

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHARLES J. PRUDENCIO and DEPARTMENT OF THE AIR FORCE,
HOLLOMAN AIR FORCE BASE, N.M.

*Docket No. 97-251; Submitted on the Record;
Issued January 11, 1999*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that the position of cashier II fairly and reasonably represented appellant's wage-earning capacity, effective September 18, 1994, the date it reduced his compensation.

This case has previously been on appeal before the Board. By decision dated March 5, 1990, the Board affirmed the Office's decision dated December 1, 1988 denying appellant's request for a hearing and set aside the Office's decision dated November 1, 1989, denying appellant's untimely petition for reconsideration on the grounds that the Office did not address whether the application for review presented clear evidence of error. The facts and circumstances of the case are completely set out in that decision and are hereby incorporated by reference.¹ On remand in a decision dated April 26, 1990, the Office rescinded its decision dated August 17, 1988 on the grounds that the medical evidence did not establish that appellant had been released to regular work without restrictions and therefore there was clear evidence of error. In a decision dated June 28, 1990, the Office accepted appellant's claim for a recurrence of disability, found that appellant had a muscle sprain of the left arm and began payment of compensation for temporary total disability.

On September 16, 1992 appellant was referred for rehabilitation services. Nancy Watson, appellant's rehabilitation counselor, indicated that the positions of tune-up mechanic, cashier II, self-service station attendant and invoice control clerk were reasonably available and appropriate based on appellant's vocational testing and a labor market survey within appellant's geographical area. In a final report dated January 24, 1994, James B. Howard, a rehabilitation specialist, reviewed Ms. Watson's reports and indicated that the cashier II position was reasonably available and appropriate for appellant based on the labor market surveys that had

¹ Docket No. 90-338 (issued March 5, 1990).

been performed and since the specified job duties could be performed by use of one dominate extremity.

In a letter dated June 27, 1994, the Office notified appellant of a proposed reduction in compensation on the grounds that he was no longer totally disabled and had the capacity to earn wages as a cashier II. The Office based its determination on a one line note on a prescription pad dated June 10, 1994 from appellant's treating physician and general practitioner, Dr. Brent Aday, which stated, "I have reviewed the job description of cashier II and feel [appellant] should be able to function in the capacity described."

In a decision dated August 25, 1994, the Office determined that appellant's wage-earning capacity was \$197.25 per week as represented by the position of cashier II and adjusted his compensation from that for total disability to that for partial disability effective September 18, 1994. In a merit decision dated July 1, 1996 and finalized on July 2, 1996, an Office hearing representative affirmed the Office's August 25, 1994 decision.

The Board finds that the Office properly determined that the position of cashier II fairly and reasonably represented appellant's wage-earning capacity effective September 18, 1994, the date it reduced his compensation benefits.²

Once the Office accepts a claim, it has the burden of proving that the disability ceased or lessened in order to justify termination or modification of compensation. 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 or 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.³ When the Office makes a medical determination of partial disability and of specific work restrictions, it may 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 market, that fits the employee's capabilities with regard to 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 market should be made through contact with the state employment service or other applicable services. Finally, application of the principles set forth in the *Alfred C. Shadrick*⁴ decision will result in the percentage of the employee's loss of wage-earning capacity.⁵

² The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal. As appellant filed his appeal with the Board on November 29, 1996, the only decision before the Board is the Office's July 2, 1996 decision. See 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

³ See generally 5 U.S.C. § 8115(a), *The Law of Workers' Compensation* § 57.22 (1989); see also *Betty F. Wade*, 37 ECAB 556 (1986).

⁴ 5 ECAB 376 (1953).

⁵ See *Hattie Drummond*, 39 ECAB 904 (1988); *Shadrick*, *supra* note 3.

In the present case, Mr. Howard, a rehabilitation specialist, selected the position of cashier II based on appellant's vocational capabilities and physical requirements and concluded that this position was reasonably available in appellant's living area. Appellant contends that the position identified is not suitable as he has an emotional condition that would prevent him from working in the selected position. In determining wage-earning capacity based on a constructed position, the Office must determine whether the position is medically suitable for appellant "taking into consideration medical conditions due to the accepted work-related injury or disease, and any preexisting medical conditions. (Medical conditions arising subsequent to the work-related injury or disease will not be considered)."⁶ A review of the record reveals that it is devoid of any medical evidence which establishes that appellant was not capable of performing the constructed position due to his accepted employment injury. Rather, appellant's belief that he was not able to perform the position of cashier II was due to diagnosed emotional conditions, including depression, chronic mental illness and paranoid personality disorder. While appellant presented substantial evidence to establish that he did have an emotional condition, there is no evidence that this condition was a preexisting medical condition. Dr. Aday indicated that he had been treating appellant for some time and that in June 1990 he was evaluated by a number of physicians concerning his medical conditions, including psychological problems. Therefore, appellant's earliest diagnosis for his emotional condition of record was some time after June 1990 and that this condition was not diagnosed prior to his February 3, 1988 injury. In addition, Dr. Aday concurred with the report by Dr. Clifford R. Stoller, a Board-certified psychiatrist and Office referral physician. In his report dated January 18, 1993, he indicated that appellant could work eight hours a day with restrictions on the use of his left arm. Dr. Aday noted his agreement with Dr. Stoller's report on a form dated January 6, 1994 but expressed reservations about appellant due to his acquired psychiatric problems. In later reports dated May 16 and November 7, 1995, Dr. Aday again explained that while he had indicated that appellant could work in the position delineated, he would have severe problems due to long-standing paranoia with some depression. However, since neither of these conditions predate appellant's date of injury and as a review of the totality of Dr. Aday's reports reveal that he has not indicated that appellant was physically unable to perform the duties of a cashier II due to residuals of his accepted employment injury, this medical evidence is not sufficient to establish that the position offered was not medically suitable. Thus, the Office properly determined that the position of cashier II fairly and reasonably represented appellant's wage-earning capacity as appellant was physically capable of working in said position.

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(d) (December 1993).

The decision of the Office of Workers' Compensation Programs dated July 2, 1996 is hereby affirmed.

Dated, Washington, D.C.
January 11, 1999

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member