

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM A. PORTER and U.S. POSTAL SERVICE,
POST OFFICE, Little Rock, AR

*Docket No. 98-652; Submitted on the Record;
Issued February 1, 2000*

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly determined appellant's wage-earning capacity based on his ability to work as a telephone solicitor.

On December 11, 1992 appellant, then a 47-year-old special delivery messenger, filed a claim for a traumatic injury alleging that on December 10, 1992 he sustained back injuries while attempting to pull apart several empty mail tubs in the course of his federal employment duties. The Office accepted appellant's claim for cervical and lumbar sprains, and, although it is not entirely clear from the record, the Office apparently expanded the accepted conditions to include herniated nucleus pulposus at L5-S1. Appellant was placed on the periodic rolls. He had a prior 1984 claim for traumatic lumbosacral strain which was accepted by the Office on September 27, 1984, and the two claims were doubled by the Office on January 20, 1994. With respect to his December 12, 1992 claim, appellant underwent an interior interbody spinal fusion at L5-S1 on October 6, 1993, which was apparently authorized by the Office, although again this is not entirely clear from the record. On January 3, 1994 appellant was referred for physical therapy for eight weeks and on May 16, 1994 received a bone stimulator. On November 29, 1994 appellant was referred to a pain clinic, and on May 26, 1995 appellant was referred for vocational rehabilitation assistance.

By decision dated February 20, 1996, the Office reduced appellant's compensation effective March 3, 1996 to reflect his capacity to earn wages as a telephone solicitor.¹ By decision dated July 31, 1996, the Office denied appellant's request for reconsideration of its prior decision. Appellant submitted additional factual and medical evidence, and by merit decisions dated February 6 and October 3, 1997, the Office denied modification of its February 20, 1996 decision.

¹ The Office issued a notice of proposed reduction of compensation on January 19, 1996, and allowed appellant 30 days to submit additional factual and medical evidence.

The Board has duly reviewed the case record and finds that the Office improperly determined appellant's wage-earning capacity based on his ability to work as a telephone solicitor.

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.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 wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity, or the employee has no actual earnings, his wage-earning capacity is determined with due regard to 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.⁴

After the Office makes a medical determination of partial disability and of special work restrictions, it may refer the employee's case to an Office wage-earning capacity specialist for selection of a position listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open market, that fits the employee's capabilities with regard to his or her physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment services or other applicable services. Finally, application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.⁵

In the present case, the Office received a work capacity evaluation dated May 18, 1995, which indicated that appellant had the capability to perform work in the sedentary category with safe occasional maximum lifting of nine pounds.⁶ On May 24, 1995 the Office referred appellant to a rehabilitation counselor for vocational rehabilitation. In a medical report dated June 20, 1995, appellant's treating physician, Dr. H. Austin Grimes, a Board-certified orthopedic surgeon, confirmed that appellant displayed the capability to perform sedentary duties with a maximum lifting limit of nine pounds.

² *David W. Green*, 43 ECAB 883 (1992); *Harold S. McGough*, 36 ECAB 332 (1984).

³ 5 U.S.C. §§ 8101-8193.

⁴ *Samuel J. Chavez*, 44 ECAB 431 (1993).

⁵ *Albert C. Shadrick*, 5 ECAB 376 (1953).

⁶ The evaluation further identified that appellant's ability to sit was "unrestricted 30 minutes," and he could stand "restricted 10 minutes." Walk "restricted 5 minutes," and stair climb "unrestricted 6 flights/60 steps." Appellant could also static bend, kneel and static squat less than one time an hour, and could reach overhead and forward, crawl, push, pull twist and perform repeated bending and squatting and fine motor skills approximately 2.5 hours a day. The functional capacity report further indicated that the static consistency reports contained in the report were invalid as appellant had to take pain medication afterwards.

In a vocational rehabilitation report dated July 25, 1995, the rehabilitation counselor identified the positions of computer (bar code) operator and telephone solicitor as within appellant's capabilities and determined that the positions were reasonably available within appellant's geographical area. The job descriptions for computer (bar code) operator and telephone solicitor were forwarded to Dr. Grimes for his review, and on August 18, 1995 Dr. Grimes approved both the physical demands of the jobs, as well as the working conditions, as within appellant's capabilities. On September 7, 1995 appellant signed a job search plan prepared by the Office, however, the vocational rehabilitation counselor indicated that appellant failed to comply with the job search plan or to otherwise participate in the job placement process.

The Office properly relied upon the opinions of the rehabilitation counselor and Office rehabilitation specialist in finding that the position of telephone solicitor was vocationally suitable for appellant and geographically available. The Office, however, further has the responsibility to determine whether the medical evidence establishes that appellant has the ability to perform the selected position. In determining a loss of wage-earning capacity where the residuals of an injury prevent an employee from performing his regular duties, the impairments which preexisted the injury, in addition to the injury-related impairments, must be taken into consideration in the selection of a job within his work tolerance. It is only subsequently acquired impairments unrelated to the injury, which are excluded from consideration in the determination of the employee's work capabilities.⁷ In the instant case, the medical evidence is insufficient to show that appellant had the capacity to perform the position around the time his compensation was adjusted in March 1996. Appellant had been receiving psychological treatment since August 23, 1995 for anxiety and panic attacks. In a progress note dated November 8, 1995, received by the Office prior to its February 20, 1996 decision reducing appellant's benefits, Dr. Grimes noted that the Office had asked that appellant comply with a September 7, 1995 job search agreement and stated that appellant had been "under the care of Dr. Joe Brogdon[, appellant's psychological counselor] for acute anxiety disorder and is unable to function because of panic attacks. He is currently being actively treated for this. Appellant is still not able to do manual labor in regard to his low back. He is unavailable for a job."

In its February 20, 1996 decision reducing appellant's compensation benefits, the Office relied on Dr. Grime's June 20 and August 18, 1995 opinions that appellant was capable of performing sedentary work, but did not discuss Dr. Grimes' more recent report concerning appellant's disabling anxiety disorder. While the evidence of record establishes that appellant did not begin receiving psychological treatment until after his December 10, 1992 injury, the record does not contain any evidence as to when appellant's psychological condition began. In addition, the record contains some indication that appellant's anxiety attacks may have been

⁷ *William Ray Fowler*, 31 ECAB 1817, 1822 (1980).

triggered or exacerbated by a magnetic resonance imaging (MRI) scan appellant underwent.⁸ The Office procedure manual provides that the claims examiner “is responsible for determining whether the medical evidence establishes that the claimant is able to perform the job, taking into consideration medical conditions due to the accepted work-related injury or disease, and any preexisting medical conditions,” (Medical conditions arising subsequent to the work-related injury or disease will not be considered.) and further provides that “[i]f the medical evidence is not clear and unequivocal, the [claims examiner] will seek medical advice from the [district medical adviser], treating physician, or second opinion specialist as appropriate.”

The Office thus issued its wage-earning capacity decision without determining whether appellant’s identified psychological condition, which prevented him from performing the duties of the selected position, was preexisting or a consequence of appellant’s accepted back injury. The Office, therefore, improperly determined appellant’s wage-earning capacity based on his ability to work as a telephone solicitor.

The decisions of the Office of Workers’ Compensation Programs dated October 3 and February 6, 1997 are hereby reversed.

Dated, Washington, D.C.
February 1, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member

⁸ In a September 26, 1995 progress report, Dr. Brogdon, appellant’s psychological counselor, states that appellant related to him that he first experienced an anxiety attack “approximately one and a half years ago, when he had his first MRI, during which time he had to abort the test and return later, as he became so anxious.”