U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DONNA L. BAXTER and DEPARTMENT OF JUSTICE,
FEDERAL PRISON SYSTEMS, Springfield, Mo.

Docket No. 97-512; Submitted on the Record;
Issued December 29, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation effective October 13, 1996, finding that the position of administrative assistant fairly and reasonably represented her wage-earning capacity.

The Office accepted that on July 15, 1986 appellant, then 50 years old, sustained depression in the performance of her duties as a federal prison educational aide. Appellant was placed on the periodic rolls and rehabilitation efforts were undertaken. Appellant was approved for a one-year training program at Vatterott College for administrative secretary, administrative assistant work. She completed the program with good grades and on time. Shortly after a placement effort was started appellant indicated that she planned to buy office equipment and a computer for her home and to do free lance writing. Nevertheless, the rehabilitation counselor provided appellant with the labor market survey and multiple job leads from recent newspaper advertisements for secretarial, administrative assistant, receptionist and clerical positions. Appellant, however, was not interested in full-time employment and accepted part-time employment on a contract basis working 12 to 15 hours per week with a Rogersville newspaper.

Since appellant rejected seeking full-time employment outside her home, the rehabilitation counselor selected the position of administrative assistant, dictionary of occupational titles number 169.167-010, for which her training qualified her, and which was found to be reasonably available within appellant's commuting area and proceeded with a loss of wage-earning capacity determination. Appellant's treating physician, Dr. James G. Neal, a Board-certified psychiatrist, opined on November 21, 1995 that appellant would certainly be able to perform the work described for an administrative assistant. The rehabilitation counselor reported that appellant had accepted the selected position documentation of her wage potential if she entered the work force at $300.00 to $360.00 per week.

On June 3, 1996 appellant was notified of the proposed reduction of compensation to reflect her wage-earning capacity as an administrative assistant. The Office indicated that she

had the capacity to earn wages at the rate of $300.00 per week. Appellant was given 30 days within which to submit additional relevant evidence or argument if she disagreed with the proposed action. In response appellant submitted a June 25, 1996 statement disagreeing with the proposed action and stating that she believed her former employer would not rehire her because of her age. She further stated that she believed no other employer paying more than $5.00 per hour would be interested in someone of her age, regardless of her qualifications. Appellant indicated that she did not reject full-time employment, rather that she planned to go into business for herself doing free lance writing, however, this was not financially possible, so she accepted a part-time job with a weekly newspaper. Appellant also stated that she was taking care of her 92-year-old mother.

The Office considered appellant's arguments, found that they were not relevant to the issue at hand, found that appellant was vocationally, educationally, and medically qualified for the position of administrative assistant, and found that such position fairly and reasonably represented her current wage-earning capacity. The Office further found that, based upon the rehabilitation counselor's labor market research performed in March and April 1996, full-time jobs as administrative assistants were reasonably available to appellant within her commuting area. The Office therefore employed the *Shadrick* formula, calculated appellant's loss of wage-earning capacity, and reduced appellant's compensation effective October 13, 1996 finding that the position of administrative assistant was medically and vocationally suitable for appellant in accordance with the factors set forth in 5 U.S.C. § 8115(a).

The Board finds that the Office properly reduced appellant's compensation based on her capacity to perform the full-time duties and earn the wages of an administrative assistant.

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.[1]

The Office met its burden to reduce compensation benefits in this case, relying on the November 21, 1995 report of Dr. Neal, in which he stated that appellant could certainly perform the duties of an administrative assistant, and relying on the rehabilitation counselor, who found that appellant was, after successful completion of her training program, educationally and vocationally qualified for such a position. As the Office properly established that appellant was medically, educationally, and vocationally qualified to perform the position of administrative assistant, it met its burden to reduce appellant's compensation benefits by determining her wage-earning capacity.

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

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

vocational qualifications, and the availability of suitable employment.[2] 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.[3]

In this case, the selected position of administrative assistant was not a makeshift or an odd lot position, but, the evidence provided by the rehabilitation counselor demonstrated, was reasonably available in significant numbers in the general labor market in appellant's commuting area, as demonstrated by the job advertisements in the local newspaper. As the Office established that she was medically, educationally and vocationally qualified for the position of administrative assistant, and that such positions were reasonably available in significant numbers within appellant's commuting area, it met its burden of proof to reduce appellant's monetary compensation benefits to reflect her wage-earning capacity as an administrative assistant.

Thereafter, the Office properly employed the *Shadrick* formula, calculated appellant's loss of wage-earning capacity and adjusted appellant's compensation to reflect her ability to earn wages as an administrative assistant.

[2] *See generally*, 5 U.S.C. § 8115(a); A. Larson *The Law of Workmen's Compensation* § 57.22 (1989); section 8115(a) of the Federal Employees' Compensation Act provides:

> "Wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings of the employee do not fairly and reasonably represent his wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity as appears reasonable under the circumstances is determined with due regard to: (1) the nature of his injury; (2) the degree of physical impairment; (3) his usual employment; (4) his age; (5) his qualifications for other employment; (6) the availability of suitable employment; and (7) other factors or circumstances which may affect his wage-earning capacity in his disabled condition."

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

Accordingly, the decision of the Office of Workers' Compensation Programs dated October 17, 1996 is hereby affirmed.

Dated, Washington, D.C.
December 29, 1998

George E. Rivers
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member