

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NORMAN K. JONES, II and U.S. POSTAL SERVICE,
POST OFFICE, Southeastern, PA

*Docket No. 98-244; Submitted on the Record;
Issued March 3, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation effective October 13, 1996 based on his capacity to perform the duties of the constructed position of general clerk.

On November 27, 1991 appellant, a letter sorting machine clerk, filed a claim asserting that he developed severe anxiety while in the course of his employment. The Office accepted his claim for the condition of adjustment disorder with mixed emotional features and paid compensation for temporary total disability.

To resolve a conflict in medical opinion on the extent of appellant's disability, the Office referred him, together with a copy of the record and a statement of accepted facts, to Dr. Martin D. Plutzer, a Board-certified psychiatrist. On October 26, 1994 he reported that appellant suffered from post-traumatic stress disorder, which was related to his employment injury and which was still problematic. Dr. Plutzer reported that appellant was able to work in another field but needed retraining to learn a new trade, preferably one in which he could be self-employed. "In my opinion [appellant] is not totally or partially disabled for any employment. He is only disabled for employment in the [employing establishment] or a job within a similar organizational structure." Dr. Plutzer added: "[Appellant] is suffering from post-traumatic stress disorder. It would be helpful if he could receive retraining for another field. He could successfully work and function in another field, preferably one in which he was self[-]employed." Dr. Plutzer completed a work restriction evaluation whose only limitation was that appellant "may return to work except at the [employing establishment]."

Based upon the medically determinable residuals of appellant's accepted employment injury and taking into consideration all significant preexisting impairments and pertinent nonmedical factors, an Office rehabilitation specialist found that appellant was able to perform the duties of a general clerk, as described in the Department of Labor's *Dictionary of Occupational Titles*. The rehabilitation specialist determined that appellant had satisfied the

specific vocational preparation required by the job as it provided on-the-job training after hiring. The rehabilitation specialist indicated that the job was being performed in sufficient numbers so as to make it reasonably available to appellant within his commuting area. The rehabilitation specialist also determined the position's prevailing wage rate according to an occupational compensation survey.

After obtaining verification of appellant's pay rate as of the date of his injury as well as the current pay rate for the position he held when he was injured, the Office issued a notice of proposed reduction of compensation finding that the medical evidence showed that he could perform the duties of the constructed position of general clerk for 40 hours a week. In an attached memorandum, the Office noted that appellant's only limitation for work was his inability to return to the employing establishment.

In a decision dated September 21, 1996, the Office reduced appellant's compensation effective October 13, 1996 on the grounds that the medical and vocational evidence supported that the position of general clerk reasonably represented appellant's wage-earning capacity.

In a decision dated September 22, 1997, an Office hearing representative affirmed the September 21, 1996 reduction of appellant's compensation. The hearing representative found that Dr. Plutzer's restriction was prophylactic in nature and was of no probative value in assessing appellant's ability to earn wages as a general clerk.

The Board finds that the Office has not met its burden of proof to justify the reduction of 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.¹ 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.²

Although the impartial medical specialist, Dr. Plutzer, reported that appellant was able to work in another field, he did not make clear appellant's specific work restrictions. He reported that appellant was only disabled for employment in the employing establishment or a job "within a similar organizational structure." This description is vague and does not reasonably describe

¹ See generally 5 U.S.C. § 8115(a).

² *Hattie Drummond*, 39 ECAB 904 (1988); see *Albert C. Shadrick*, 5 ECAB 376 (1953).

the exposure that appellant should avoid. Dr. Plutzer twice reported his preference that appellant work in a field of self-employment, suggesting a reluctance to expose appellant to any kind of organizational structure. The Office did not seek clarification of Dr. Plutzer's medical restrictions.

The Office's procedure manual provides that the claims examiner is responsible for determining whether the medical evidence establishes that the claimant is able to perform the job, taking into consideration medical conditions due to the accepted work-related injury or disease and any preexisting medical conditions. If the medical evidence is not "clear and unequivocal," the claims examiner will seek medical advice from the district medical adviser, treating physician or second opinion specialist as appropriate.³ The evidence is not clear and unequivocal in this case. Because the Office did not seek clarification from Dr. Plutzer, the record fails to establish that the constructed position of general clerk satisfies the medical restriction imposed.

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.⁴ As the record in this case fails to establish that the constructed position of general clerk satisfies the limitations imposed by the impartial medical specialist, the Board finds that the Office has not met its burden of proof.

The September 22, 1997 decision of the Office of Workers' Compensation Programs is reversed.

Dated, Washington, D.C.
March 3, 2000

Michael J. Walsh
Chairman

Bradley T. Knott
Alternate Member

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8.d. (December 1993).

⁴ *Harold S. McGough*, 36 ECAB 332 (1984).

A. Peter Kanjorski
Alternate Member