

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WALTER J. BUSCHER and U.S. POSTAL SERVICE,
POST OFFICE, Seattle, WA

*Docket No. 98-639; Submitted on the Record;
Issued December 27, 1999*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation for wage loss to reflect a capacity to earn wages as a customer service clerk.

On the prior appeal of this case,¹ the Board found that the Office failed to establish that appellant had the capacity to earn wages as a customer service clerk. The Board found that the opinion of the impartial medical specialist constituted the weight of the medical evidence in establishing appellant's diagnosed condition and partial disability. The Board found, however, that the Office should have limited appellant's work hours, in accordance with the specialist's recommendation of six to eight hours a day, or should have referred the position to the specialist to clarify whether appellant could perform the duties of a customer service clerk for a full eight hours a day. Because of the discrepancy between the work restrictions outlined by the impartial medical specialist and the constructed position, the Board reversed the Office's decisions dated August 31, 1994 and June 27 and July 17, 1995. The facts of this case are set forth in the Board's prior decision and are hereby incorporated by reference.

On remand, the Office referred the case to its rehabilitation specialist for clarification of whether the constructed position was reasonably available on a part-time basis in 1994 and whether it was still reasonably available.

In a memorandum dated November 13, 1997, the rehabilitation specialist advised that the position of retail sales clerk was quite adaptable to part-time work schedules, according to the labor market survey done in 1993 and that part-time work was reasonably available at the time of the rehabilitation case closure in December 1993. The rehabilitation specialist reported that there were currently several part-time job openings listed for both the retail sales clerk and

¹ Docket No. 95-2712 (issued August 11, 1997).

customer service clerk positions. He stated that employment in the latter was reasonably available on a part-time basis in the local labor market with entry level wages of \$7.75 per hour.

In a decision dated November 20, 1997, the Office reduced appellant's compensation for wage loss because the medical evidence showed that he was no longer totally disabled for work due to the effects of his accepted employment injury. The Office found that appellant was able to perform the duties and physical requirements of the position of customer service clerk and reduced his compensation for wage loss accordingly retroactive to August 15, 1994.

The Board finds that the Office improperly reduced appellant's compensation.

Chapter 2.814.8(e)(1) of the Office's procedure manual provides that, after selecting a position from those listed by the rehabilitation counselor and after determining that the job is suitable and available, the Office should provide the claimant with a prereduction notice as described in Chapter 2.1400.6 and 2.1400.7.² Chapter 2.1400.6 provides that the Office must provide notice of termination or reduction of compensation in all cases where benefits are being paid on the periodic rolls.³ This chapter further provides that notice is not needed to end daily rolls payments if such payments have continued less than a year, or before terminating or reducing benefits when the claimant dies, the claimant returns to work, the claimant is convicted of defrauding the program, or the claimant forfeits compensation by failing to report earnings.⁴

The record shows that appellant was receiving benefits on the periodic rolls prior to the Office's August 31, 1994 decision to reduce his compensation. The Board reversed that decision on the prior appeal. After confirming the availability of the constructed position on a part-time basis, the Office issued another decision reducing appellant's compensation for wage loss, but it did not provide appellant with the prereduction notice required by Chapter 2.814.8(e)(1) of its procedure manual. For this reason, the Board finds that the Office improperly reduced appellant's compensation for wage loss.⁵ The Board will reverse the Office's November 20, 1997 decision.

The Board also notes that appellant received compensation for temporary total disability on the periodic rolls until September 18, 1994, when the Office's August 31, 1994 reduction became effective. There is no evidence that the Office returned appellant to the periodic rolls or reinstated compensation for temporary total disability following the Board's August 11, 1997 decision reversing the Office's action. On November 20, 1997 the Office reduced appellant's compensation for wage loss retroactive to August 15, 1994.

² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(e)(1) (December 1995).

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.6(a) (March 1997).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.6(c) (March 1997).

⁵ *Cf. Lan Thi Do*, 46 ECAB 366 (1994) (finding that the Office was required to provide pretermination notice where the claimant was paid on the daily rolls for more than a year and should have been placed on the short-term rolls).

Chapter 2.814.8(f) of the Office's procedure manual provides that retroactive constructed loss of wage-earning capacity (LWEC) determinations should be considered only when the evidence clearly shows that partial rather than total disability existed prior to adjudication and no compensation has been paid for the period of disability in question: "Retroactive constructed LWEC determinations are not to be made where compensation is being paid for temporary total disability. In such cases payments must continue until the LWEC decision is made."⁶

Because compensation for temporary total disability continued beyond August 15, 1994, the effective date of the retroactive determination and because appellant remained entitled to continuing compensation for temporary total disability following the reversal of the Office's August 31, 1994 decision, the Office erred in making its determination of wage-earning capacity retroactive. As the Office has not met its burden of proof to justify the reduction of appellant's compensation, the Board hereby directs the Office to reinstate compensation for temporary total disability retroactive to the previously effective date of reduction.

The November 20, 1997 decision of the Office of Workers' Compensation Programs is reversed and the case remanded for further action consistent with this opinion.

Dated, Washington, D.C.
December 27, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

⁶ Federal (FECA) Procedural Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(f) (December 1995).