

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NATHANIEL HARVEY and U.S. POSTAL SERVICE,
POST OFFICE, Dallas, TX

*Docket No. 00-1520; Submitted on the Record;
Issued September 11, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs, by its August 13, 1999 decision, satisfied its burden of proof to justify the termination of appellant's compensation.

This is the third appeal in this case. In the first appeal, the Board issued a decision on March 22, 1999 in which it reversed the Office's August 23, 1996 decision on the grounds that the Office failed to meet its burden of proof to establish that appellant's actual earnings fairly and reasonably represented his wage-earning capacity.¹ The Board found that the medical opinions provided by both Dr. Mark Greenberg, the Office referral physician and orthopedist, and Dr. Syed A.A. Shah, appellant's attending neurologist, indicated that it was unlikely that appellant would return to any type of gainful employment. The Board found that appellant's attending physician gave only guarded approval for him to assume the modified limited-duty job offered by the employing establishment, appellant was not actually required to perform some of the duties of the position, and he experienced symptoms when he attempted to perform them. The Board concluded that appellant's modified limited-duty position was makeshift and not reasonably available on the open market.

Following the Board's March 22, 1999 decision, the Office issued a decision on August 13, 1999 which again determined that appellant's modified letter carrier position fairly and reasonably represented his wage-earning capacity and terminated his compensation.

In the second appeal, the Board issued an order on November 2, 1999 dismissing the appeal at the request of appellant.²

¹ Docket No. 97-380.

² Docket No. 00-79.

Appellant subsequently filed the present appeal by letter received by the Board on March 23, 2000.

The Board finds that the Office failed to meet its burden of proof to justify the termination of appellant's compensation.

Once the Office accepts a claim, it has the burden to justify termination or modification of compensation benefits.³ The Office accepted that appellant sustained an injury while in the performance of duty on September 6, 1983. It authorized surgical interventions and paid compensation for temporary total disability until August 5, 1995, when appellant returned to work in a modified limited-duty position. It is therefore the Office's burden to justify the reduction of appellant's monetary compensation.

Section 8115(a) of the Federal Employees' Compensation Act provides that the wage-earning capacity of an employee is determined by actual earnings if actual earnings fairly and reasonably represent the wage-earning capacity. Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity must be accepted as such measure.⁴

In its August 13, 1999 decision, the Office terminated appellant's benefits on the grounds that his actual wages as a modified letter carrier met or exceeded the wages of the job he held when injured and, therefore, no loss of wages had occurred. Subsequent to the Board's March 22, 1999 decision in which it reversed the Office's August 23, 1996 decision, no additional medical evidence appears in the record submitted to the Board. The Office, therefore, failed to satisfy its burden of proof to justify the termination of appellant's benefits. The Board finds that the medical evidence of record, including the opinions of Drs. Greenberg and Shah, establishes that appellant's actual earnings in the modified limited-duty position did not fairly and reasonably represent his wage-earning capacity. The record also does not reflect that the Office established that the modified limited-duty position was not makeshift, another deficiency noted by the Board in the prior appeal. The record submitted to the Board on April 26, 2000 does not reflect that the Office corrected any of the deficiencies, addressed previously by the Board, in the Office's August 23, 1996 decision. The Office appears to have merely reissued the August 23, 1996 decision.

³ *Harold S. McGough*, 36 ECAB 332 (1984).

⁴ *Don J. Mazurek*, 46 ECAB 447 (1995).

The August 13, 1999 decision of the Office of Workers' Compensation Programs is reversed.

Dated, Washington, DC
September 11, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member