

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARYAN GILBERT and U.S. POSTAL SERVICE,
POST OFFICE, Los Angeles, Calif.

*Docket No. 96-772; Submitted on the Record;
Issued April 10, 1998*

DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation, effective June 30, 1994, on the grounds that she was able to perform the selected position of general ledger bookkeeper.

The Board has given careful consideration to the entire case record and the issues involved. The Board finds that the decision of the Office hearing representative, dated and finalized May 26, 1995, correctly sets forth the law and facts of the case. However, as the hearing representative did not set forth the medical record in detail and the issue in this case is medical in nature, the pertinent reports will be discussed herein.

Appellant's case was accepted on January 27, 1988 for low back pain with sciatica and on March 15, 1991 for a single episode of severe, major depression related to a December 8, 1985 incident. Her case was placed on the periodic rolls and she received vocational rehabilitation services from 1990 through January 1993.

Dr. Barry L. Burton, a Board-certified orthopedic surgeon, to whom appellant was referred by the employing establishment, submitted reports from June 14 to August 9, 1990 finding a "severe psychological problem" but no objective disability related to the December 8, 1985 injury.¹

¹ Dr. Burton submitted periodic reports in June and July 1990 reiterating the need for psychiatric evaluation, and noting that appellant would not perform prescribed back exercises. In an August 9, 1990 report, Dr. Burton stated that appellant refused to be examined or discuss a possible return to work.

In a September 10, 1990 report, Dr. David N. Alexander, an attending Board-certified psychiatrist and neurologist, noted no objective clinical findings substantiating appellant's complaints of "disequilibrium and blank-out spells."²

In a November 8, 1990 report, Dr. David Gottlieb, a Board-certified psychiatrist, to whom appellant was referred by Dr. Burton, diagnosed "[d]epression, severe, major, single episode," associated with "chronic pain, isolation, poor communications with her doctors" and possibly menopause. He submitted September 1 and November 1, 1991 reports noting appellant's continuing depression.

In a February 6, 1992 report, Dr. Alexander diagnosed persistent low back pain with diffuse pain, chronic lumbosacral degenerative disc disease and recommended an inpatient pain management program.³ He referred appellant to Dr. Rick B. Delamarter, a Board-certified orthopedic surgeon, who in a July 1, 1992 report diagnosed a chronic benign pain syndrome without evidence of neural compression.

Appellant attended an inpatient pain management program in January 1993, administered by Dr. Norman S. Namerow, a Board-certified psychiatrist and neurologist. In a January 27, 1993 discharge report, Dr. Namerow referred appellant to a fitness center for a work hardening and conditioning program. He commented that appellant had experience as a computer programmer, EEG technician, accountant and licensed cosmetologist, all "relatively sedentary jobs which we believe [appellant] could perform."⁴

In a February 19, 1993 work restriction evaluation (Form OWCP-5), Dr. Namerow proscribed bending, squatting, climbing, kneeling and twisting, limited lifting up to 10 pounds to 1 hour per day, walking to 2 hours per day and standing to 3 hours per day. He indicated that appellant was capable of working eight hours per day within those restrictions.⁵ Dr. Alexander submitted a March 8, 1993 work restriction evaluation, containing identical work limitations and indicating appellant could work 8 hours per day.

Appellant submitted November 8, 1993 and February 3, 1994 reports from Dr. Roosevelt Jacobs, an attending clinical psychologist and a May 6, 1994 report from Dr. Buford Gibson, Jr., an attending psychiatrist, concluding that she was totally disabled for work due to major

² October 3, 1990 electroencephalogram (EEG) and November 1, 1990 magnetic resonance imaging (MRI) scan of the brain were within normal limits. A February 6, 1992 lumbar MRI spine showed degenerative disc disease at L5-S1, and an electromyogram (EMG) of the lower extremities was normal.

