United States Department of Labor
Employees' Compensation Appeals Board

R.C., Appellant	)	
and	)	**Docket No. 06-1293**
	)	**Issued: February 12, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Pueblo, CO, Employer	)	

Appearances:
John S. Evangelisti, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 23, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decisions dated June 15, 2005 and April 14, 2006, reducing his compensation. Pursuant to 20 C.F.R. §§ 501.2 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 effective July 9, 2005 based on its determination that the full-time constructed position of medical billing clerk represented his wage-earning capacity.

FACTUAL HISTORY

On April 21, 2001 appellant, a 35-year-old distribution clerk, filed an occupational injury claim alleging stress. His claim was accepted for dysthymic disorder (depression) and he was placed on the periodic rolls.

In a second opinion report dated June 17, 2003, Dr. Robert Kleinman, a Board-certified forensic psychiatrist, opined that appellant was no longer disabled. He further opined that appellant could return to work either at the employing establishment or elsewhere.

Appellant submitted reports from his treating physicians. In a November 26, 2003 report, Dr. Carlos Rodriguez disagreed with Dr. Kleinman's June 17, 2003 report. He opined that appellant would be unable to return to work at the employing establishment, due to his current psychopathology, including anger towards his supervisors. In a report dated April 26, 2004, Dr. Stephen Bonney also disagreed with Dr. Kleinman's report. Noting that appellant suffered from severe major depression with obsessive features and post-traumatic-like anxiety syndrome, Dr. Bonney opined that appellant would not be able to work at the employing establishment in any capacity.

The Office determined that a conflict of medical opinion existed between Dr. Kleinman and appellant's treating physicians. It referred appellant to Dr. Bert Furmansky, a Board-certified forensic psychiatrist, for an impartial medical examination. The record contains ESAFEC reports reflecting that the Office used the Physicians' Directory System (PDS) in conjunction with the Marquis Directory of Medical Specialists to select the referee physician. On July 14, 2004 the Office attempted to schedule appointments with Dr. Laura J. Klein and Dr. Susan Beausoleil Bograd, both Board-certified psychiatrists in Denver, Colorado. The reports reflects that both doctors were "too busy" to perform an examination of appellant. A July 14, 2004 PDS report shows that, after the above-referenced "bypasses," an appointment was scheduled with Dr. Furmansky on August 24, 2004. On July 27, 2004 appellant's representative objected to the selection of Dr. Furmansky to perform the impartial medical examination.

On August 4, 2004 the Office responded to appellant's objection, stating that it had strictly adhered to Office procedures, which required use of the PDS system in conjunction with the Marquis Directory of Medical Specialists.

In a 22-page report dated August 25, 2004, Dr. Furmansky discussed the history of injury, reviewed the evidence of record and listed findings on physical examination. He diagnosed major depressive disorder, chronic, in partial remission; alcoholism and personality disorder. Dr. Furmansky indicated that appellant had a coexisting and preexisting personality disturbance, which caused him to be more vulnerable to being taken advantage of by others in the workplace. He agreed with Drs. Bonney, Rodriguez and Kleinman that the cumulative effect of work incidents caused appellant's depression. Indicating that appellant should not return to the employing establishment, Dr. Furmansky opined that he could return to work outside the employing establishment eight hours per day, five days per week, with no restrictions. In a September 15, 2004 work capacity evaluation, Dr. Furmansky stated that, although appellant should not work for the employing establishment, he could work eight hours per day. By letter dated September 15, 2004, the Office asked Dr. Furmansky to clarify appellant's work restriction, if he obtained a position with an employer other than the employing establishment. On October 6, 2004 Dr. Furmansky opined that appellant would have no psychiatric restrictions if employed outside the employing establishment.

On September 20, 2004 the Office referred appellant to a rehabilitation counselor for vocational rehabilitation. In a report dated October 31, 2004, the rehabilitation counselor

reviewed Dr. Furmansky's work restrictions and transferable skills. He developed a reemployment placement plan for placement of appellant with a new employer based on labor market research. On January 9, 2005 appellant signed an individual rehabilitation plan agreeing to search for jobs as a truck driver, cashier and maintenance/repairer and hotel clerk in his geographical region. On January 25, 2005 the Office informed appellant that he would be provided with 90 days' job placement assistance, after which his compensation benefits would be reduced, based on his annual wage-earning capacity of $25,636.00. A vocational rehabilitation report for the period February 1 through March 4, 2005, reflected that appellant refused to participate in the job search, claiming that he wanted to open a scuba diving shop instead, at a cost of $300,000.00. A memorandum from the vocational counselor, dated March 4, 2005, reflects appellant's refusal to pursue any of the jobs designated in the rehabilitation plan. Appellant insisted that he would not accept any job with which he was not happy and was determined to open a scuba diving shop. In a March 8, 2005 letter to appellant, the vocational rehabilitation consultant confirmed his refusal to participate in the job search.

