

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CARL D. MAREZ and DEPARTMENT OF THE INTERIOR,
NATIONAL FOREST SERVICE, Taos, NM

*Docket No. 00-574; Submitted on the Record;
Issued November 13, 2001*

DECISION and ORDER

Before MICHAEL E. GROOM, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

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

On August 5, 1994 appellant, then a 31-year-old emergency firefighter, filed a claim for a lower back injury sustained on August 4, 1994 when he stepped into a hole and felt his back pop. He stopped work on August 6, 1994 and did not return.

On October 1, 1998 the Office, which had been paying appellant compensation for temporary total disability, issued a proposal to reduce appellant's compensation on the basis of his capacity to earn wages as a general clerk. By decision dated November 6, 1998, the Office reduced appellant's compensation effective November 8, 1998. By decision dated January 5, 1999, the Office found that the additional evidence appellant submitted with a request for reconsideration was insufficient to warrant modification of its prior decision.

By letter dated January 20, 1999, appellant's attorney requested reconsideration, pointing out that the Office had not sent him a copy of its November 6, 1998 decision. By decision dated February 2, 1999, the Office vacated its November 6, 1998 decision because it had not sent a copy to appellant's attorney as required by its regulations; the Office reinstated appellant's compensation.

On March 16, 1999 the Office issued a proposal to reduce appellant's compensation on the basis of his capacity to earn wages as a general clerk. By decision dated April 20, 1999, the Office reduced appellant's compensation effective April 25, 1999. By letter dated August 3, 1999, appellant requested reconsideration and submitted additional medical evidence. By decision dated September 29, 1999, the Office found that the additional evidence was insufficient to warrant modification of its prior decision.

The Board finds that the Office did not meet its burden of proof to reduce appellant's compensation effective April 25, 1999.

Once the Office accepts a claim, it has the burden of proving that the disability has lessened in order to justify reduction of compensation benefits.¹ Under section 8115 of the Federal Employees' Compensation Act,² titled "*Determination of Wage-Earning Capacity*," if the employee has no actual earnings, as in this case, his wage-earning capacity is determined with due regard to the nature of his injury; the degree of physical impairment; his usual employment; his age; his qualifications for other employment; the availability of suitable employment; and other factors or circumstances which may affect his wage-earning capacity in his disabled condition.

In this case, the medical evidence does not establish that appellant is physically capable of performing the duties of the position of general clerk. In a report dated May 12, 1998, appellant's attending physician, Dr. Michael Baten, noted that he had reviewed the job descriptions for general clerk and telephone solicitor and that these "would be classified as light-duty positions." Dr. Baten then stated: "[I]t is possible that [appellant] might be capable of fulfilling these two positions although I am uncertain how well he will be able to participate given the severe degree of pain from which he appears to suffer. Nevertheless, from a medical perspective, these would not be inappropriate job situations." The Office relied on this report as the basis of its determination that appellant was physically capable of doing the work of a general clerk, which is described in the Department of Labor's *Dictionary of Occupational Titles* as requiring only light strength.

However, in a report dated October 20, 1998, Dr. Baten stated: "It is my opinion that [appellant] is permanently and completely disabled and is unable to return to work due to his injuries." In a report dated January 27, 1999, he stated: "His ability to function has been severely curtailed now for several years owing to the severe pain. At times he has tried to do things but has been incapable of functioning in any type of capacity even in a light or sedentary position owing to the severity of the discomfort from which he is suffering." In a report dated May 17, 1999, Dr. Baten stated:

"My initial response [that appellant might be able to perform the position of general clerk] was based on the fact that the job seemed relatively minimal in [its] description. However, it is quite clear that [appellant] suffers from a severe/intractable back pain condition. Even the minimal type of activity that would be required of him to engage in those clerical positions would I feel, given his condition, [be] excessive, based on the fact that he suffers from severe and intractable pain. As a result of this pain he is [in] no position to perform even that type of a light-duty job."

The Office's decision states that Dr. Baten's later reports do not contain sufficient rationale, but the May 12, 1998 report relied upon by the Office also does not contain rationale and expresses doubt about appellant's ability to perform the duties of the selected position. The reports from Dr. Baten contradicting his earlier conclusion that appellant was able to do the work

¹ *Keith Hanselman*, 42 ECAB 680 (1991).

² 5 U.S.C. § 8115.

seriously diminish the probative value of the earlier report. For this reason, the Office has not met its burden of proof.³

The Office also has not shown that the position of general clerk was reasonably available in appellant's commuting area.⁴ In connection with its 1998 proposal to reduce appellant's compensation, the Office ascertained that general clerk positions were available in appellant's area. However, by the time the Office issued its wage-earning capacity decision on April 20, 1999 the information on availability was more than two years old and thus, did not reflect current availability.

The decisions of the Office of Workers' Compensation Programs dated September 29 and April 20, 1999 are reversed.

Dated, Washington, DC
November 13, 2001

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member

³ See *Patrick A. Santucci*, 40 ECAB 151 (1988). (The Board found that the later report of a physician suggesting that his prior conclusion -- that appellant could perform a job offered by the employing establishment -- significantly diminished the probative value of the earlier report, such that the Office did not meet its burden of establishing the offered position was suitable).

⁴ Part of the Office's burden is establishing that jobs in the position selected for determining wage-earning capacity are reasonably available in the area in which the employee lives. *Samuel J. Chavez*, 44 ECAB 431 (1993).