

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES HENDERSON, JR. and DEPARTMENT OF HEALTH & HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION, Washington, DC

*Docket No. 98-616; Submitted on the Record;
Issued January 10, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation benefits effective November 9, 1997 based on its determination that the selected position of mail sorter represented his wage-earning capacity.

The Board has duly reviewed the case record and finds that the Office did not meet its burden of proof in this case.

In the present case, the Office accepted that appellant, then a 40-year-old clerk, fell on April 28, 1981 and sustained bilateral patellofemoral arthritis and chondromalacia of the knees. Appellant stopped work in January 1988 and received payment of a schedule award for 25 percent permanent impairment of the right lower extremity from January 11, 1989 to May 20, 1990. Appellant elected Federal Employee's Compensation Act wage-loss benefits and was placed on the periodic rolls on April 3, 1995. By decision dated November 17, 1997, the Office determined that the selected position of mail sorter represented appellant's wage-earning capacity and reduced appellant's wage-loss benefits accordingly.

Once the Office accepts a claim, it has the burden of proof to establish that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.¹

Under section 8115(a) of the 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 the employee's wage-earning capacity, or if the employee has no actual wages, the wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, the employee's usual employment, age, qualifications for other employment, the

¹ Philip S. Deering, 47 ECAB 692 (1996).

availability of suitable employment, and other factors and circumstances which may affect his wage-earning capacity in his or her disabled condition.²

In the present case, the Office contacted appellant's employing establishment to determine the feasibility of returning him to work in a limited-duty capacity. As appellant was not able to return to modified work at the employing establishment, the Office referred him for vocational rehabilitation services on April 11, 1995. He underwent vocational aptitude testing and a rehabilitation plan was developed to return appellant to work as either a mail sorter, gatekeeper or router. Appellant was given extended job placement services until April 30, 1997. He was unable to obtain employment and a determination was made that further rehabilitation efforts would be unsuccessful. Appellant's case was then developed to determine appellant's wage-earning capacity.

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 labor market should be made through contact with the state employment service or other applicable service.³ Finally, application of the principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.⁴

The Office's initial determination was medical in nature; the Office found that appellant was partially disabled and the Office then reviewed the nature of appellant's injury and his degree of physical impairment to determine appellant's work restrictions before proceeding to select a vocationally appropriate position. In determining that appellant could perform light work, the Office relied upon a second opinion evaluation conducted by Dr. Donald I. Saltzman, a Board-certified orthopedic surgeon, on February 6, 1995. Dr. Saltzman explained that appellant still had some residual symptoms and chondromalacia of the right patella from the accepted knee injury, but that the majority of appellant's impairment of the right lower extremity was caused by his hemiparesis which caused muscle weakness. On February 7, 1995 he completed a work restriction evaluation form, in which he noted appellant's restrictions due to his accepted employment knee injury as well as his preexisting hemiparesis and Dr. Saltzman essentially concluded that appellant could perform light work. The Office did not, however, determine appellant's wage-earning capacity until November 1997.

In a memorandum to the Director dated July 23, 1997, the Office claims examiner noted that appellant had undergone arthroscopic surgery to his left knee in 1996. The record does not indicate that the Office obtained a medical report regarding the status of appellant's knee condition after this 1996 procedure. Appellant's accepted employment-related conditions were

² 5 U.S.C. § 8115.

³ See *Dennis D. Owen*, 44 ECAB 475 (1993).

⁴ 5 ECAB 376 (1953).

bilateral knee trauma, with patellofemoral arthritic and chondromalacia of both knees. It appears that appellant's left knee condition in 1996 which required surgery might have been causally related to the accepted injury. The Board is unable to ascertain from the record whether the Office found that the 1996 arthroscopic surgery was causally related to the accepted injury. Furthermore, the record does not indicate that the Office obtained any further medical opinion between Dr. Saltzman's report of February 1995 and the loss of wage-earning capacity determination in November 1997 which evaluated appellant's current medical condition and his ability to perform the selected position.

The Office also failed to determine the medical suitability of the selected position, given appellant's preexisting medical conditions. The Board has previously held that in determining a loss of wage-earning capacity where the residuals of an injury prevent an employee from performing her regular duties, the impairments which preexisted the injury, in addition to the injury-related impairments, must be taken into consideration in the selection of a job within his work tolerance. It is only subsequently acquired impairments unrelated to the injury which are excluded from consideration in the determination of work capabilities.⁵ In an attending physician's report dated December 14, 1994,⁶ it was noted that appellant had a history of right-sided hemiparesis secondary to a stab wound in 1968, as well as intracranial bleed during the 1960s with recent seizures and right-sided mild cerebral vascular accident with aphasia. This report indicated that appellant was disabled from work and would remain so probably indefinitely. Medical history of head trauma, CVA, hypertension, post-traumatic seizure disorder and left shoulder injury were also noted by Jim Lightner Jr., M.A., in a July 3, 1996 discharge summary from the Maryland rehabilitation center. A report dated September 7, 1984 from Dr. Lucille Canete, noted a history of "post head injury in 1968 resulting into a grand mal seizure disorder and right hemiparesis," and history of craniotomy secondary to head trauma. The Office did find that appellant's hemiparesis was a preexisting condition which should be considered in determining appellant's wage-earning capacity. The record does not indicate, however, that the Office developed the medical evidence to determine the status of appellant's recent seizure disorder, which reportedly also resulted from this preexisting injury, and whether this disorder caused any loss of wage-earning capacity. The Office also did not develop the medical evidence to determine the nature of appellant's intracranial bleed or appellant's CVA and did not determine whether these conditions preexisted the employment injury and caused any loss of wage-earning capacity. The record is therefore unclear as to whether appellant had other medical conditions prior to his employment injury, which continued to limit his wage-earning capacity. As the Office did not develop the medical evidence both relative to appellant's knee condition in 1996 and his preexisting medical conditions, the Office did not meet its burden of proof to reduce appellant's compensation benefits.

The decision of the Office of Workers' Compensation Programs dated November 17, 1997 is hereby reversed.

⁵ *William Ray Fowler*, 31 ECAB 1817 (1980).

⁶ The physician's signature is illegible. The physician's specialty is noted as orthopedic surgery and the medical practice address is listed as Bayview Medical Center, 4940 Eastern Ave., Baltimore, MD 21224.

Dated, Washington, D.C.
January 10, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member