In a March 11, 2005 letter, Drs. Bonney and Rodriguez noted a significant deterioration in appellant's mental health due to a failed relationship with his vocational rehabilitation counselor. Determining that appellant was not capable of returning to work due to intense levels of depression and anxiety, they suggested reassignment to a different counselor. In a March 17, 2005 letter, his representative stated that appellant was unable to participate in the return-to-work effort at that time, due to his deteriorated condition. On March 25, 2005 the representative asked the Office to cease all contact between the vocational counselor and appellant. On March 30, 2005 appellant was informed that no new vocational representative would be assigned due to safety concerns.

In a closing report dated May 5, 2005, the rehabilitation specialist noted that appellant's 90-day job search had begun on February 1, 2005. As of the date of the report, appellant had not obtained employment. The rehabilitation counselor submitted job classifications for the positions of cashier; truck driver, light delivery and building maintenance repairer. The rehabilitation specialist reviewed the constructed position of cashier 2 and found that it should be the target job of choice in determining appellant's wage-earning capacity. He stated that the work was within appellant's vocational abilities and was most similar to his employment with the employing establishment. The rehabilitation specialist noted that appellant had completed one year of college classes, which thoroughly met the required specific vocational preparation for such work. He noted that the nature of appellant's injury, as well as his usual employment, age, degree of physical impairment and qualifications for other employment had been considered. The rehabilitation specialist further found that the job was reasonably available within appellant's commuting area with average weekly wages of $337.00.

On May 6, 2005 the Office issued a notice of proposed reduction of compensation on the grounds that appellant was no longer totally disabled and had the capacity to earn the wages of a cashier, at the rate of $337.20 per week. The record contains a wage-earning capacity computation reflecting a weekly pay rate when injured of $787.60; current weekly pay rate for job when injured of $870.56; constructed weekly earning capacity of $337.20 per week; percentage of new wage-earning capacity of 39 percent; adjusted wage-earning capacity amount per week of $307.16; loss in wage-earning capacity of $480.44; gross weekly compensation rate of $387.75 and new compensation rate every four weeks of $1,551.00.

By letter dated January 26, 2005, appellant's representative contended that appellant was totally disabled. He also claimed that appellant's wage-loss compensation had been incorrectly calculated based on a 40-hour workweek, when, in fact, he had worked 32 hours per week at the time of injury. The record contains a record of appellant's work schedule for the period March 25, 2000 through March 31, 2004, showing that appellant worked an average of 23.83 hours per week during that period. A June 15, 2005 pay rate calculation indicates that appellant's base hourly pay, for the same period, was $21.76, based on an average 24-hour workweek ($522.24 per week).

By decision dated June 15, 2005, the Office finalized the reduction of wage-loss compensation effective July 9, 2005. The Office found that the full-time position of cashier was medically and vocationally suitable and represented appellant's wage-earning capacity of $337.20 per week.

On July 12, 2005 appellant, through his representative, requested an oral hearing. At the February 24, 2006 hearing, counsel argued that appellant had sustained a recurrence of disability and was unable to work, due to a conflict with the rehabilitation counselor. He also contended that the impartial medical examiner had been improperly selected and that appellant's loss of wage-earning capacity had been incorrectly calculated, because it had been based on a constructed 40-hour week, rather than a 32-hour week.

By decision dated April 14, 2006, the Office hearing representative affirmed the June 15, 2006 decision. The hearing representative found that the position of cashier was medically and vocationally suitable and fairly and reasonably represented appellant's wage-earning capacity. He determined that the Office had followed proper procedures in the selection of the impartial medical specialist and that appellant did not sustain a recurrence of disability. He further found that counsel argument as to an incorrect pay rate calculation to be without merit, in that appellant was capable of working 40 hours per week.

