

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of F. JOHN SHRECK and DEPARTMENT OF TRANSPORTATION,
FEDERAL AERONAUTICS ADMINISTRATION, Palmdale, CA

*Docket No. 00-2656; Submitted on the Record;
Issued December 13, 2001*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that the position of customer service representative fairly and reasonably represented appellant's wage-earning capacity, effective January 21, 1999, the date it reduced his compensation benefits; and (2) whether the refusal of the Office to reopen appellant's claim for merit review under 5 U.S.C. § 8128(a) constituted an abuse of discretion.

On October 8, 1975 appellant, then a 29-year-old air traffic controller, sustained an employment-related aerotitis media and tinnitus of the right ear and subsequently right ear deafness and permanent anxiety neurosis. He retired in 1978 and elected to receive benefits under the Federal Employees' Compensation Act. On June 18, 1976 the employing establishment removed appellant from the air traffic controller position because he was diagnosed with anxiety neurosis. He enrolled and then withdrew from a retraining program through the employing establishment. On July 31, 1980 he underwent authorized surgery which resulted in total deafness in the right ear which was accepted as employment related. He later moved from California to Fairfield Bay, Arkansas.

The Office continued to develop the claim and unsuccessful rehabilitative efforts were undertaken in 1985 through 1986. On January 25, 1989 the Office referred appellant to Dr. W.M. Douglas, who is Board-certified in psychiatry and neurology, and to Dr. James J. Pappas, a Board-certified otolaryngologist.

By report dated March 14, 1989, Dr. Douglas advised that appellant had no psychiatric diagnosis and could work anywhere without loud noises, based on appellant's subjective complaint that this made his tinnitus worse. In an attached work restriction evaluation, Dr. Douglas provided no restrictions to appellant's physical activity and advised that appellant could work eight hours a day.

In a March 30, 1989 report, Dr. Pappas advised that, while appellant had good hearing in his left ear, he had permanent total sensorineural hearing loss in the right. He further advised

that appellant could do any type of work for eight hours a day that did not require keen hearing in both ears.

Finding that a conflict in the medical evidence existed regarding appellant's emotional condition, by letter dated June 29, 1989, he was referred to Dr. Aubrey C. Smith, who is Board-certified in psychiatry and neurology, for an independent medical evaluation. On that same day appellant was also referred to Dr. Albert Reed Thompson, a Board-certified otolaryngologist, for a second opinion evaluation to include audiometric testing.

Audiometric testing completed on August 1, 1989 demonstrated total sensorineural hearing loss in the right. Dr. Thompson diagnosed intractable tinnitus.

In a psychiatric work restriction evaluation dated August 1, 1989, Dr. Smith advised that appellant could work eight hours a day but should avoid loud noises. He was further limited in that he had only "occasional" ability to deal with people on the telephone because of his right ear deafness. By report dated August 17, 1989, Dr. Smith advised that he saw no evidence of mental illness at the time of his examination and saw no reason why appellant could not be employed in any capacity other than to avoid loud noises due to his right ear deafness. In an attached work restriction evaluation, he advised that appellant had no physical restrictions and could work eight hours a day.

Rehabilitative efforts were undertaken, beginning in July 1989. The file was closed on April 17, 1990 as not rehabilitated.

In reports dated January 10, 1991 and March 13, 1992, Dr. S.Z. Tahir, a Board-certified surgeon, advised that appellant could work anywhere in which hearing was not critical.

On June 30, 1995 the Office informed appellant that it proposed to terminate his compensation on the grounds that his emotional condition had resolved and his hearing loss was nondisabling. In response, he submitted a July 13, 1995 report from Dr. Krishna K. Reddy, a general practitioner, who advised that he had first seen appellant on March 30, 1994 with complaints of tinnitus in his right ear which kept him from sleeping. Dr. Reddy opined that appellant's "disabling tinnitus ... may interfer[e] with his job as an air traffic controller." By decision dated October 6, 1995, the Office finalized the termination, effective October 15, 1995.

On October 12, 1995 appellant requested a hearing, that was held on May 23, 1996. In a November 26, 1996 decision, an Office hearing representative affirmed the prior decision. Appellant requested reconsideration, and by decision dated May 12, 1997, the Office found that, while appellant was still entitled to wage-loss compensation due to his right ear deafness, his employment-related anxiety had ceased.¹ Appellant was returned to the periodic rolls.

The record indicates that beginning in February 1998, rehabilitative efforts were undertaken in an effort to return appellant to work. In an April 7, 1998 report, Jan Owens, a rehabilitative counselor, advised that she would be conducting labor market surveys in both rural

¹ By decision dated May 14, 1997, appellant was granted a schedule award for 100 percent loss of hearing in the right ear.

Arkansas where appellant resided and in California where he sustained the employment-related injury. In reports dated May 5, 1998, Ms. Owens completed labor market surveys and determined that the positions of checker II/reviewer and customer service representative, based on the Department of Labor's *Dictionary of Occupational Titles*, fit appellant's capabilities. Ms. Owens further indicated that, because appellant lived in a sparsely populated area with few available jobs, it was necessary to conduct a labor market survey in Palmdale, California, appellant's place of residence at the time of the employment injury.

