U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARK E. SCHAEFER and U.S. POSTAL SERVICE,
POST OFFICE, Livonia, MI

Docket No. 01-877; Submitted on the Record;
Issued April 10, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly reduced appellant's compensation effective June 28, 2000, based on his capacity to perform the duties of a construction painter; and (2) whether the Office abused its discretion by refusing to reopen appellant's claim for further review on the merits under 5 U.S.C. § 8128(a).

On July 5, 1997 appellant, a 30-year-old city carrier, was physically assaulted by his supervisor. He filed a claim for benefits, which the Office accepted for acute stress disorder and post-traumatic stress disorder.[1] Appellant has not returned to work since the date of injury. The Office paid compensation for temporary total disability.[2]

In a work restriction evaluation dated March 16, 1999, Dr. Jean Alce, a specialist in psychiatry and appellant's treating physician, indicated that appellant was unable to perform his usual employment, but could perform alternate employment with restrictions. These restrictions included: not interacting in a public situation such as in a cashier or hotel clerk position; inability to organize work and complete tasks without supervision; inability to maintain concentration and pace at acceptable levels; inability to perform high volume work; and inability to adapt to stressful work situations, such as meetings, deadlines, shifting priorities and changes in routine. Dr. Alce advised that appellant was able to communicate with others on the telephone and in face to face settings and was partially able to participate actively in group/team activities and to cooperate with coworkers. She concluded that appellant would benefit from rehabilitation by acquiring the necessary skills for interpersonal relations.

---

[1] Although appellant filed a Form CA-1 claim based on traumatic injury, the Office adjudicated the claim as one based on an emotional condition.

[2] The Office terminated appellant's compensation by decision dated January 5, 1998. The Office denied reconsideration by decision dated March 13, 1998; appellant's attorney requested reconsideration on April 29, 1998. By decision dated August 7, 1998, the Office vacated the January 5, 1998 termination decision and reinstated his total disability compensation, finding that appellant still had residuals from the July 5, 1997 work injury.

On May 25, 1999 the Office authorized appellant's referral for vocational rehabilitation.

In a vocational rehabilitation report dated May 10, 2000, a vocational rehabilitation counselor issued a report summarizing his efforts to find vocational training or suitable alternate employment for appellant within his indicated restrictions. The vocational counselor indicated that appellant had rejected a proposal to attend a part-time, two-year associate degree program in computer-aided design drafting and that consequently his case had been closed. The vocational rehabilitation counselor recommended a position for appellant listed in the Department of Labor's *Dictionary of Occupational Titles*, which, he determined, reasonably reflected appellant's ability to earn wages, that of construction painter, DOT #840.381-010.[3]

By notice of proposed reduction dated May 25, 2000, the Office advised appellant of its proposal to reduce his compensation because the factual and medical evidence established that he was no longer totally disabled and that he had the capacity to earn wages as a construction painter at the weekly rate of $480.00 in accordance with the factors outlined in 5 U.S.C. § 8115.[4] The Office calculated that appellant's compensation rate should be adjusted to $87.37 using the *Shadrick*[5] formula. The Office indicated that appellant's salary on July 5, 1997, the date he began receiving compensation for temporary total disability, was $595.67 a week, that his current, adjusted pay rate for his job on the date of injury was $612.98 and that appellant was currently capable of earning $480.00 a week, the rate of a construction painter. The Office, therefore, determined that appellant had a 78 percent wage-earning capacity, which when multiplied by 2/3 amounted to a compensation rate of $87.37. The Office found that based on the current consumer price index, appellant's current adjusted compensation rate was $91.25. The Office stated that the case had been referred to a vocational rehabilitation counselor, who had located a position as a construction painter, which he found to be suitable for appellant given his work restrictions and was available in appellant's commuting area. The Office allowed appellant 30 days in which to submit any contrary evidence.

By letter dated June 22, 2000, appellant contested the proposed reduction of compensation, contending that he was psychologically unable to perform the selected position. He contended that residuals from his work-related emotional conditions precluded him from attending the part-time college course offered by his vocational rehabilitation counselors and from performing alternate employment. Appellant also alleged that one of his counselors behaved in an uncooperative and threatening manner. He submitted several medical reports which he had previously submitted, but did not submit any additional medical evidence.

[3] The job description indicated that appellant would read work orders or receive instructions from a supervisor or homeowner regarding painting, after which he would engage in the customary activities of a painter; *e.g.*, applying coats of pain using brushes or sprays, selecting paints, smoothing surfacing, using sandpaper, removing fixtures, spreading dropcloths over floors and furnishings, erecting scaffolding, setting up ladders, etc.

[4] 5 U.S.C. § 8115.

[5] *Albert C. Shadrick*, 5 ECAB 376 (1953); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.814.2 (April 1995).

By decision dated June 28, 2000, the Office advised appellant that it was reducing his compensation because the weight of the medical evidence showed that he was no longer totally disabled for work due to effects of his July 5, 1997 employment injury and that the evidence of record showed that the position of construction painter represented his wage-earning capacity.

