

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RANDALL W. FOSTER and DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION, Indianapolis, Ind.

*Docket No. 97-2372; Submitted on the Record;
Issued May 26, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation for total disability effective June 21, 1997, based on his capacity to perform the duties of an order clerk.

On December 21, 1988 appellant, then a 32-year-old air traffic controller, observed a mid-air "near-miss" of two airplanes while in the performance of duty, and subsequently experienced a panic attack, in addition to chest and left arm pain. He filed a Form CA-2 claim for benefits on December 21, 1988, which the Office accepted for a panic disorder and generalized anxiety disorder by letter dated July 26, 1989. The Office subsequently accepted an expansion of appellant's claim to include agoraphobia.

Compensation for disability and medical benefits was paid since the date of injury.

By letter dated February 23, 1996, the Office requested an updated medical report from Dr. Jon D. Marhenke, Board-certified in psychiatry and neurology and appellant's treating psychiatrist. The Office asked Dr. Marhenke to submit an opinion regarding whether appellant was currently disabled by his accepted, employment-related psychiatric conditions. The Office further requested, in the event he believed appellant was unable to perform his regular job as an air traffic controller, an opinion as to whether appellant could perform other types of employment or participate in a rehabilitation program. The Office enclosed an OWCP-5 work restriction evaluation form and requested that Dr. Marhenke complete the form.

Dr. Marhenke responded to the Office's letter in a medical report dated March 4, 1996. In his report, Dr. Marhenke stated that he had seen appellant on 10 occasions since his most recent report of February 6, 1995, with his latest examination occurring on February 5, 1996. He stated that appellant had reported episodic anxiety with shaking and occasional classic panic attacks, and diagnosed panic disorder, generalized anxiety disorder, and post-traumatic stress

disorder. Dr. Marhenke concluded that appellant remained disabled for work as an air traffic controller, and was not a candidate for further rehabilitation at that time.

In a supplemental report dated March 19, 1996, Dr. Marhenke commented that “I qualified the OWCP-5 answers by stating that ‘the patient does have panic attacks which would limit his activity.’” He explained that panic attacks were sudden episodes of severe fright which do not correspond to the reality of the moment and may not appear to be causally related. Dr. Marhenke advised that appellant’s panic attacks were often incapacitating in their severity and might also awaken him at night, and that although appellant took medication to prevent them, they had not proven completely effective in reducing his attacks. He further stated that:

“When an attack occurs, [appellant] is usually unable to continue any productive activity. Therefore, he is disabled from returning to a high stress employment situation such as an air traffic controller. It should be noted that he has no special training or marketable skills; he has attempted to return to college but this has not been successful. At the present time, I do not think he could undertake any training or employment situation because of the likelihood of another attack which would disrupt the training or work situation.”¹

In letters dated September 20, 1996, the Office referred appellant for a second opinion examination with Dr. Larry M. Davis, Board-certified in psychiatry and neurology.

Dr. Davis reviewed the statement of accepted facts, examined appellant on May 6, 1996, and stated findings on examination; he stated his conclusions regarding appellant’s current psychological condition in a medical report dated May 6, 1996. He found that appellant’s disability was not permanent and that his condition was much improved from his original symptoms. Dr. Davis advised that if appellant could recover his medical clearance from the employing establishment, which he felt was appropriate, and received additional training, he could return to full-time employment. He advised that he did not believe appellant’s panic disorder was of sufficient severity, especially in light of the medication he was taking, so as to create a dangerous or crisis situations in tasks he might be performing. Dr. Davis stated that he believed appellant’s social skills were good and unimpaired, and that appellant was motivated to work. He concluded that, in order to restore his sense of accomplishment and usefulness, appellant could and should be able to work a variety of jobs, but would probably not be best-placed as an air traffic controller.

By letters dated October 1 and October 7, 1996, the Office determined there was a conflict in the medical evidence between the opinions of Drs. Marhenke and Davis, and it therefore referred appellant, a statement of facts and the medical file to Dr. Jeffrey J. Kellams, Board-certified in psychiatry and neurology, for a referee, independent medical examination.

¹ Dr. Marhenke stated that appellant’s first panic attack occurred shortly after observing the mid-air “near miss” between two planes while in the performance of his duty as an air traffic controller, and he advised that appellant had continued to experience panic attacks since that time which had occasionally been triggered by dreams of plane crashes or by hearing news of such events.