³ In an April 23, 1992 report, Dr. Sherry Leib, a clinical psychologist associated with Dr. Alexander, diagnosed moderately severe depression due to chronic pain, and recommended admission to an inpatient pain management center.

⁴ Appellant's application for federal employment (Form SF-171) showed that she received a cosmetology degree in 1964, a computer programming degree from a junior collage in 1971, completed a programming bookkeeping program at a business college, and completed certification as an EEG technician in 1983.

⁵ In a February 25, 1993 report, Dr. Namerow noted paraspinous muscle tightness and a positive Lasegue's sign on the right. He noted appellant's refusal to consider an exercise or fitness center program. A March 31, 1993 EMG was normal.

depression and anxiety. In a February 24, 1995 work release slip, Dr. T. Trigari, a neurologist, indicated appellant was totally disabled for work for three months.⁶

The Board finds that the Office properly reduced appellant's compensation for total disability, effective June 30, 1994, based on her capacity to perform the duties of an appointment clerk.

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.⁷

The Office properly found in its proposed reduction of compensation, finalized on June 30, 1994, that appellant was no longer totally disabled for work due to the effects of her December 8, 1985 work-related injury. Work restriction evaluation reports dated as early as February 19, 1993 indicate that appellant was capable of performing full-time sedentary work.

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, including general ledger bookkeeper. The rehabilitation offer advised the Office in July 1993 concerning these positions. The Office properly referred to the February 19, 1993 report from Dr. Namerow and the March 8, 1993 report of Dr. Alexander both attending physicians and Board-certified in psychiatry and neurology, to determine appellant's capability to perform the jobs as recommended. Both of these reports indicated that appellant was capable of performing light or sedentary work with no bending, squatting, climbing, kneeling, twisting and limited lifting. Dr. Namerow and Dr. Alexander both indicated that appellant had reached maximum medical improvement. The position of general ledger clerk is well within the restrictions provided by Dr. Namerow and Dr. Alexander.

The Office has stated that in some circumstances extensive rehabilitation efforts will not succeed. In such circumstances, the Office procedures instruct the rehabilitation counselor to submit a final report summarizing that placement efforts were not successful and submitting relevant information to the Office.⁸ In this case, the rehabilitation counselor properly submitted a final report on July 7, 1993, indicating that placement efforts had been unsuccessful due to appellant's focus on her symptoms and reluctance to participate in rehabilitation efforts. The counselor provided required information concerning the position descriptions, the availability of positions within appellant's commuting area and pay ranges within the geographic area.

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,

⁶ As these reports contain no medical rationale supporting a causal relationship between the accepted conditions and appellant's psychiatric problems following the accepted episode of major depression, they are not relevant as to whether appellant is capable of performing the selected position as of June 30, 1994.

⁷ *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

⁸ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.813.11(c)(2) (December 1993).

given the nature of the employee's injuries and the degree of physical impairment, his or her usual employment, employee's age and vocational qualifications and the availability of suitable employment.⁹ The evidence must establish that jobs in the position selected are reasonably available in the general labor market in the commuting area in which the employee lives.¹⁰

The Office identified a position of the two listed by the rehabilitation counselor, which was most consistent with appellant's background, including her training as a computer programmer and accountant. The Office used the information provided by the rehabilitation counselor, of the prevailing wage rate in the area of an general ledger bookkeeper. Finally, the Office properly applied the principles set forth in the *Shadrick* decision¹¹ to determine appellant's loss of wage-earning capacity.

The Office properly found that appellant was no longer totally disabled as a result of her December 8, 1985 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 decision of the Office of Workers' Compensation Programs dated and finalized May 26, 1995 is hereby affirmed.

Dated, Washington, D.C.
April 10, 1998

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

⁹ *Hattie Drummond*, 39 ECAB 904 (1988). See 5 U.S.C. § 8115(a); A. Larson, *The Law of Workers' Compensation* § 57.22 (1989).

¹⁰ *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

¹¹ *Albert C. Shadrick*, 5 ECAB 376 (1953).