

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JENNY DROST and U.S. POSTAL SERVICE,
POST OFFICE, El Paso, TX

*Docket No. 99-2484; Submitted on the Record;
Issued November 8, 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 effective September 15, 1996 based on her capacity to perform the position of paralegal.

The Office accepted that appellant sustained an anxiety disorder in the performance of her duties as a letter carrier. The Office paid appellant compensation for temporary total disability beginning April 8, 1991, when she stopped work. The Office terminated appellant's compensation in a decision dated December 30, 1992, but an Office hearing representative found in a September 29, 1993 that the Office failed to meet its burden of proof to terminate appellant's compensation, which was reinstated.

On August 1, 1996 the Office issued a notice of proposed reduction of compensation, on the basis that appellant was no longer totally disabled and had the capacity to earn wages as a paralegal. By decision dated September 10, 1996, the Office reduced appellant's compensation effective September 15, 1996 based on her ability to earn wages as a paralegal. By letter dated November 1, 1996, appellant requested reconsideration, contending that she was not qualified for the position of paralegal. By decision dated November 29, 1996, the Office found that the additional evidence was not sufficient to warrant modification of its prior decision. By letters dated March 24 and June 6, 1997, appellant again requested reconsideration. By decision dated June 25, 1998, the Office found that the additional evidence was not sufficient to warrant modification of its prior decisions. By letter dated June 24, 1999, appellant again requested reconsideration. By decision dated July 22, 1999, the Office found that the additional evidence was not sufficient to warrant modification of its prior decisions.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.¹ Under section 8115 of the Federal Employees'

¹ *Linda C. Ball*, 43 ECAB 533 (1992).

Compensation Act,² 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 of the employee do not fairly and reasonably represent his wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity as appears reasonable under the circumstances is determined with due regard to the nature of the injury, the degree of physical impairment, the employee's usual employment, his or her age and qualifications for other employment, the availability of suitable employment, and other factors or circumstances which may affect wage-earning capacity in his or her disabled condition.

The Board finds that the Office did not properly reduce appellant's compensation effective September 15, 1996 based on her capacity to perform the position of paralegal.

The Office found that the opinion of Dr. Jacob Schut, a Board-certified psychiatrist to whom it referred appellant for a second opinion evaluation, constituted the weight of the medical evidence on appellant's limitations for work and established that she could perform the duties of a paralegal. Dr. Schut's report, however, was prepared on February 21, 1994, and thus was over two and one-half years old at the time the Office reduced appellant's compensation in September 1996. A more current detailed description of appellant's disability and ability to perform work is needed to justify a reduction of compensation.³ The Office's reliance on stale medical evidence is especially egregious where, as in the present case, medical evidence more contemporaneous with the Office's decision indicates appellant is not able to work.

In a report dated June 12, 1996, appellant's then-attending psychiatrist, Dr. Robert B. Smith, stated that he had advised appellant "not to return to a work experience setting before her lawsuit has been settled." In a report dated November 1, 1996, submitted with appellant's first request for reconsideration, Dr. Smith stated that appellant "has been and still is unable to work at all until further notice." As there is no medical evidence indicating appellant could work as a paralegal that is relatively contemporaneous with the date of the Office's decision reducing her compensation based on her ability to perform the duties of this position, the Office did not meet its burden of proof to reduce appellant's compensation.

² 5 U.S.C. § 8115.

³ *Keith Hanselman*, 42 ECAB 680 (1991); *Ellen G. Trimmer*, 32 ECAB 1878 (1981) (Reports almost two years old deemed invalid basis for loss of wage-earning capacity determination in both cases).

The decision of the Office of Workers' Compensation Programs dated July 22, 1999 is reversed.

Dated, Washington, DC
November 8, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member