In a report dated October 21, 1996, Dr. Kellams found that appellant continued to suffer from panic disorder, but without agoraphobia. He advised that appellant was not able to return to work as an air traffic controller due to his psychiatric illness and the need for medical management of that illness. Dr. Kellams stated, however, that appellant was capable of some type of gainful employment which would necessarily require some redirection in training and mindset. He concluded that although appellant did suffer from a psychiatric illness, his illness was largely treatable, and that he had become sufficiently experienced with his illness so that he was able to cope with it and had a much better comprehension of it.

In memorandums dated November 6, 1996, the Office indicated that, based on Dr. Kellams' report, appellant was capable of returning to employment other than this regular job as an air traffic controller, and that it was referring appellant for vocational rehabilitation, counseling and job goal identification as of November 6, 1996.

By letter dated November 6, 1996, the Office referred appellant to a vocational rehabilitation counselor for the development of a vocational rehabilitation program in order to locate a suitable alternate job, within the restrictions imposed by his employment injury, based on Dr. Kellams' report.

On January 21, 1997 the vocational rehabilitation counselor issued a report summarizing his efforts to find suitable alternate employment for appellant within Dr. Kellams' restrictions. The vocational rehabilitation counselor stated that he had excluded from consideration any job which required substantial "people contact", and indicated he had consulted the classified ads from a local newspaper and the state employment commission. The vocational rehabilitation counselor recommended one position for appellant listed in the Department of Labor's *Dictionary of Occupational Titles*, which, he determined, reasonably reflected appellant's ability to earn wages, that of "general clerk, DOT #209.562-010." The vocational rehabilitation counselor requested a 90-day job placement to examine the job goal of the recommended position.

In a closure report dated February 12, 1997, the vocational rehabilitation counselor stated he had identified two positions which would be medically suitable and available for appellant. These included the general clerk position recommended previously and an additional position listed in the Department of Labor's *Dictionary of Occupational Titles*, order clerk, DOT #249.632-026. The vocational rehabilitation counselor stated that he had met with appellant to review these recommendations, but that appellant had indicated he was unwilling to participate in a job placement plan due to his condition. Based on appellant's stated unwillingness to participate in the job search, the vocational rehabilitation counselor indicated he was closing the case.

In a status report dated April 17, 1997, the Office closed appellant's case, stating that although appellant been provided with vocational planning and counseling had, it had been unable to develop a rehabilitation plan. The Office stated that the vocational rehabilitation counselor could not recommend training because of appellant's refusal to participate in a new employer placement program. The Office noted that job goals and occupational wage documentation had been provided to the claims examiner for a loss of wage-earning capacity

determination, and noted that appellant had demonstrated a \$328.00 weekly wage-earning capacity as an order clerk.

On May 13, 1997 the Office calculated that appellant's compensation rate should be adjusted to \$598.44 using the *Shadrick*² formula. The Office indicated that appellant's salary on December 21, 1988, the date of injury, was \$1,036.25 per week, that his current, adjusted pay rate for his job on the date of injury was \$1,410.91, and that appellant was currently capable of earning \$328.00 per week, the rate of an order clerk. The Office therefore determined that appellant had a 23 percent wage-earning capacity, which when multiplied by 3/4 amounted to a compensation rate of \$598.44. The Office found that based on the current consumer price index, appellant's current adjusted compensation rate was \$782.25.

By notice of proposed reduction dated May 13, 1997, the Office advised appellant of its proposal to reduce his compensation because the factual and medical evidence established that he was no longer totally disabled and that he had the capacity to earn wages as an order clerk at the weekly rate of \$328.00 in accordance with the factors outlined in 5 U.S.C. § 8115.³ The Office stated that the case had been referred to an independent medical examiner, Dr. Kellams, who opined that appellant was capable of some type of gainful employment which would have to involve some retraining, and that appellant was better able to deal with his employment illness now that he had become accustomed to dealing with it. The Office stated that the case had been referred to a vocational rehabilitation counselor, who had located a position as an office clerk which he found to be suitable for appellant given Dr. Kellams' restrictions. The Office found that this position was available in appellant's commuting area, was in accordance with appellant's education and past work experience,⁴ and that entry level pay for this position was \$328.00 per week. The Office allotted appellant 30 days in which to submit any contrary evidence.

