-United States Department of Labor
Employees' Compensation Appeals Board

MARK A. BATE, Appellant	)	
and	)	**Docket No. 05-657**
	)	**Issued: December 14, 2005**
U.S. POSTAL SERVICE, FARMINGTON POST OFFICE, Farmington Hills, MI, Employer	)	

Appearances:
Mark A. Bate, 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
WILLIE T.C. THOMAS, Alternate Judge

JURISDICTION

On January 24, 2005 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated October 26, 2004 in which a hearing representative affirmed a loss of wage-earning capacity determination. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly reduced appellant's compensation based on its finding that he had the capacity to earn wages as a part-time employee relations representative.

FACTUAL HISTORY

On November 9, 1994 appellant, then a 35-year-old postmaster, filed an occupational disease claim alleging that he sustained stress, anxiety and depression due to factors of his

federal employment.[1] He stopped work and did not return. The Office accepted the claim for post-traumatic stress disorder and major depressive disorder.[2]

The Office referred appellant to a rehabilitation counselor for vocational rehabilitation on November 20, 1996. Based on the recommendation of the rehabilitation counselor, the Office approved a training and job placement program at Walsh Business College with the goal of appellant becoming a transportation manager. In a report dated January 15, 2000, the rehabilitation counselor noted that appellant had earned a degree in Business Administration from Walsh Business College. He also indicated that appellant owned a Christmas tree lot.[3] The Office approved 90-day job placement assistance on January 18, 2000.

In a report dated October 6, 2000, Dr. Robert A. Papazian, a psychologist, found that appellant had not fully recovered from his post-traumatic stress disorder and major depressive disorder. He opined that he could work 20 to 25 hours per week supervising no more than 5 people and could not multitask or work in a fast-paced environment.

By letter dated July 3, 2001, the Office referred appellant to Dr. Saul Z. Forman, a Board-certified psychiatrist, for a second opinion evaluation. In a report dated August 22, 2001, Dr. Forman diagnosed a dysthymic disorder and narcissistic and schizoid personality disorder. He noted that appellant had developed his own business while receiving total disability. Dr. Forman opined that he had the capacity to work full time as a traffic manager.

By letter dated February 5, 2002, the Office referred appellant to Dr. Robert S. Burnstein, a Board-certified psychiatrist, to resolve a conflict in medical opinion between Dr. Papazian and Dr. Forman regarding the extent of his employment-related disability.

In a report dated May 28, 2002, Dr. Burnstein reviewed the history of injury and diagnosed dysthymic disorder, resolved post-traumatic stress disorder and resolved major depressive disorder. He opined that appellant was "not psychologically able to be a traffic manager eight hours a day and five days a week" because he was "unable to handle that level of stress and responsibility at this time." Dr. Burnstein stated, "I agree with Dr. Forman that some of his difficulties are probably related now to character problems which were aggravated by his employment and subsequent major depression and post-traumatic stress disorder." He

[1] Appellant issued disciplinary action to Thomas McIlvaine, a subordinate. Mr. McIlvaine subsequently killed several supervisors at the employing establishment. Appellant had transferred to another work location prior to the killings.

[2] By decision dated September 15, 1995, the Office accepted that appellant had employment-related post-traumatic stress disorder but found that he had not established disability due to the accepted condition. In a decision dated July 19, 1996, a hearing representative set aside the September 15, 1995 decision and determined that appellant was disabled on or after August 26, 1994 due to employment-related post-traumatic stress disorder and major depressive disorder.

[3] Appellant completed a Form CA-1032 dated October 30, 1999. He noted that he owned a Christmas tree farm with his family which yielded a loss of $4,308.00.

recommended an update from Dr. Papazian regarding appellant's current work restrictions. Dr. Burstein related:

> "It is my opinion therefore that [appellant] is still unable to work at a full-time position. He should at this time be limited to no more than 20 hours per week in a nonstressful and nonmulti-task position with no supervision whatsoever of employees. I believe he continues to be disabled due to his employment as noted above and these restrictions are work related."

In an accompanying work restriction evaluation, Dr. Burnstein opined that appellant could not supervise employees or return to work for the employing establishment. He further found that he was unable to work full time due to "significant depression" but could work 20 hours per week.

On September 11, 2002 the rehabilitation counselor identified various part-time positions available within appellant's commuting area, including the position of employee relations representative. She described the job duties of an employee relations representative, obtained from the Department of Labor's *Dictionary of Occupational Titles*, as requiring meeting with potential workers, using a computer for paperwork, "[m]onitor[ing] workers and employment plans," updating employment books and telephoning workers and clients.

By letter dated January 31, 2003, appellant informed the Office that he was self-employed in graphics and design.

In a report dated February 23, 2003, Dr. Papazian indicated that appellant was no longer disabled from post-traumatic stress disorder but that he "continue[d] to experience many of the disabling symptoms of his long-standing depression which resulted from his work trauma." He opined that appellant could work 20 to 25 hours per week in a position which did not require supervising or multitasking and was not stressful or fast paced.

In a letter dated June 11, 2003, the rehabilitation counselor responded to a question by the Office regarding whether the position of employee relations representative for 25 hours per week required supervision of employees. He stated, "Contact with the employer revealed that this is not a supervision position. Monitoring of employees is done through contact with the employer of these temporary workers rather than directly."

