

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TONY R. SCOTT and DEPARTMENT OF VETERANS AFFAIRS,
BILOXI VETERANS ADMINISTRATION MEDICAL CENTER, Biloxi, Miss.

*Docket No. 97-759; Submitted on the Record;
Issued February 5, 1999*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's monetary compensation to reflect a capacity to earn wages in the position of cashier.

On the prior appeal of this case,¹ the Board found that the Office had improperly reduced appellant's monetary to zero for failure to cooperate with vocational rehabilitation. The Office had sufficient information, the Board found, to determine under 5 U.S.C. § 8113(b) what would probably have been appellant's wage-earning capacity in the absence of his failure to continue participation in the vocational rehabilitation effort when so directed. The facts of this case are set forth in the Board's prior decision and are hereby incorporated by reference.

On June 29, 1995 the Office issued a notice of proposed reduction of compensation. The Office found that the position of cashier was suitable both medically and vocationally in accordance with the factors set forth in 5 U.S.C. § 8115(a) and that appellant's compensation should be reduced based on his ability to earn \$210.00 per week as a cashier. The Office noted that Dr. Christopher E. Wiggins, an orthopedic surgeon and Office referral physician, had reported appellant's ability to perform a range of primarily light physical activities; that Dr. Harry A. Danielson, appellant's attending neurosurgeon, had approved the position of cashier; and that Dr. Joseph I. Faison, appellant's family practitioner, had provided no rationale to support the work restriction evaluation that appellant was completely unable to perform such activities as sitting, walking, lifting, bending, squatting, climbing, kneeling twisting or standing, even on an intermittent basis.

In a decision dated September 20, 1995, the Office finalized its decision to reduce appellant's compensation.

¹ Docket No. 95-252 (issued May 23, 1995).

Appellant requested reconsideration and in support thereof submitted a November 15, 1995 form report from Dr. Faison, who indicated that appellant was totally disabled for his usual work for the period October 15 through November 15, 1995. Appellant also argued that the medical evidence upon which the Office based its decision was furnished in 1992 and therefore appeared to violate the requirement of current medical information.

In a decision dated September 25, 1996, the Office reviewed the merits of appellant's claim and denied modification of its September 20, 1995 decision. The Office found that Dr. Faison's opinion had been previously considered and presented no additional medical rationale. The Office reiterated that both Drs. Wiggins and Danielson had agreed that appellant could perform limited-duty work and that the position of cashier was well within his work restrictions.

The Board finds that the Office improperly reduced appellant's monetary compensation to reflect a capacity to earn wages in the position of cashier.

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.² 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.³

The Board has held that the Office may not base a determination of wage-earning capacity on medical evidence that is not current. In *Ellen G. Trimmer*,⁴ for example, the Board found that the Office had not met its burden of proof to justify the reduction of the claimant's monetary compensation when it based its decision on a medical report that was almost two years old. The Board found that the passage of time had lessened the relevance of the report. In *Sammuel J. Russo*,⁵ the Office determined the claimant's wage-earning capacity without a current medical evaluation of the claimant's work limitations. The most recent medical reports regarding such limitations in that case were made two year prior to the Office's determination.

² See generally 5 U.S.C. § 8115(a).

³ *Hattie Drummond*, 39 ECAB 904 (1988); see *Albert C. Shadrick*, 5 ECAB 376 (1953).

⁴ 32 ECAB 1878 (1981).

⁵ 28 ECAB 43 (1976).

And in *Anthony Pestana*,⁶ the Board held that the Office failed to ensure that the record contained a detailed current description of the claimant's disabled condition and ability to perform work. In that case, the Office made its wage-earning capacity determination nearly five years after the claimant's most thorough physical examination and evaluation.

The Office in this case based its September 20, 1995 determination of wage-earning capacity on medical evidence obtained from Drs. Wiggins and Danielson in April, May and October 1992. Consistent with its case precedent, the Board finds that this evidence is stale and cannot form a valid basis for a loss of wage-earning capacity determination.

It is well established that, once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.⁷ The Board finds that the Office failed to meet its burden of proof by failing to demonstrate that the selected position of cashier was consistent with appellant's current work tolerance limitations.

The September 25, 1996 decision of the Office of Workers' Compensation Programs is reversed.

Dated, Washington, D.C.
February 5, 1999

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

⁶ 39 ECAB 980 (1988).

⁷ *Harold S. McGough*, 36 ECAB 332 (1984).