By letter dated October 21, 1998, the Office advised appellant that it proposed to reduce his compensation based on his ability to earn wages as a customer service representative. The Office noted that the medical evidence of record demonstrated that he could perform the position and advised that if he disagreed with its proposed action, he should submit contrary evidence or argument within 30 days. Hearing nothing further from appellant, by decision dated January 21, 1999, the Office finalized the reduction of his compensation, effective January 31, 1999, based on his capacity to earn wages as a customer service representative. The Office determined that the position of customer service representative fairly and reasonably represented appellant's wage-earning capacity and found that it was available in the commuting area of Palmdale, California.

On June 23, 1999 appellant requested reconsideration and submitted additional medical evidence. In a decision dated September 20, 1999, the Office denied modification of the prior decision. On January 4, 2000 appellant again requested reconsideration and submitted additional medical evidence. By decision dated March 28, 2000, the Office denied appellant's request.

The Board finds that the Office did not meet its burden of proof to reduce appellant's compensation, effective January 31, 1999, based on his ability to perform the duties of the selected position, customer service representative.

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 in such benefits.² Under section 8115(a) of the Federal Employees' Compensation Act,³ 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 wage-earning capacity, or if the employee has no actual earnings, wage-earning capacity is determined with due regard to the nature of injury, degree of physical impairment, usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect the employee's wage-earning capacity in his or her disabled condition.⁴

The Board initially notes that in a case such as this where an appellant has moved since the employment injury, Office procedures provide that "when the employee voluntarily moves to

² *Garry Don Young*, 45 ECAB 621 (1994).

³ 5 U.S.C. §§ 8101-8193.

⁴ *See Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); 5 U.S.C. § 8115(a).

an isolated locality with few job opportunities, the question of availability should be applied to the area of residence at the time of the injury.”⁵ The record indicates that appellant voluntarily moved from Palmdale, California to rural Arkansas. The Board further notes that in its May 12, 1997 decision, the Office found that appellant’s employment-related anxiety had ceased. Appellant did not challenge that aspect of his claim.

The Board must nonetheless reverse the wage-earning capacity determination in this case because the medical reports on which the Office relied upon in determining appellant’s wage-earning capacity are insufficient to establish that he is capable of performing the selected position of customer service representative. The Office relied upon a January 27, 1997 report in which Dr. Douglas, who is Board-certified in psychiatry and neurology, advised that appellant could not work around loud noises due to right ear deafness. The record also contains a January 4, 1997 report in which Dr. Collie Shaw, an otolaryngologist, advised that appellant continued to be troubled with tinnitus. In a February 2, 1997 report, Dr. Reddy, a general practitioner, advised that appellant should avoid loud noises and stressful conditions. By report dated March 11, 1997, Dr. Shaw advised that appellant had no restriction of movement but that his tinnitus increased when he was around loud noises.

The selected position of customer service representative is described as follows:

“Interviews applicants and records interview info[rmation] into computer for services to the customer. Talks with customers by [tele]phone or in person and receives orders for installation, turn-on, discontinuance or change in service. Fills out contract forms, determines charges for services requested, collects deposits, prepares change of address records or additional services. May adjust complaints concerning billing or service rendered, referring complaints of service failures.”

The position was described as inside, sedentary with ability to talk and hear. The rehabilitation specialist stated that appellant was vocationally prepared for the position based on his employment as an air traffic controller for a number of years which required accuracy in working with information, eye hand coordination, use of mathematics and writing technical reports.

The Board finds that the Office has not established that the position of customer service representative falls within the restrictions of appellant’s condition which includes employment-related tinnitus. In making its determination that appellant could perform the selected position, the Office relied upon a report from a Board-certified psychiatrist, Dr. Douglas. It does not appear from the record that Dr. Shaw, an otolaryngologist, or for that matter, any other physician, was asked to provide an opinion regarding the effect of appellant’s tinnitus on his employability as a customer service representative which requires talking with customers by telephone or in person. Moreover, Dr. Douglas’ report is dated two years prior to the adjustment of appellant’s compensation. The record thus does not contain a current medical opinion by an otolaryngologist that appellant could perform the duties of the customer service representative position or a detailed current description of appellant’s work capacity that is sufficient to support

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Constructed Position*, Chapter 2.814.8 (December 1993).

a finding of medical suitability for the selected position. It was thus error for the Office to reduce appellant's wage-loss compensation benefits on the basis of his ability to perform the duties of the position of customer service representative.⁶

As the Office's decision concerning appellant's loss of wage-earning capacity is reversed, the second issue regarding the Office's refusal to reopen appellant's claim for merit review is moot.

The decisions of the Office of Workers' Compensation Programs dated March 28, 2000 and September 20, 1999 are hereby reversed.

Dated, Washington, DC
December 13, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member

⁶ The Board notes that, subsequent to the January 21, 1999 decision reducing appellant's compensation, he submitted reports dated January 14 and April 22, 1999 in which Dr. Aubrey C. Smith, a Board-certified psychiatrist, advised that appellant should avoid stressful situations and therefore could not perform the customer service position. In its May 12, 1997 decision, the Office, however, properly found that his employment-related anxiety neurosis had ceased. Appellant would thus now have the burden to establish that any emotional condition is employment related. The Office is not required to consider medical conditions arising subsequent to the work-related injury in determining whether a position fairly and reasonably represents an employees wage-earning capacity. *Dorothy Jett*, 52 ECAB____ (Docket No. 99-297, issued January 29, 2001).