

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GEORGE SCOCCA and U.S. POSTAL SERVICE,
POST OFFICE, Flushing, NY

*Docket No. 02-2358; Submitted on the Record;
Issued October 20, 2003*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that the selected position of general clerk represented appellant's wage-earning capacity; and (2) whether appellant has established that a modification of the wage-earning capacity is warranted.

This is the third time this case has been before the Board. On April 3, 1967 appellant, a 36-year-old mail carrier, injured his back in the performance of duty. He filed a claim for benefits, which the Office accepted for lumbosacral strain and possible nerve root irritation.¹ Appellant retired on disability from the employing establishment on June 19, 1967.

In a letter dated June 7, 1971, the Office advised appellant that the medical evidence of record indicated that he was capable of performing light work within his physical restrictions. In a vocational rehabilitation report received by the Office on June 4, 1971, a vocational rehabilitation counselor recommended a position for appellant listed in the Department of Labor, *Dictionary of Occupational Titles*, which, he determined, reasonably reflected appellant's ability to earn wages, that of a general clerk, #209.388,² which entailed a wage-earning capacity of \$85.00.

By decision dated September 10, 1971, the Office found that the selected position of "general clerk" reflected his wage-earning capacity. The Office, therefore, reduced appellant's compensation effective September 10, 1971 because the weight of the medical evidence showed that he was no longer totally disabled for work due to effects of his April 3, 1967 employment injury and because the evidence of record showed that the position of general clerk represented his wage-earning capacity.

¹ Appellant also filed claims for a right shoulder and right knee injury sustained on June 13, 1953; for a left wrist and back injury sustained on June 29, 1965; and for an injury to both legs sustained on April 1, 1966.

² The job description for a general office clerk stated:

The Office determined that appellant was able to earn wages as a general clerk at the weekly rate of \$85.00 in accordance with the factors outlined in 5 U.S.C. § 8115. The Office calculated that appellant's compensation rate should be adjusted to \$59.46 using the *Shadrick* formula. The Office indicated that appellant's salary on April 3, 1967, the date he began receiving compensation for temporary total disability, was \$129.60 a week, that his current adjusted pay rate for his job on the date of injury was \$176.96 and that appellant was currently capable of earning \$85.00 a week, the rate of a general clerk. The Office, therefore, determined that he had a 48 percent wage-earning capacity, which, when multiplied by 3/4 amounted to a compensation rate of \$50.54. The Office found that based on the current consumer price index, appellant's current adjusted compensation rate was \$59.46. The Office stated that the case had been referred to a vocational rehabilitation counselor, who had located a position as a general clerk which he found to be suitable for appellant given his work restrictions and was available in his commuting area.

An Office hearing representative affirmed this decision on January 22, 1973. By letter dated January 29, 1975, the Office advised appellant that based on medical evidence he recently submitted, it was increasing his compensation to total disability as of December 12, 1974. By decision dated May 20, 1975, the Office informed appellant that based on the medical evidence of record he was no longer totally disabled and that as of May 29, 1975 his compensation would be reduced to that reflected by the wage-earning capacity of a general clerk. By letter dated June 25, 1975, appellant requested reconsideration of the Office's decision, contending that he was physically unable to perform the job as a general clerk. In support of his request, appellant submitted a letter dated June 25, 1975 from the New York State Department of Labor indicating that work as a general clerk was no longer available in his area.

By decision dated September 29, 1975, an Office hearing representative remanded the case for further development on the issue of whether the general clerk position represented appellant's wage-earning capacity as of May 29, 1975. The Office initially noted that in a June 4, 1975 report, Dr. Joseph E. Farrell, a Board-certified orthopedic surgeon, indicated that appellant could go back to work on light duty. Based on Dr. Farrell's report, the Office affirmed the finding that appellant was no longer totally disabled. The Office noted, however, that Dr. Farrell did not indicate the limitations under which appellant could perform light duty and had recommended psychiatric counseling for him. The Office, therefore, remanded for further development of the medical evidence to ascertain appellant's work restrictions and obtain the results of his psychiatric evaluation, at which time the Office would make a determination of whether he was in fact medically capable of performing the general clerk position.

On July 5, 1995 appellant filed a claim alleging that he sustained a recurrence of disability as of June 25, 1975. By letter dated September 22, 1995, his attorney contended that he was entitled to retroactive compensation for total, as opposed to partial, compensation as of June 25, 1975, based on the date of a letter from the New York State Department of Labor.

By decision dated October 24, 1995, the Office denied appellant's claim for a recurrence of disability. In a decision dated April 8, 1998, the Board affirmed the October 24, 1995 Office decision.³ By letter dated March 11, 1999, appellant's attorney requested reconsideration. By

³ Docket No. 96-656 (issued April 8, 1998).

decision dated February 3, 2000, the Office denied reconsideration. In a decision dated May 6, 2002, the Board affirmed the February 3, 2000 Office decision denying compensation based on a recurrence of disability.⁴ In addition, the Board stated in a footnote that because the Office had not issued a final decision regarding a separate issue raised by appellant, raised in his attorney's September 25, 1995 letter, that he should receive compensation for total rather than partial disability because he submitted evidence, *i.e.*, the June 25, 1975 letter from the New York State Department of Labor, which indicated that the selected position of general clerk did not represent his earning capacity because it was no longer available in his commuting area, it lacked jurisdiction to consider appellant's attorney's contention.