By letter dated September 26, 2000, appellant requested reconsideration. He did not submit any additional medical evidence with his request.

By decision dated November 16, 2000, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require the Office to review its prior decision.

The Board finds that the Office properly reduced appellant's compensation for total disability effective June 28, 2000, based on his capacity to perform the duties of a construction painter.

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.[6]

In the present case, the Office properly found in its June 28, 2000 reduction of compensation that appellant was no longer totally disabled for work due to the effects of his July 5, 1997 employment injury. The Board notes that Dr. Alce indicated in a work restriction evaluation dated March 16, 1999, that although appellant's accepted emotional conditions precluded him from returning to his usual job as a city carrier, he was able to perform alternate employment with certain restrictions.

In a report received by the Office on May 10, 2000, the vocational rehabilitation counselor issued a report summarizing his efforts to find suitable alternate employment for appellant in which he indicated that, although appellant was offered a part-time two year collegiate training course in computer-aided design drafting, he had rejected this offer. The vocational rehabilitation counselor also indicated that appellant was able to work as a construction painter. The vocational rehabilitation counselor's job availability report indicated the position was reasonably available for appellant in his local labor market and reasonably represented his wage-earning capacity.

The Office then properly followed established procedures for determining appellant's employment-related loss of wage-earning capacity.

Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions given the nature of the employee's injuries and the degree of physical impairment, his or her usual employment, the employee's age and vocational qualifications and the availability of suitable employment.[7] Accordingly, the

[6] *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

[7] *Samuel J. Chavez*, 44 ECAB 431 (1993); *Hattie Drummond*, 39 ECAB 904 (1988); *see* 5 U.S.C. § 8115(a); A. Larson, The Law of Workers' Compensation § 57.22 (1989).

evidence must establish that jobs in the position selected for determining wage-earning capacity are reasonably available in the general labor market in the commuting area in which the employee lives. In determining an employee's wage-earning capacity, the Office may not select a makeshift or odd lot position or one not reasonably available on the open labor market.[8]

In the instant case, the rehabilitation counselor assigned to assist appellant in placement efforts identified two positions listed in the Department of Labor's *Dictionary of Occupational Titles*, appropriate for appellant based on the most recent work restriction evaluation obtained by both the Office and the rehabilitation counselor, Dr. Alce's March 16, 1999 report. Based on these restrictions, the Office selected a position as a construction painter which it found suitable for appellant, one of the two positions listed by the rehabilitation counselor which was most consistent with appellant's background.[9] The Office used the information provided by the rehabilitation counselor of the prevailing wage rate in the area for a construction painter and established that jobs in the position selected for determining wage-earning capacity were reasonably available in the general labor market in the geographical commuting area in which the employee lived, as confirmed by state officials. Finally, the Office properly applied the principles set forth in the *Shadrick*[10] decision to determine appellant's loss of wage-earning capacity.

The Office properly found that appellant was no longer totally disabled as a result of his July 5, 1997 employment injury and it followed established procedures for determining appellant's employment-related loss of wage-earning capacity. The Board, therefore, finds that the Office has met its burden of justifying a reduction in appellant's compensation for total disability.

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's case for further review on the merits of his claim under 5 U.S.C. § 8128(a).

Under 20 C.F.R. § 10.607, a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law; by advancing a relevant legal argument not previously considered by the Office; or by submitting relevant and pertinent evidence not previously considered by the Office.[11] Evidence that repeats

[8] *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

[9] The Office properly noted that Dr. Alce's restrictions had all pertained to appellant's emotional conditions and that appellant had no apparent physical restrictions. Her work restriction evaluation indicated that appellant would have trouble working in a job which involved close supervision and stressful situations such as deadlines and meetings and that he was unable to maintain concentration and pace. The Office indicated that the construction painter position was medically suitable because it offered work that is more independent of others and is minimally supervised.

[10] *Shadrick, supra* note 5 .

[11] 20 C.F.R. § 10.607(b)(1). *See generally* 5 U.S.C. § 8128(a).

or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[12]

In this case, appellant has not shown that the Office erroneously applied or interpreted a specific point of law; he has not advanced a relevant legal argument not previously considered by the Office; and he has not submitted relevant and pertinent evidence not previously considered by the Office. The evidence appellant submitted was either previously considered and rejected by the Office in prior decisions, or is not pertinent to the issue on appeal. Additionally, appellant's letter failed to show that the Office erroneously applied or interpreted a point of law nor did it advance a point of law or fact not previously considered by the Office. Therefore, the Office acted within its discretion in refusing to reopen appellant's claim for a review on the merits.

The decisions of the Office of Workers' Compensation Programs dated November 16 and June 28, 2000 are hereby affirmed.

Dated, Washington, DC
April 10, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

[12] *Howard A. Williams*, 45 ECAB 853 (1994).