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.[1] Under section 8115(a), 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 his or her wage-earning capacity or if the employee has no actual earnings, his or her 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 and circumstances which may affect wage-earning capacity in his or her disabled condition.[2]

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

[2] *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

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 fits the employee's capabilities with regard to his or her 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*,[3] will result in the percentage of the employee's loss of wage-earning capacity.[4]

The Board has held that the Office may proceed to a wage-earning capacity determination based upon a selected position if it has established that appellant, without good cause, failed to participate in or cooperate with vocational rehabilitation.[5]

ANALYSIS

The Office determined that the selected position of cashier represented appellant's wage-earning capacity based upon Dr. Furmansky's report and work capacity evaluation, finding that appellant could work eight hours per day, so long as he was not employed by the employing establishment. The Board finds the position of cashier was medically and vocationally suitable and represented appellant's wage-earning capacity. However, the Board further finds that the Office improperly calculated appellant's loss of wage-earning capacity by using an incorrect pay rate.

As appellant did not have actual earnings which fairly and reasonably represented his wage-earning capacity, the Office properly selected a position for determination of wage-earning capacity. The weight of the medical evidence supports that appellant is not totally disabled. The Office found a conflict in medical opinion between the Office's referral physician, Dr. Kleinman, who found that appellant had no further residuals of his employment injury and could return to his regular employment and appellant's attending physicians, Drs. Rodriguez and Bonney, who opined that appellant could not return to work at the employing establishment in any capacity. On August 25, 2004 Dr. Furmansky, a Board-certified forensic psychiatrist, performed an impartial medical examination. In an extensive report, he discussed the history of injury, reviewed the evidence of record and listed findings on physical examination. Dr. Furmansky diagnosed major depressive and personality disorders. He indicated that appellant had a coexisting and preexisting personality disturbance, which caused him to be more vulnerable to be taken advantage of by others in the workplace. Dr. Furmansky agreed with Drs. Bonney, Rodriguez and Kleinman that the cumulative effect of work incidents caused appellant's depression. He advised that appellant not return to work at the employing establishment. Dr. Furmansky opined that he could return to work outside the employing establishment eight

[3] 5 ECAB 376 (1953).

[4] *James A. Birt*, 51 ECAB 291 (2000); *Francisco Bermudez*, 51 ECAB 506 (2000).

[5] *See Daniel Renard*, 51 ECAB 466 (2000).

hours per day, five days per week, with no restrictions. In an October 6, 2004 letter intended to clarify his report, Dr. Furmansky opined that appellant would have no psychiatric restrictions if employed outside the employing establishment.

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.[6] In this case, Dr. Furmansky provided a detailed report expressing his opinion that appellant was not totally disabled and providing work restrictions. He relied on his psychiatric examination of appellant, a review of the medical evidence of record, including the results of objective testing and the history of injury in reaching his conclusions. The Board finds that Dr. Furmansky provided a detailed and well-rationalized report based on a proper factual background and thus his opinion is entitled to the special weight accorded an impartial medical examiner. His report, therefore, constitutes the weight of the medical opinion evidence and establishes that appellant was capable of performing work within the provided work restrictions. As the job classification of a cashier is sedentary and is not located within the employing establishment, the medical evidence supports a finding that appellant has the physical and mental capacity to perform the duties of the position.

Appellant contends that the impartial medical examiner was not properly selected by the Office. The Board finds this contention to be without merit. A physician selected by the Office to serve as an impartial medical specialist should be one wholly free to make a completely independent evaluation and judgment. In order to achieve this, the Office has developed specific procedures for the selection of impartial medical specialists designed to provide adequate safeguards against any possible appearance that the selected physician's opinion was biased or prejudiced.[7] These procedures, set forth in the Federal (FECA) Procedure Manual, provide, in pertinent part, as follows:

> "b. Selection of [p]hysician. The [claims examiner] may use Form CA-19, [r]equest for [s]pecialist [r]eferral to initiate the referral. Unlike selection of second opinion examining physicians, selection of referee physicians is made by a strict rotational system using appropriate medical directories. The [PDS], including physicians listed in the American Board of Medical Specialties Directory and specialists certified by the American Osteopathic Association, should be used for this purpose.
>
> "(1) The services of all available and qualified Board-certified specialists will be used as far as possible to eliminate any inference of bias or partiality. This is accomplished by selecting specialists in alphabetical order as listed in the roster chosen under the specialty and/or subspecialty heading in the appropriate geographic area and repeating the process when the list is exhausted. A physician who is not Board-certified may be used if he or she has special qualifications for

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

[7] *Charles M. David*, 48 ECAB 543 (1997).

performing the examination, but the MMA must document the reasons for the selection in the case record."[8]

