U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHIRLEY A. FINDLAY and U.S. POSTAL SERVICE,
POST OFFICE, Ariel, WA

Docket No. 02-604; Submitted on the Record;
Issued September 11, 2002

DECISION and ORDER

Before COLLEEN DUFFY KIKO, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation to reflect her capacity to earn wages in the constructed position of sales clerk.

On June 8, 1987 appellant, then a 52-year-old retired postmaster, filed a claim asserting that her bronchial asthma and traumatic leg fracture were a result of her federal employment. The Office accepted her claim for the condition of post-traumatic stress disorder and paid compensation for temporary total disability.[1]

On March 26, 1998 the Office rehabilitation specialist reported that appellant's previous employer was unable to offer light duty within appellant's work restrictions. Vocational evaluation and testing, however, indicated an interest and an ability to be trained to successfully perform work in a general clerk, administrative clerk or related occupation falling within the light category suitable to appellant's restrictions.

On May 4, 1998 a vocational rehabilitation counselor reported as follows:

> "Recommend vocational rehabilitation services be closed at this time. [Appellant] cannot work due to subsequent impairments which she states prevents her from attending school as outlined in her approved vocational rehabilitation plan. Current information indicates that [appellant] last attended school on April 15, 1998 and has not contacted her instructor, the disabilities counselor or her vocational rehabilitation counselor. Jobs for which she may have been able to work based on transferable skills with no further training/skill acquisition are the jobs of sales clerk and cashier. However, she does not currently possess the

[1] The Office found that appellant's emotional condition was causally related to the eruption of Mount St. Helens in 1980. The Office did not accept that appellant's respiratory condition or leg fracture was related to her federal employment.

physical capacities to perform these jobs due to post-injury physical complaints (leg and knee) which limit her standing and walking abilities."

The Office found that a conflict existed between appellant's attending psychologist and the second opinion psychiatrist on whether appellant continued to be disabled due to residuals of her accepted post-traumatic stress syndrome. To resolve the conflict, the Office referred appellant, together with the medical record and a statement of accepted facts, to Dr. G. Christian Harris, a Board-certified psychiatrist. The Office attached the position description for sales clerk and asked whether appellant was capable of performing the duties of that position.

On October 12, 1998 Dr. Harris related appellant's history, complaints and findings on mental status examination. He reported that appellant had remnants of post-traumatic stress disorder causally related to her federal employment, together with a related depression, which waxed and waned. As far as he could determine, appellant had no industrial or preexisting disability issues. On the issue of the sales clerk position, Dr. Harris reported:

"The claimant is probably not capable of performing the duties of a sales clerk assuming this means considerable time on her feet, although I would defer to the orthopedic surgeon for a final opinion about this. She is able to work from a strictly cognitive standpoint and her suggestion that she work out of her home as an astrology consultant sounds fairly reasonable to me. However, this might impact her disability situation. Because of her post-traumatic stress disorder as well as her life problems and now other medical problems I doubt she could be reasonably realistically expected to return to employment as Postmaster at [the employing establishment]."

On March 17, 2000 the Office issued a notice of proposed reduction of compensation on the grounds that appellant had the capacity to earn wages as a sales clerk.

In a decision dated June 13, 2000, the Office adjusted appellant's compensation because the medical evidence showed that she was no longer totally disabled for work due to the effects of her accepted employment injury. Based on the residuals of her injury and considering all significant preexisting impairments and pertinent nonmedical factors, the Office found that appellant was able to perform the position of sales clerk.

Appellant requested a hearing before an Office hearing representative and submitted additional medical opinion evidence to support that the accepted employment injury had rendered her unfit for the position of retail sales clerk.

In a decision dated February 23, 2001, the hearing representative affirmed the Office's June 13, 2000 decision adjusting appellant's compensation. The hearing representative found that the weight of the medical evidence at the time of the Office's decision rested with the opinion of the referee medical specialist, Dr. Harris, and established that appellant's injury-related psychiatric condition did not prevent her from performing the duties of a sales clerk.

Appellant filed an appeal with the Board on January 21, 2002.

The Board finds that the Office has met its burden of proof to justify the reduction of appellant's compensation to reflect her capacity to earn wages in the constructed position of sales clerk.

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[2] 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.[3]

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

When the Office makes a medical determination of partial disability and of the specific work restrictions, it should 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 labor market, that fits the employee's capabilities in light of his or her physical limitations, education, age and prior experience. Once this selection is made a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service. Finally, application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.[5]

After obtaining medical evidence that appellant was capable of working on a psychological basis, the Office referred the case record to an Office specialist in wage-earning capacity, who selected a position listed in the Department of Labor's *Dictionary of Occupational Titles* to fit appellant's capabilities. The specialist determined both the prevailing wage rate for the position of sales clerk and its availability in open labor market from information obtained from the state employment service. The specialist also determined that appellant had specific vocational preparation for the job.

[2] *Harold S. McGough*, 36 ECAB 332 (1984).

[3] *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

[4] 5 U.S.C. § 8115(a)

[5] *Hattie Drummond*, 39 ECAB 904 (1988); *see Albert C. Shadrick*, 5 ECAB 376 (1953).

The Office determined, however, that a conflict in medical opinion existed on whether appellant remained disabled for work as a result of her accepted employment injury. Section 8123(a) of the Act provides in part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[6]

To resolve the conflict, the Office referred appellant to Dr. Harris, a Board-certified psychiatrist. The Office provided Dr. Harris the case record and a statement of accepted facts so he could base his opinion on a proper background. Dr. Harris explained that appellant continued to suffer residuals of her accepted post-traumatic stress disorder but that these residuals did not disable her from a strictly cognitive standpoint from performing the duties of the position of sales clerk, a description of which the Office submitted for his review. He stated that appellant was probably not capable of performing these duties assuming it meant considerable time on her feet, though he wished to defer to the orthopedic surgeon for a final opinion on that matter.

In determining an employee's wage-earning capacity based on a position deemed suitable but not actually held, the Office must consider the degree of physical impairment, including impairments resulting from both injury-related and preexisting conditions but not impairments resulting from postinjury or subsequently acquired conditions.[7] Any incapacity to perform the duties of a sales clerk resulting from subsequently acquired conditions is immaterial to the loss of wage-earning capacity that can be attributed to the accepted employment injury and for which appellant may receive compensation.

When there exist opposing medical reports of virtually equal weight and rationale, and the case is referred to a referee medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[8] The Board finds that the opinion of Dr. Harris is based on a proper factual background and is sufficiently well reasoned that it is entitled to such weight in resolving the conflict on appellant's capacity to work.

Based on the weight of the medical opinion evidence the Office properly found that appellant was no longer totally disabled due to residuals of her post-traumatic stress disorder. The Office properly followed established procedures for determining appellant's injury-related loss of wage-earning capacity and gave due regard to the factors specified in 5 U.S.C. § 8115(a). The Board will therefore affirm the hearing representative's February 23, 2001 decision upholding the reduction of appellant's compensation for wage loss.[9]

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[6] 5 U.S.C. § 8123(a).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8.a (December 1993).

[8] *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

[9] As of January 21, 2002, the date appellant filed her appeal with the Board, the Office issued no further decision in her case. Further development of the evidence, as ordered by the Office hearing representative to resolve a subsequent conflict in medical opinion, remains for purposes of this appeal an interlocutory matter over which the Board may exercise no jurisdiction. 20 C.F.R. § 501.2(c).

The February 23, 2001 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
September 11, 2002

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member