

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KAREN L. LONON-JONES and DEPARTMENT OF DEFENSE,
INVESTIGATIVE SERVICE, Long Beach, Calif.

*Docket No. 97-155; Submitted on the Record;
Issued March 18, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation to reflect her wage-earning capacity in the selected position of customs broker.

The Office accepted appellant's claim for temporary adjustment disorder with mixed emotional features. Appellant was placed on the periodic roll beginning February 14, 1988 and received temporary total disability benefits through August 21, 1994. Appellant commenced vocational rehabilitation on April 18, 1989. In a report dated April 19, 1989, appellant's treating physician, Dr. Hamilton Moody, a psychologist, diagnosed anxiety and depressive syndromes with obsessive systems which he stated were specifically work related but no longer appeared to be an obstacle to appellant's adjustment. He recommended that she continue vocational rehabilitation.

Appellant obtained a customs broker license on January 8, 1991. However, she was unable to work as a customs broker due to a conflict of interest which would occur due to her husband's employment with the U.S. Customs Service. Appellant submitted a March 15, 1991 information notice from the Customs Service stating that, to avoid a conflict of interest created when one family member works for the United States Customs Service and the other member works in an industry whose business is "in any way connected with or regulated by the Customs Service," the Customs Service employee must submit a report on Customs Form 361 to his or her immediate supervisor. By letter dated September 12, 1990, addressed to Charles C. Mantle, the Pacific Director of Internal Affairs at the Customs Service, appellant's husband stated that his wife was told over a year ago that there would be a delay in her receiving her customs broker license due to a possible conflict of interest arising from his employment with the Customs Service. He stated that appellant had run "into a blank wall" inquiring about her status and that she requested assistance from her congressman. Appellant's husband stated that appellant did not plan to use her license until he retired.

By letter dated September 12, 1990 addressed to Congressman Glenn Anderson, the District Director of the Customs Service noted that on April 29, 1989 appellant received notice that she had passed the customs broker examination. The District Director noted that on May 23, 1989 the Customs Service received appellant's application package for employment, that it was forwarded to the investigative branch for the required background investigation which was completed on February 16, 1989 and that on March 27, 1990 the application package was sent to the customs headquarters in Washington, D.C., to determine if it was appropriate for a license to be issued. On April 3, 1990 the file was forwarded to the Assistant Chief counsel to determine if a conflict of interest existed. The District Director stated that the Chief Counsel's Office had not yet rendered a decision. The record contains letters dated from September 5, 1990 through January 11, 1991 from Congressman Anderson to the Customs Service inquiring as to the status of appellant's customs broker license. As was noted above, appellant received her customs broker license on January 8, 1991.

By letter dated March 16, 1992, appellant informed the Office that she was unable to return to work as a customs broker due to the fact that for two years -- since the required background investigation was commenced in 1989 through 1991 -- her license had been withheld pending a conflict of interest ruling. She stated that the Customs Service required that she not use her license for employment purposes until her husband retired.

By letter dated March 9, 1992, the Office requested an updated report from Dr. Moody on the status of appellant's health but he did not respond.

On March 18, 1993 the Office referred appellant to a second opinion physician, Dr. Ronald T. Silverstein, a Board-certified psychiatrist, for evaluation. In his report dated May 26, 1993, Dr. Silverstein considered appellant's history of injury, her personal history, performed personality testing and reviewed the medical reports in the record. He diagnosed an adjustment reaction with mixed emotional features, resolved, occupational problems and obsessive and passive-aggressive personality features. Dr. Silverstein opined that appellant had recovered from her adjustment disorder with mixed emotional features and was capable of participating in a vocational rehabilitation program. In a supplemental report dated October 25, 1993, Dr. Silverstein stated that appellant was unable to perform her date of injury position of special agent.

On June 23, 1994 Annie R. Williams, appellant's rehabilitation counselor, submitted an updated job description of a customs broker.¹ Ms. Williams indicated that the job was reasonably available to appellant and the weekly salary was \$1,052.00.

In a notice of proposed reduction of compensation dated July 7, 1994, the Office advised appellant that it proposed to reduce her compensation for wage loss because the evidence of record established that the selected position of customs broker fairly and reasonably represented her wage-earning capacity. The Office advised that her compensation would be reduced to zero

¹ Department of Labor's *Dictionary of Occupational Titles*, No. 186-117-018. The position was listed as sedentary with maximum lifting of 10 pounds, performed indoors and verified as available with the California Employment Development Department.

and provided appellant with 30 days to respond. The Office based its decision on the June 23, 1994 documentation submitted by Ms. Williams showing that the constructed position of customs broker was vocationally and medically suitable and reasonably available.

Appellant subsequently submitted evidence consisting of correspondence which had previously been submitted addressing her efforts to determine the status of her customs broker application, a letter dated July 25, 1994 from her to the Office and a medical report from Dr. James F. Skalicky, a psychologist, dated July 28, 1994. In his report, Dr. Skalicky generally considered appellant's history, performed a mental examination and diagnosed anxiety disorder with paranoid features. He concluded that appellant was temporarily totally disabled and required continued psychotherapy.

By decision dated August 9, 1994, the Office reduced appellant's compensation to zero based on her capacity to earn wages as a customs broker.

