stated that the original injury affected his short-term memory which hindered his ability to work, he suffered from an exaggerated response to stimuli and hypervigilance and he would become irritable, have difficulty communicating and become angry and then totally withdrawn due to mental flare-ups.

By decision dated February 8, 2002, the Office denied appellant's claim, stating that the evidence of record failed to establish that the claimed recurrence was the result of the approved injury and progression of the accepted condition and that outside or intervening factors were identified as the proximate cause of the claim for total disability.

By letter dated August 11, 2002, appellant requested a written review of the record by an Office hearing representative. He submitted a report from Dr. Trask dated June 7, 2002. In his report, Dr. Trask stated that he felt his August 19, 2001 report had been misinterpreted as meaning that appellant was capable of working "especially with reference to paragraph #4," in which he stated that appellant could only work if he "pursued limited self-employment as he once did." He stated:

> "[Appellant's] home business ended because of increasing inability to manage his own anxiety and paranoid perceptions of others. This business had promise and [appellant] was very interested in it succeeding but the cumulative effects of his anxiety and paranoid perceptions rendered the continuation of the business impossible."

Dr. Trask stated that he could not foresee appellant being able to restart a home business, especially in view of the deterioration he had seen since he began communicating with the Office which had revived delusional-type thinking about the government and the employing establishment and had revived the turmoil associated with the original circumstances as occurred with PTSD. Dr. Trask stated that he was concerned about appellant's further decompensation in view of the way that he was psychiatrically responding to the Office's revival of his past trauma, despite his full compliance with recommendations and medication.

By decision dated October 28, 2002, the Office hearing representative affirmed the Office's February 8, 2002 decision, although he concluded that the actual issue was whether appellant showed that the Office's determination of his wage-earning capacity as an importer/salesman should be modified. The Office hearing representative noted that appellant did not allege that the original loss of wages-earning capacity was incorrect or that he underwent vocational rehabilitation but rather, that his work-related disability worsened preventing him from working at Quetzel Foods International Corporation. The Office hearing representative found, however, that Dr. Trask's opinion was insufficiently well rationalized to establish that the worsening of appellant's emotional condition was work related and appellant did not establish that his wage-earning capacity should be modified.

By letter dated December 11, 2002, appellant requested reconsideration of the Office's decision and submitted a report from Dr. Trask dated November 27, 2002. In his report, Dr. Trask stated that he had been treating appellant since 1985 and appellant continued to meet the criteria for chronic, PTSD. He stated:

> "The PTSD symptoms have greatly restricted [appellant's] life throughout the time that I have known him and his ability to tolerate stress has been severely impaired by his persistent symptoms. His baseline functioning has been low in all areas and his life has been punctuated by regressions to markedly paranoid states in which he has been reclusive for weeks or months at a time. [Appellant's] efforts to function have been encouraged as in his relationships and attempts to have a business, but normal daily life stressors have been enough to trigger paranoid delusional thinking and withdrawals which were focused on the original traumas associated with the [employing establishment] and his job as an air traffic

controllers. [Appellant] is a good person who was permanently crippled as a result of the psychological damage, which he experienced."

By decision dated March 3, 2003, the Office denied appellant's request for modification.

The Board finds that the case is not in posture for decision.

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 in such benefits.[2]

Under section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity of the Act, 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 the employee's wage-earning capacity or if the employee has not actual wages, the wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, the employee's usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect his wage-earning capacity in his or her disabled condition.[3]

To the extent that appellant seeks modification of the wage-earning capacity, it is his burden of proof. Once the wage-earning capacity of an injured employee is determined, a modification of such a determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was, in fact, erroneous.[4]

In this case, as noted by the Office hearing representative, appellant did not allege that the original determination of his wage-earning capacity as an importer/salesman was erroneous or that he underwent vocational rehabilitation. He contended that there had been a material change in the nature and extent of the injury-related condition and presented the opinion of his treating physician, Dr. Trask, to support his contention. In progress notes dated from May 15, 1999 to August 17, 2001, Dr. Trask indicated that appellant was incurring increasing debt, in his business, which resulted in his going into bankruptcy and that he broke up with a girlfriend. In his August 19, 2001 report, Dr. Trask stated that appellant continued to display severe disorganizing anxiety in response to circumstances that resembled the original set of circumstances as an air traffic controller. He stated that minor events caused a withdrawal reaction and that appellant continued to ruminate and have intrusive thoughts about his employing establishment experience. Dr. Trask stated that appellant had become depressed in recent months during which he cut off most of his ties and remained at home. He stated that appellant's several year relationship with a female and his small order business failed largely as a result of his PTSD symptoms.

[2] *Francisco Bermudez*, 51 ECAB 506 (2000).

[3] 5 U.S.C. § 8115; *James Henderson, Jr.*, 51 ECAB 268, 269 (2000).

[4] *Tamra McCauley*, 51 ECAB 375, 377 (2000).

In his June 27, 2002 report, Dr. Trask stated that appellant's home business ended because of appellant's increasing inability to manage his own anxiety and paranoid perception of others. Dr. Trask opined that appellant would be unable to restart a home business especially in view of the deterioration that appellant had since he began communicating with the Office which had revived his delusional type thinking about the employing establishment and the turmoil associated with the original circumstances as occurred with PTSD. In his November 27, 2002 report, Dr. Trask stated that, since his treatment of appellant in 1985, appellant continued to have PTSD which severely impaired his ability to tolerate stress. He stated that appellant's efforts to function had been encouraged as in his relationships and attempts to have a business but the normal daily life stressors had triggered paranoid delusional thinking and withdrawals which were focused on the original traumas associated with the employing establishment and air traffic controllers.

Dr. Trask's opinion indicates that appellant continued to have PTSD since his treatment of him in 1985 and that appellant's emotional condition worsened since his employment with Quetzel Foods International Corporation. He attributed appellant's difficulty in a personal relationship and the failure of his business to the PTSD. Dr. Trask's opinion suggests that appellant's PTSD prevented him from coping with the daily stressors of living. While Dr. Trask's opinion in itself is not sufficiently rationalized to establish that appellant's accepted emotional condition worsened and, therefore, his wage-earning capacity had changed, Dr. Trask's opinion constitutes substantial, uncontradicted evidence in support of appellant's claim for modification of his wage-earning capacity and requires further development of the case record by the Office. The Office shares responsibility in the development of the evidence to see that justice is done.[5]

The case is therefore, remanded to the Office for referral of appellant, with a statement of accepted facts and the case record, to an appropriate specialist, to determine whether appellant's emotional condition worsened due to the November 30, 1976 employment injury. If so, the Office must determine whether appellant has sustained a recurrence of total disability causally related to his accepted PTSD that he is no longer capable of performing the position of importer/salesman. After further development that it deems necessary, the Office should issue a *de novo* decision.

[5] *Jimmy A. Hammons*, 51 ECAB 219, 223 (1999).

The March 3, 2003 and October 28, 2002 decisions of the Office of Workers' Compensation Programs are hereby set aside and the case is remanded for further action consistent with this decision.

Dated, Washington, DC
September 2, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member