

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT W. CARLISLE and DEPARTMENT OF COMMERCE,
NATIONAL OCEANIC ATMOSPHERIC ADMINISTRATION/EASTERN
ADMINISTRATION SUPPORT CENTER, Norfolk, Va.

*Docket No. 97-1299; Oral Argument Held September 9, 1998;
Issued December 3, 1998*

Appearances: *James T. Martin, Esq.*, for appellant; *Miriam D. Ozur, Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined that effective August 20, 1995 appellant had the wage-earning capacity to perform the duties of shipmate.

The Board has duly reviewed the case record and concludes that the Office did not meet its burden of proof to establish that appellant had the wage-earning capacity to perform the duties of shipmate.

The facts in this case establish that on August 11, 1990 appellant, then a 46-year-old ordinary seaman, sustained employment-related cervical and back strains and laceration to the head. He received appropriate continuation of pay and compensation and was referred to rehabilitation specialists who provided placement services. In an October 24, 1994 report, his treating Board-certified orthopedic surgeon, Dr. Lawrence R. Morales, advised that appellant was fit for duty on a trial basis. By report dated May 3, 1995, a rehabilitation specialist identified the occupation "shipmate" as within appellant's work restrictions and confirmed that it was performed in sufficient numbers to be considered reasonably available in appellant's commuting area. In a work capacity evaluation dated May 11, 1995, Dr. Morales advised that appellant was fit for duty as a merchant seaman.

On June 23, 1995 the Office issued a notice of proposed termination of compensation wherein it informed appellant that the medical and factual evidence of record established that he was no longer totally disabled but rather was capable of earning wages as a "shipmate," at a payrate of \$605.00 per week. The Office finalized its reduction of appellant's compensation on August 18, 1995. Appellant requested reconsideration and submitted additional medical

evidence. On February 22, 1996 the Office referred appellant, along with a statement of accepted facts, job descriptions of “seaman” and “shipmate” and the medical record, to Dr. Sidney Tiesenga, a Board-certified orthopedic surgeon, for a second-opinion evaluation.¹ By decision dated April 15, 1996, the Office denied modification of the prior decision. Appellant again requested reconsideration and submitted additional medical evidence. In a June 13, 1996 decision, the Office again denied modification of the prior decision. Appellant again requested reconsideration and submitted additional medical evidence and, in a letter decision dated January 9, 1997, the Office denied appellant’s request. The instant appeal follows.

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 in compensation benefits. Once the medical evidence suggests that a claimant is no longer totally disabled but rather is partially disabled, the issue of wage-earning capacity arises.² Section 8115(a) of the Federal Employees’ Compensation Act³ provides that in determining compensation for partial disability, the wage-earning capacity of an employee is determined by actual earnings. If an employee does not have any actual earnings, his or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, the employee’s usual employment, age, qualifications for other employment, the availability of suitable employment and other circumstances which may affect the employee’s wage-earning capacity in his disabled condition.⁴

In the present case, the medical evidence of record indicated that as of 1994 appellant was not totally disabled. As appellant was unable to obtain employment, the Office proceeded to determine his wage-earning capacity by use of a constructed position. Based upon the recommendation of the Office’s rehabilitation specialist, the Office selected the position of “shipmate,” classified as the Department Of Labor’s *Dictionary of Occupational Titles* (DOT) position 197-133-022. The DOT position description states that a shipmate:

“Supervises and coordinates activities of crew aboard ship. Inspects holds of ship during loading to insure that cargo is stowed according to specifications. Examines cargo-handling gear and lifesaving equipment and orders crew to repair or replace defective gear and equipment. Supervises crew engaged in cleaning and maintaining decks, superstructure and bridge of ship. Stands watch during specified periods and determines geographical position of ship upon request of Master, Ship.... Assumes command of ship in event Master, Ship becomes

¹ Dr. Tiesenga provided a March 26, 1996 report in which he advised that appellant could perform the shipmate position. The record also contains reports from appellant’s treating physicians, Dr. Raymond Iglecia, a Board-certified psychiatrist and neurologist, who advised that appellant was totally disabled and could not return to his previous job, and Dr. Sidney S. Loxley, a Board-certified orthopedic surgeon, who advised that appellant could not return to sea duty or perform exertional activity.

² See *Gregory A. Compton*, 45 ECAB 154 (1993).

³ 5 U.S.C. § 8115(a).

⁴ *Mary Jo Colvert*, 45 ECAB 575 (1994).

incapacitated. May be required to hold license issued by U.S. Coast Guard, depending on waters navigated and tonnage of ship....”⁵

In assessing the claimant’s ability to perform the selected position, the Office must consider not only physical limitations, but also education, age and prior experience. To determine wage-earning capacity, the Office relies upon its wage-earning capacity specialist for selection of an appropriate position. In this regard, the Board has held that it is the responsibility of the Office to obtain confirmation, not simply an indication, of the specific requirements for the position and that the claimant has the necessary vocational skills to perform the requirements of the position.⁶ Although the Office’s rehabilitation specialist concluded that appellant had the necessary skills to perform the selected position, the evidence of record indicates that appellant lacked the supervisory experience to be able to competitively perform the duties of the selected position, “shipmate.” Other than the fact that he underwent some additional navigational training, and that he has a Coast Guard license certifying that he can operate or navigate passenger carrying vessels, there is nothing further in the record to indicate that he has the necessary background and experience to perform the selected position. The Office therefore did not meet its burden of proof to establish that appellant could perform the duties of “shipmate.”

The decisions of the Office of Workers’ Compensation Programs dated January 9, 1997 and June 13 and April 15, 1996 are hereby reversed.

Dated, Washington, D.C.
December 3, 1998

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

⁵ *Dictionary of Occupational Titles*, No. 197.133-022, 4th ed. rev., 1991.

⁶ *See Garlon L. Campbell*, 40 ECAB 381 (1988).