By letter dated August 24, 1994, appellant requested an oral hearing before an Office hearing representative which was held on December 13, 1994. At the hearing, appellant reiterated that she was issued the customs broker license on the condition that she would not use it until her husband retired from the Customs Service. Appellant testified that she had enrolled herself in a screen writer program and was doing "quite well." Appellant's husband testified that he had worked for the Customs Service for 22 years. He confirmed appellant's testimony that her customs broker license had been issued contingent on her not using it while he worked for the Customs Service.

Appellant also submitted several medical reports from Dr. Skalicky dated November 10 and August 22, 1994, January 30, February 28, March 1, May 31, June 7, June 30, August 31 and September 30, 1995 and March 30 and April 30, 1996. In his most recent report dated April 30, 1996, Dr. Skalicky diagnosed major depression, anxiety features and generalized anxiety disorder and stated that the precipitating event and psychosocial stressor was harassment by her supervisor. He stated that appellant continued to suffer from symptoms of her work injury. Dr. Skalicky stated that appellant was temporarily totally disabled but he recommended vocational rehabilitation. His disability assessment was the same since his November 10, 1994 report. Appellant also submitted a xeroxed copy from an unidentified source stating that entry level customs broker could earn \$19,000.00 to \$24,000.00 a year.

Further, appellant submitted a memorandum on Customs Service letterhead dated May 26, 1995 from her husband to the Internal Affairs Group Supervisor, James Riggs, stating that almost two years after appellant became eligible for her license no ruling had been made by the Commissioner as to whether there would be a conflict of interest if she obtained employment as a customs broker. Appellant's husband stated that in late 1990 he was advised by the former Regional Director of Internal Affairs, Charles Mantle, who had since retired, that issuance of his wife's license was conditional on his submitting a statement asserting that she would not use the license until her husband either retired or stopped working for the Customs Service.

By decision dated May 29, 1996, the Office hearing representative affirmed the Office's August 9, 1994 decision.

The Board finds that Office has met its burden in reducing appellant's compensation based on her capacity to perform the selected position of a customs broker.

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.²

Under section 8115(a) of Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent his or her wage-earning capacity, or if the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, his or her usual employment, age, qualifications for other employment, the availability of suitable employment, and other factors and circumstances which may affect wage-earning capacity in his or her disabled condition.³

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by the Office or 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 that employee's capabilities with regard to 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.⁴ Finally, application of the principles set forth in *Albert C. Shadrack* will result in the percentage of the employee's loss of wage-earning capacity.⁵ The basic rate of compensation paid under the Act is 66 2/3 percent of the injured employee's monthly pay.

In the present case, the evidence of record establishes that appellant is physically capable of performing the work of customs broker as, in his May 26 and October 25, 1993 reports, Dr. Silverstein opined that while appellant could not perform her former position as special agent, she should pursue vocational rehabilitation. In his April 19, 1989 report, appellant's treating physician, Dr. Moody opined that her emotional condition was no longer an obstacle to her adjustment and she should pursue vocational rehabilitation. Although in his reports dated from July 28, 1994 through April 30, 1996, Dr. Skalicky consistently stated that appellant was temporarily totally disabled, in his reports since November 10, 1994, he also recommended vocational rehabilitation and did not provide a fully-rationalized opinion as to how appellant remained totally disabled due to her employment. Further, his diagnoses of depression and

² *Sylvia Bridcut*, 48 ECAB _____ (Docket No. 95-63, issued November 6, 1996); *James B. Christenson*, 47 ECAB 775 (1996).

³ *See Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); *see also* 5 U.S.C. § 8115(a).

⁴ *Raymond Alexander*, 48 ECAB _____ (Docket No. 94-2589, issued April 11, 1997); *Dorothy Lams*, 47 ECAB 584 (1996).

⁵ *Dorothy Lams*, *supra* note 4; *Albert C. Shadrack*, 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.303.

anxiety disorder were not accepted conditions. Dr. Skalicky's opinion is therefore not probative in establishing that appellant remains totally disabled.⁶

The evidence also establishes that the selected position of customs broker is reasonably available based on Ms. Williams' June 23, 1994 report establishing that she confirmed there were job openings for that position with the state employment department and that the weekly salary for a customs broker was \$1,052.00. The Board notes that appellant's statements at the hearing and her March 16, 1992 letter to the Office establish that she was unable to obtain work as a customs broker. The fact, however, that the evidence of record establishes that appellant was not able to obtain work as a customs broker does not establish that the work was not reasonably available in the area⁷ or that it does not reasonably represent her wage-earning capacity. The fact that appellant was not able to secure a job does not establish that the work is not available or suitable. If the evidence establishes that jobs in the selected position are reasonably available, the selection of such a position is proper even though the employee has been unsuccessful in obtaining work or she has submitted documents from individual employers who indicated they did not have a position for her.⁸ Moreover, the Office properly calculated appellant's wage-earning capacity based on the difference between her weekly wage at the time of the injury, \$541.13, and the weekly wage of a customs broker, \$1,052, using the *Shadrick* formula.⁹ The Office therefore met its burden of proof in reducing appellant's compensation based on her wage-earning capacity as a customs broker.

⁶ See *Ruby I. Fish*, 46 ECAB 276, 280 (1994).

⁷ See *Samuel J. Chavez*, 44 ECAB 431, 437 (1993); *Wilson L. Clow*, *supra* note 3 at 172.

⁸ See *Frank Hampton Bratton*, 31 ECAB 114 (1974).

⁹ See *Albert C. Shadrick*, *supra* note 5.

The decision of the Office of Workers' Compensation Programs dated May 29, 1996 is hereby affirmed.

Dated, Washington, D.C.
March 18, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member