Appellant submitted a letter contesting the Office's proposed reduction of compensation dated June 11, 1997. He noted that Dr. Marhenke, his treating psychiatrist, had recently increased the dosage of his medication. Appellant also expressed his dissatisfaction with the vocational counselor. However, he did not submit any additional factual or medical evidence in support of his opposition to the Office's proposed reduction in his compensation.

By letter decision dated June 16, 1997, the Office advised appellant that his compensation would be reduced effective June 21, 1997 because the weight of the medical evidence showed that he was no longer totally disabled for work due to effects of his December 21, 1988 employment injury, and that the evidence of record showed that the position of order clerk represented his wage-earning capacity.

² *Albert C. Shadrick*, 5 ECAB 376 (1953); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.814.2 (April 1995).

³ 5 U.S.C. § 8115.

⁴ The Office stated that appellant had gained the skills and aptitudes required for this position through his employment as an air traffic controller and that he had taken college level math, economics and computer operations courses.

The Board finds that the Office properly reduced appellant's compensation for total disability effective June 21, 1997, based on his capacity to perform the duties of an order clerk.

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.⁵

In the present case, the Office properly found in its May 13, 1997 proposed reduction of compensation that appellant was no longer totally disabled for work due to the effects of his December 21, 1988 employment injury. The Board notes that Dr. Kellams, the independent medical examiner, opined in a October 21, 1996 report that although appellant was not able to return to work as an air traffic controller due to his employment-related psychiatric illness and the need for medical management of that illness, he was capable of some type of gainful employment which would necessarily require "some redirection in training and mindset." Dr. Kellams concluded that appellant's illness was largely treatable, and he found that appellant had become sufficiently experienced with his illness so that he had become more adept at coping with it and comprehending it.

The rehabilitation counselor assigned to assist appellant in placement efforts identified two positions listed in the Department of Labor's *Dictionary of Occupational Titles*, appropriate for appellant based on Dr. Kellams' accepted work tolerance limitations as set forth by both the Office and the rehabilitation counselor. Based on these restrictions and on the vocational counselor's recommendations, the Office selected a position as an order clerk which it found suitable for appellant.

The Office has stated that in some situations extensive rehabilitation efforts will not succeed. In such circumstances, the Office procedures instruct the rehabilitation officer to submit a final report summarizing that placement efforts were not successful and submitting relevant information to the Office.⁶

In the instant case, the rehabilitation counselor properly submitted a final report on February 12, 1997, indicating that placement efforts had been unsuccessful because, although to he had met with appellant in an attempt to review his job recommendations, appellant had indicated he was unwilling to participate in a job placement plan due to his condition. The vocational counselor advised the Office that he had subsequently closed the case due to appellant's stated unwillingness to participate in the job search. The counselor provided required information concerning the position descriptions, the availability of the positions within appellant's commuting area and pay ranges within the geographical area, as confirmed by state officials.

The Office then properly followed established procedures for determining appellant's employment-related loss of wage-earning capacity.

⁵ *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

⁶ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.814.8 (April 1995).

Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions given the nature of the employee's injuries and the degree of physical impairment, his or her usual employment, the employee's age and vocational qualifications and the availability of suitable employment.⁷ Accordingly, the evidence must establish that jobs in the position selected for determining wage-earning capacity are reasonably available in the general labor market in the commuting area in which the employee lives. In determining an employee's wage-earning capacity, the Office may not select a makeshift or odd lot position or one not reasonably available on the open labor market.⁸

In the instant case, the Office identified one of the two positions listed by the rehabilitation counselor which was most consistent with appellant's background. The Office used the information provided by the rehabilitation counselor of the prevailing wage rate in the area of an order clerk. Finally, the Office properly applied the principles set forth in the *Shadrick*⁹ decision to determine appellant's loss of wage-earning capacity.

The Office properly found that appellant was no longer totally disabled as a result of his December 21, 1988 employment injury and it followed established procedures for determining appellant's employment-related loss of wage-earning capacity. The Board therefore finds that the Office has met its burden of justifying a reduction in appellant's compensation for total disability.

⁷ *Samuel J. Chavez*, 44 ECAB 431 (1993); *Hattie Drummond*, 39 ECAB 904 (1988); see 5 U.S.C. § 8115(a); A. Larson, *The Law of Workmen's Compensation* § 57.22 (1989).

⁸ *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

⁹ *Shadrick*, *supra* note 2.

The decision of the Office of Workers' Compensation Programs dated June 16, 1997 is hereby affirmed.

Dated, Washington, D.C.
May 26, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member