The record contains ESAFEC reports reflecting that the Office used the PDS system in conjunction with the Marquis Directory of Medical Specialists to select the referee physician. On July 14, 2004 attempts were made to schedule appointments with Dr. Laura J. Klein and Dr. Susan Beausoleil Bograd, both Board-certified psychiatrists in Denver, Colorado. The reports reflects that both physicians were not available to perform an examination of appellant. The July 14, 2004 PDS report shows that, after the above-referenced "bypasses," an appointment was scheduled with Dr. Furmansky on August 24, 2004. The Board finds that the Office properly followed its internal procedures in the selection of Dr. Furmansky. The Board notes that the conclusion of the impartial medical examiner is fundamentally the same as that of appellant's treating physicians. All doctors opined that appellant could work full time, so long as he was not employed by the Postal Service.

Appellant's vocational rehabilitation counselor determined that he was able to perform the position of cashier and that the position was available in sufficient numbers so as to make it reasonably available within his commuting area. Based on appellant's prior work experience and educational background, he qualified for position of cashier. Although he signed a 90-day job search agreement, appellant refused to actively search for any position identified in his rehabilitation plan or to accept any position with which he was "not happy." Based upon appellant's refusal to participate in the job search and his failure to obtain employment within the 90-day period, the Office properly proceeded to a wage-earning capacity determination based upon the selected position of cashier. The Office considered the proper factors, such as availability of employment and appellant's physical limitations, usual employment, age and employment qualifications, in determining that the medical cashier position represented his wage-earning capacity.[9] The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the duties of cashier and that such a position was reasonably available within the general labor market of his commuting area.

The Office found that the full-time position of cashier was medically and vocationally suitable and represented appellant's wage earning capacity of $337.20 per week. The record contains a wage-earning capacity computation reflecting a weekly pay rate when injured of $787.60; current weekly pay rate for job when injured of $870.56 (April 21, 2001); constructed weekly earning capacity of $337.20 per week; percentage of new wage-earning capacity of 39 percent; adjusted wage-earning capacity amount per week of $307.16; loss in wage-earning capacity of $480.44; gross weekly compensation rate of $387.75 and new compensation rate every four weeks of $1,551.00.

In this case, the Office based its determination on the selected position of full-time cashier, although appellant was only working as a part-time clerk at the time of injury. The hearing representative agreed that appellant's wage-earning capacity should be based on his present ability to work full time, in spite of the fact that appellant worked part time on the date of

[8] Federal (FECA) Procedure Manual, Part 3 -- Medical, Medical Examinations, Chapter 3.500.4(b) (May 2003).

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

injury. However, this application produces an inequitable result. Section 8115(a) of the Federal Employees' Compensation Act provides that, if a claimant's actual earnings do not fairly and reasonably represent wage-earning capacity, then it should be determined with regard to specific criteria, including his usual employment. Appellant's usual employment, *i.e.*, his employment on the date of injury, was part time, not full time. Thus, the Office based its wage-earning capacity decision on an incorrect, inflated salary. Appellant's loss of wage-earning capacity should be determined by comparing consistent work schedules. In the instant case, appellant worked approximately 30 hours per week and earned approximately $26.00 per hour on the date of injury ($787.60 per week). Based upon the constructed position of cashier, the Office imputed income to appellant in the amount of $8.43 per hour for a 40-hour week and concluded that he had a wage-earning capacity of $337.20 per week. Application of the *Shadrick*[10] formula resulted in a monthly compensation rate of $1,551.00. The Board will set aside this aspect of the case for remand to the Office for a proper determination of appellant's wage-earning capacity consistent with his part-time employment.

CONCLUSION

The Board finds that the Office properly found that the position of cashier was medically and vocationally suitable and represented appellant's wage-earning capacity. However, the Board further finds that the Office improperly calculated appellant's loss of wage-earning capacity by using an incorrect pay rate. This case must be set aside and remanded to the Office for a proper determination of appellant's wage-earning capacity consistent with his part-time employment and calculation of his correct pay rate in accordance with section 8114 of the Act.

[10] *See supra* note 3.

ORDER

IT IS HEREBY ORDERED THAT the April 14, 2006 and June 15, 2005 decisions of the Office of Workers' Compensation Programs are affirmed as to the finding that the position of cashier was medically and vocationally suitable and fairly and reasonably represented appellant's wage-earning capacity. It is further ordered that the aforementioned decisions are set aside and remanded to the Office for a proper determination of appellant's wage-earning capacity consistent with his part-time employment and calculation of his correct pay rate in accordance with section 8114 of the Act.

Issued: February 12, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board