By letter to the Office dated May 16, 2002, appellant's attorney, noting the Board's footnote indicating that the Office had not considered the issue raised in his September 25, 1995 letter, requested that the Office consider the evidence he submitted which demonstrated that appellant was entitled to compensation for total rather than partial disability as of June 25, 1975.

By decision dated August 14, 2002, the Office denied modification of the previous Office decisions which found that the selected position of general clerk represented appellant's wage-earning capacity. The Office found that the June 25, 1975 letter from the New York State Department of Labor did not constitute evidence sufficient to establish that appellant was not capable of performing the general clerk position or that the position was not readily available in his commuting area.

The Board finds that the Office properly determined that the selected position of general clerk represented appellant's wage-earning capacity.

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 of benefits.

Under section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent wage-earning capacity or, if the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, his degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect his wage-earning capacity in his disabled condition.⁵

In the present case, the Office found in its September 10, 1971 decision that the position of general clerk met the requirements of section 8115 for determination of wage-earning capacity and his compensation was accordingly reduced to reflect his wage-earning capacity. As indicated above, a position selected as representing wage-earning capacity must be made with due regard to the degree of physical impairment of the employee.

⁴ Docket No. 00-1592 (issued May 6, 2002).

⁵ 5 U.S.C. § 8155(a).

The selected position of general clerk required appellant to perform a variety of clerical tasks such as writing, typing, proofreading, record-sorting, envelope-stuffing, answering the telephone and running errands and assembling requested items and placing them on a conveyor belt, but did not require him to engage in any duties necessitating heavy lifting or manual labor. The Office's wage-earning capacity determination must be based on reasonably current medical evidence in the record at that time.⁶ In this case, the Office found that the selected position was within appellant's physical limitations based on a March 17, 1971 work restriction form completed by an Office medical adviser and the most recent report from appellant's treating physician, dated January 27, 1971.⁷ The form indicated that appellant was restricted from lifting, carrying, pushing/pulling, stooping, kneeling, repeated bending, climbing and was required to alternate walking, standing and sitting. The position description of general clerk is within these restrictions.

Accordingly, the Board finds that appellant's wage-earning capacity was determined with due regard to his physical impairment as provided in 5 U.S.C. § 8115(a).⁸ The Office has, therefore, met its burden of proof in reducing appellant's compensation based upon his wage-earning capacity. The Board further finds that the mathematical calculation of appellant's loss of wage-earning capacity is correct and in accordance with the Office's procedures.

Once the wage-earning capacity of an injured employee is properly determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was erroneous.⁹ Appellant bears the burden to show a material change in the nature and extent of his injury-related conditions.¹⁰

In its September 29, 1975 decision, the Office vacated its May 20, 1975 loss of wage-earning capacity determination decision. The Office remanded for further development of the medical evidence which, while indicating that appellant was capable of performing light duty, did not specify his work restrictions and did not contain the results of psychiatric tests for which he had been referred by his treating physician. There is no indication in the record, however, that such further development of the record was ever undertaken. In his September 22, 1995 letter, appellant's attorney raised the issue of whether appellant was entitled to retroactive compensation for total, as opposed to partial, compensation as of June 25, 1975 -- thereby contesting the Office's September 29, 1975 decision. The Board indicated in the footnote to its May 6, 2002 decision, that the Office had hitherto not issued a final decision regarding the issue of whether appellant should have received compensation for total disability as of May 29, 1975.

⁶ See *Anthony Pestana*, 39 ECAB 980 (1988); *Ellen G. Trimmer*, 32 ECAB 1878 (1981).

⁷ The January 27, 1971 report notes that appellant's condition was essentially unchanged since he was last examined on June 11, 1969, when his treating physician, in a report issued on the date of the examination, recommended that appellant should be referred to occupational rehabilitation for work which did not demand excessive weight lifting, back bending, pushing, pulling or excessive lifting.

⁸ See *Carl C. Green, Jr.*, 47 ECAB 737 (1996).

⁹ *Stanley B. Plotkin*, 51 ECAB 700 (2000); *Doris J. Wright*, 49 ECAB 230, 238 (1997).

¹⁰ *Id.* at 700.

Subsequently, appellant's attorney raised this issue before the Office with his May 16, 2002 request for reconsideration. Although the Office did consider the issue of the availability of the selected general clerk position, it neglected to consider the outstanding, unresolved issue of whether, based on the medical evidence of record, appellant was able to perform the duties of the selected position.

The August 14, 2002 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision.

Dated, Washington, DC
October 20, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member