

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSEPH HOUSTON and DEPARTMENT OF THE NAVY
LONG BEACH NAVAL SHIPYARD, Long Beach, CA

*Docket No. 99-336; Submitted on the Record;
Issued October 20, 2000*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
VALERIE D. EVANS-HARRELL

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's wage-earning capacity was represented by the position of information clerk.

On September 20, 1973 appellant, then a 40-year-old rigger helper, filed a notice of traumatic injury alleging that, on June 5, 1973, he injured his back in the course of his employment. The Office accepted this claim for a herniated disc at L4. Appellant had a laminectomy on April 8, 1974. He has not returned to work.

As appellant had not received any recent medical treatment, by letter dated April 5, 1995, the Office referred appellant to Dr. Philip H. Reiswig, a Board-certified orthopedic surgeon, for a second opinion. In a medical opinion dated May 18, 1995, based on a physical examination and review of his medical record, Dr. Reiswig diagnosed status post lumbar laminectomy, L4-5 and L5-S1, degenerative disc disease, L4-5 and L5-S1, and nonindustrial pes planus, both feet. Dr. Reiswig opined that appellant's original back pain was due to the injury of June 5, 1973. He noted that appellant was "limited to no heavy work, which contemplates about a half preinjury capacity for bending, stooping, lifting, pushing, pulling or climbing." Dr. Reiswig further noted that appellant should not lift over 30 pounds. He found that appellant's disability status was permanent and stationary, and that he did not believe future medical treatment would benefit appellant. Dr. Reiswig stated that, if appellant's employer was unable to meet these restrictions, appellant should be retrained to work within these restrictions.

On August 17, 1995 Dr. Reiswig completed a work capacity evaluation form wherein he noted appellant's restrictions as no lifting over 30 pounds, no repetitive bending, kneeling or twisting, that lifting should be limited to 30 pounds 10 times ½ hour, bending to 6 times ½ hour and kneeling and twisting to 2 times an hour. He further noted that appellant should not be on his feet for more than five out of eight hours a day, intermittently.

On October 24, 1995 appellant was referred to vocational rehabilitation. In his initial report dated December 11, 1995, the vocational rehabilitation counselor noted that appellant “appears to be a credible person, but it is possible that the events of his disability, his age and the events of his wife’s death may have developed conditions that will make it difficult for [appellant] to be retained in a new vocation that will allow him to be competitive in the current labor market.” In a report dated January 18, 1996, the vocational counselor noted that, since the last report, appellant’s health, for nonindustrial reasons, had deteriorated in that he would be going in the hospital for treatment of prostate cancer.

In a medical report dated April 18, 1996, Dr. Nitin A. Shah, Board-certified orthopedic surgeon, stated that appellant has “a chronic lower back problem with early degenerative arthritis of the facet joints and calcification in the anterior longitudinal ligament at L3-4. No evidence of any acute radiculopathy or any additional dis[c] herniation is present.”

As appellant moved his place of residence, by letter dated May 8, 1996, the Office referred appellant to another vocational rehabilitation specialist. In a report dated December 6, 1996, the new vocational rehabilitation counselor, noted that he first saw appellant on May 21, 1996, and at that time appellant advised him that he had been diagnosed with diabetes, glaucoma, arthritis and had just completed surgery for a prostate malignancy. The vocational specialist evaluated appellant’s case and listed three jobs which he believed were within appellant’s physical limitations as posted by Dr. Reiswig in his August 17, 1995 report.¹ All of these positions were allegedly available within a 25-mile radius of appellant’s home, had current openings, and had no more than a brief on-the-job training program. One of these positions was listed as information clerk, with a duty description as follows:

“Answers inquiries from persons entering establishment: Provides information regarding activities conducted at establishment, and location of departments, offices, and employees within organization. Informs customer of location of store merchandise in retail establishment. Provides information concerning services, such as laundry and valet services, in hotel. Receives and answers request for information from company officials and employees. May call employees or officials to information desk to answer inquiries. May keep record of questions asked.”

The physical demands were listed as sedentary, *i.e.*, “exerting up to 10 pounds of force occasionally or a negligible amount of force frequently to lift, carry pull or otherwise move objects.” In a report dated January 29, 1997, the vocational counselor listed the earnings for the information specialist position at \$190.00 per week.

¹ The counselor indicated that he did not feel that appellant would make the required effort for successful participation in vocational rehabilitation.

