

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES A. BIRT and DEPARTMENT OF THE AIR FORCE,
McCLELLAN AIR FORCE BASE, CA

*Docket No. 98-1117; Submitted on the Record;
Issued January 20, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation to reflect his capacity to earn wages as a paralegal.

In 1992 appellant, an electrical mechanic, filed claims asserting that he sustained a stress-related condition while in the performance of duty. The Office accepted his claim for employment-related major depressive disorder and paid compensation for temporary total disability on the periodic rolls.

Appellant submitted a copy of his 1992 federal income tax return to verify that he worked as an attorney at law during his federal employment.¹ After the employing establishment terminated his employment in March 1993, he began a full-time career as an attorney.

On March 14, 1995 Dr. Thomas W. Ormiston, appellant's attending family practitioner, reported that he agreed with the opinion of Dr. Robert L. Blanco, a Board-certified psychiatrist and Office referral physician, that appellant was able to perform the work function ratings detailed in Dr. Blanco's May 31, 1994 report. Dr. Ormiston reported, however, that appellant could not perform these job functions at the employing establishment.

The Office referred appellant, together with a statement of accepted facts, to Dr. Blanco for a follow-up report. On February 23, 1996 Dr. Blanco reported that appellant had continued his career as an attorney, stating:

"[Appellant] states that 'it is consuming my life,' that 'it is rewarding sometimes' and that 'sometimes it takes away from R and R [rest and relaxation].'" He states that his new career became 'full bore' in March 1995 [sic]. He has his own office and works 6 to 7 days a week, 10 to 12 hours a day. He does general practice law which includes probate, family law, juvenile, wills and trusts, bankruptcies,

¹ On August 27, 1996 appellant stated that he had been licensed to practice law in the State of California since 1993.

workers' compensation, personal injury and criminal defense. He has 50 active cases. He has deadline pressures. He 'runs' back and forth to court. He neglects house and yard work since his law office is so busy. He is also not finding time to take care of himself physically. He is too often tired to work out and has gained 20 pounds over the last 2 years."

Dr. Blanco reported a principal diagnosis of major depressive disorder in partial remission. He indicated that appellant had a severe level of disability, causally related to compensable factors of employment, insofar as returning to work at the employing establishment. Insofar as appellant's current functioning, on medication and practicing law, Dr. Blanco indicated that appellant had no functional impairment.

The Office referred the case to an Office rehabilitation specialist for the selection of a position that fit appellant's capabilities. The rehabilitation specialist selected the position of paralegal. Indicating that he obtained labor market information and Sacramento/Yolo Summary Employment Statistics from the State of California Employment Development Department, Labor Market Information Division, Information Services, the rehabilitation specialist reported that paralegal jobs were found in sufficient numbers to be considered reasonably available, that such positions were projected to increase significantly through 2005, and that the position of paralegal was one of the 20 fastest growing occupations in the state. He also contacted the benefits representative at the American Bar Association to confirm that appellant's successful practice as a licensed attorney for more than three years qualified him to earn the median salary of a paralegal with three years' experience at a firm.

On September 25, 1996 the Office issued a notice of proposed reduction of compensation. The Office found that the medical evidence established that appellant was capable of working in the legal profession on a full-time basis. The Office considered the nature of appellant's injury, the degree of his physical impairment, his age, his usual employment, his qualifications for other employment, the availability of the selected position and other factors. The Office noted that appellant possessed a law degree, was licensed to practice law and had practiced law for four years. This educational background and experience, the Office found, clearly enabled him to work as a paralegal. The Office reached this assessment based on a review of the work activities of a paralegal, as described in the *Dictionary of Occupational Titles*, and on a review of the opinion of the Office rehabilitation specialist. The Office noted that appellant may not desire to work as a paralegal but was capable of performing the duties of the position. The Office found that the wage rate suggested by the rehabilitation specialist was reasonable and applied the *Shadrick* formula to determine appellant's wage-earning capacity.

On January 15, 1997 the Office adjusted appellant's compensation because he was no longer totally disabled for work and was able to perform the position of paralegal.

Appellant requested an oral hearing before an Office hearing representative, which was held on October 30, 1997.

In a decision dated January 26, 1998, the hearing representative affirmed the Office's January 15, 1997 decision reducing appellant's compensation. The hearing representative noted appellant's testimony that he was more than capable of working as a paralegal because the job required less skill and training than the job of an attorney, which he currently performed and

with respect to which he was never under a disability. The hearing representative found that appellant was capable of working as a paralegal and that this position was reasonably available in the region of appellant's residence.

The Board finds that the Office properly reduced appellant's 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 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 medical evidence in this case establishes that appellant was totally disabled from returning to work at the employing establishment but was not totally disabled for all work. Appellant's attending physician, Dr. Ormiston, and the Office referral physician, Dr. Blanco, agreed that appellant had no functional impairment outside the employing establishment. Dr. Blanco specifically reported that appellant had no functional impairment with respect to practicing law so long as he continued to take his medication. Appellant's actual employment as an attorney corroborated the conclusions reached by these physicians.

After receiving this evidence, the Office referred the case record to an Office rehabilitation specialist, who selected a position listed in the Department of Labor's *Dictionary of Occupational Titles* to fit appellant's capabilities. The specialist determined the position's prevailing wage rate for a candidate of appellant's experience and its availability in the open labor market from information obtained from the state employment service, among other sources. The specialist also determined that appellant had satisfied specific vocational requirements of the job. The Office then applied the principles set forth in the *Shadrick* decision to determine the percentage of appellant's loss of wage-earning capacity.

² See 5 U.S.C. § 8115(a).

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

The Office properly found that appellant was no longer totally disabled for all work as a result of his accepted employment injury. As the Office gave due regard to the factors specified in 5 U.S.C. § 8115(a) and as it followed established procedures for determining appellant's employment-related loss of wage-earning capacity, the Board will affirm the Office's January 26, 1998 decision reducing appellant's compensation.

The Board notes that the Office could not use appellant's earnings from his concurrent dissimilar employment as an attorney to determine his pay rate for compensation purpose, nor did the Office use such earnings to determine his wage-earning capacity.⁴ The Office properly determined wage-earning capacity as appeared reasonable under the circumstances with due regard to the factors set forth in 5 U.S.C. § 8115(a), among them, the employee's qualifications for other employment.⁵

The January 26, 1998 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
January 20, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member

⁴ *Irwin Goldman*, 23 ECAB 6 (1971); see also *Steven J. Rose*, 43 ECAB 211 (1992), petition for recon. denied, Docket No. 91-1487 (issued February 8, 1993); *James Jones, Jr.*, 39 ECAB 678 (1988).

⁵ See *Earl D. Long*, 50 ECAB ____ (Docket No. 96-2434, issued July 14, 1999) (although the Office was precluded from adjusting the claimant's compensation based on his actual earnings in concurrent dissimilar employment as a "construction worker/dock builder," it nonetheless properly adjusted the claimant's compensation based on the selected position of construction worker I (laborer), a similar but less skilled position).