On August 12, 2003 the Office issued appellant a notice of proposed reduction of compensation on the grounds that he had the capacity to perform the position of part-time employee relations representative for 25 hours per week.

In a response received September 11, 2003, appellant contended that he was currently self-employed. He further asserted that the position of employee relations representative was not within his restrictions as it required supervising employees.

By decision dated October 3, 2003, the Office reduced appellant's compensation effective October 4, 2003 after finding that he could perform the position of part-time employee relations representative. The Office noted that his self-employment was not at a level that it

fairly and reasonably represented his wage-earning capacity given his skills and vocational background.

On October 15, 2003 appellant requested an oral hearing, which was held on June 30, 2004. Appellant questioned the rehabilitation counselor's determination that the position of employee relations representative did not require supervision of employees and noted that this finding appeared to be based on contact with only one employer. He described positions that he had found available and noted that the environment was fast paced and required multitasking. Appellant related that he used to have a Christmas tree farm and then he attempted to launch a business designing graphics for golf course yardage books. He noted that work "dried up" with the decline of the travel industry after September 11, 2001 and that he was not currently self-employed. Appellant further stated, however, that he had also established an Internet-based college recruitment business.

In a letter to the hearing representative received August 20, 2004, appellant argued that the Office had ignored his attempts at self-employment. He noted that the reduction of his compensation left him with "no extra income to continue the investments in self-employment."

In a decision dated October 26, 2004, the hearing representative affirmed the Office's October 3, 2003 decision.

LEGAL PRECEDENT

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.[4] Under section 8115(a) of the Federal Employees' Compensation Act[5] the wage-earning capacity of an employee is determined by actual earnings if actual earnings fairly and reasonably represent his wage-earning capacity. If actual earnings do not fairly and reasonably represent his wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, his usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect wage-earning capacity in his disabled condition.[6]

The Office procedure manual notes that the claims examiner is responsible for determining whether the medical evidence establishes that the claimant is able to perform the job, taking into consideration medical conditions due to the accepted work-related injury or disability and any preexisting medical conditions. If the medical evidence is not clear and

[4] *David W. Green*, 43 ECAB 883 (1992).

[5] 5 U.S.C. §§ 8101-8193.

[6] *John E. Cannon*, 55 ECAB ___ (Docket No. 03-347, issued June 24, 2004).

unequivocal, the claims examiner will seek medical advice from the district medical adviser, the treating physician or second opinion specialist as appropriate.[7]

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 market, that fit the employee's capabilities with regard to his physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the labor market should be made through contact with the state employment service or other applicable service. Finally, application of the principles set forth in *Albert C. Shadrick*[8] and codified by regulation at 20 C.F.R. § 10.403[9] should be applied.

ANALYSIS

The Board finds that the medical evidence does not clearly establish that the position of employee relations representative was medically suitable for appellant. The Office properly found a conflict between Dr. Forman, an Office referral physician who found that appellant could work full time as a traffic manager and Dr. Papazian, his attending physician who found that he could work 20 to 25 hours per week in a position that did not require supervision, multitasking or a fast pace. The Office thus referred appellant to Dr. Burstein for an impartial medical examination.

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.[10] In a report dated May 28, 2002, Dr. Burnstein found that appellant could not work as a traffic manager because of the stress and responsibility. He opined that appellant could work "no more than 20 hours per week in a nonstressful and nonmulti-task position with no supervision whatsoever of employees." Dr. Burstein indicated that appellant's restrictions were work related. His report, which is well rationalized and based on a proper factual background, is entitled to special weight and establishes that appellant is capable of working 20 hours per week in a position that is not stressful and requires no multitasking or supervision.

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

[8] 5 ECAB 376 (1953).

[9] 20 C.F.R. § 10.403.

[10] *Gary R. Sieber*, 46 ECAB 215 (1994).

As appellant did not have actual earnings that fairly and reasonably represented his wage-earning capacity, the Office selected a position for determination of his wage-earning capacity.[11] The rehabilitation counselor identified the part-time position of employee relations representative as available within his commuting area and noted that the position required meeting with potential workers, using a computer, monitoring workers and employment plans, updating employment books and telephoning workers and clients. She informed the Office that based on contact with an employer, the position did not require supervision of employees but rather monitoring through contact with the employer. The Office reduced appellant's compensation effective October 4, 2003 based on its finding that he could perform the position of part-time employee relations representative for 25 hours per week.

The evidence of record, however, does not clearly establish that appellant is capable of working as an employee relations representative. Dr. Burnstein prohibited appellant from performing any position that required multitasking, was fast paced or stressful. He further found that appellant could provide "no supervision whatsoever of employees" and could work "no more than 20 hours per week." In view of these restrictions, the Office should have clarified the medical evidence by asking Dr. Burnstein if appellant could perform the selected position of employee relations representative and also ascertained whether he could work in the position for 25 hours per week. As the medical evidence does not clearly and unequivocally establish that appellant could perform the duties of the selected position, the Office did not meet its burden of proof to reduce his compensation.[12]

CONCLUSION

The Board finds that the Office improperly reduced appellant's compensation based on its finding that he had the capacity to earn wages as a part-time employee relations representative.

[11] While appellant had actual earnings at various times and in various occupations, the Office properly determined that his earnings were not sufficient to fairly and reasonably represent his wage-earning capacity in view of his education and experience.

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 26, 2004 is reversed.

Issued: December 14, 2005
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board