On February 13, 1997 the Office issued a notice of proposed reduction of compensation, stating:

“The medical and factual evidence of record establishes that you are no longer totally disabled but rather are partially disabled, and you have the capacity to earn wages as a[n] information clerk at the rate of \$190.00 per week.”

This notice was finalized on February 20, 1998.

By decision dated February 24, 1998, the Office advised appellant that the proposed reduction of his compensation benefits would be made final effective March 1, 1998 for the reason that the medical evidence established that the position of information specialist was medically and vocationally suitable in accordance with the factors set forth in 5 U.S.C. § 8115(a).

By letter dated April 28, 1998, appellant requested that the Office reconsider its decision.

In support thereof, appellant submitted a medical report by Dr. Robert R. Lawrence, a Board-certified orthopedic surgeon, wherein he diagnosed appellant as suffering from severe chronic lumbar sprain, postoperative lumbar spinal fusion, severe degenerative arthritis, diabetes and glaucoma. Dr. Lawrence noted that appellant’s back residuals were causally related to work injury of June 5, 1973. He opined, “Taking into consideration the numerous problems with this patients’ low back, as well as his diabetes and glaucoma, it is inconceivable to me that this patient will be able to return to any type of work whatsoever.”

Appellant also submitted an April 5, 1998 medical report by Dr. Shah, wherein he noted that appellant was being followed for low back pain. He further noted that appellant had been diagnosed with carcinoma of the prostate, and that the most recent bone scan studies on a personal basis have been negative for any metastasis.

In a decision dated June 8, 1998, the Office denied appellant’s request for modification of the order, finding that the weight of the medical evidence continued to establish that he was capable of performing the physical requirements of the selected position of information clerk. The Office found Dr. Lawrence did not provide detailed rationale for his opinion that appellant’s back condition prevented him from working as an information clerk.

The Board finds that the position of information clerk fairly and reasonably represents 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 in such benefits.²

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

² *Carla Letcher*, 46 ECAB 452 (1995).

reasonably represent his wage-earning capacity. If the actual earnings do not 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.³

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employees' 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, and 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 labor market should be made through contact with the state employment service or other applicable service.⁴ Finally, application of the principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.⁵

The Office identified the position of information clerk from the three listed by the rehabilitation counselor as the most consistent with appellant's background. The Office used the information provided by the rehabilitation counselor of the prevailing wage rate of information clerk.

The record indicates that the selected position of information clerk was within appellant's physical limitations and vocational ability as set by Dr. Reiswig in his August 17, 1995 work capacity evaluation, and was reasonably available in the labor market. Dr. Lawrence's opinion to the contrary does not give a rationalized explanation as to why appellant could not work in the position of information clerk due to his back injury.⁶ Accordingly, under 5 U.S.C. § 8115, the Office properly determined that appellant's wage-earning capacity was represented by the

³ 5 U.S.C. § 8115, *James Henderson, Jr.*, 51 ECAB ____ (Docket No. 98-616, issued January 10, 2000).

⁴ *Francisco Bermudez*, 51 ECAB ____ (Docket No. 98-1395, issued May 11, 2000); *Dorothy Lams*, 47 ECAB 584, 586 (1996).

⁵ 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.303.

⁶ The Board notes that subsequently acquired impairments unrelated to the injury are excluded from consideration in the determination of work capabilities. *William Ray Fowler*, 31 ECAB 1817 (1980); *see also James Henderson, supra* note 3.

position of information clerk. Her compensation is accordingly reduced to reflect his wage-earning capacity.⁷

The decisions of the Office of Workers' Compensation Programs dated June 8 and April 28, 1998 are hereby affirmed.⁸

Dated, Washington, DC
October 20, 2000

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

Valerie D. Evans-Harrell
Alternate Member

⁷ An employee's wage-earning capacity in terms of percentage is obtained by dividing the pay rate of the selected position by the current pay rate for the date-of-injury job; the wage-earning capacity in terms of dollars is computed by multiplying the pay rate for compensation purposes (defined at 20 C.F.R. § 10.5(a)(20)) by the percentage of wage-earning capacity and subtracting the result from the pay rate for compensation purposes to obtain the employee's loss of wage-earning capacity; see 20 C.F.R. § 10.303; see also *Albert C. Shadrick supra* note 5. The Office properly performed these calculations.

⁸ After the issuance of the June 8, 1998 decision, appellant attempted to submit additional evidence in support of the claim. The Board's review is limited to the evidence that was before the Office at the time of its final decision. The Board therefore cannot consider this evidence. 20 C.F.R. § 501.2(c).