

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of VERNON D. BARBARE and DEPARTMENT OF THE INTERIOR,  
NATIONAL PARK SERVICE, Fort Oglethorpe, GA

*Docket No. 02-641; Submitted on the Record;  
Issued October 1, 2002*

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DECISION and ORDER

Before MICHAEL J. WALSH, COLLEEN DUFFY KIKO,  
MICHAEL E. GROOM

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

On July 8, 1999 appellant, a 58-year-old motor vehicle operator, sustained a traumatic injury in the performance of duty. The Office accepted his claim for type II open fracture of the right distal tibia and closed fracture of the upper end of the tibia shaft. Appellant underwent 3 surgical procedures performed on July 8, August 27, 1999 and September 1, 2000 and was placed on the periodic compensation rolls.

Dr. Martin H. Redish, appellant's orthopedic surgeon, released appellant to return to full-time, limited duty effective December 2, 1999. He noted that appellant was capable of sedentary employment. In a December 2, 1999 report, Dr. Redish indicated that appellant could work eight hours a day, subject to no walking or standing over one hour a day.

On December 7, 1999 an Office rehabilitation counselor reported that the employing establishment could not accommodate appellant's work restrictions and appellant was placed in a vocational rehabilitation program. As a component of his rehabilitation program, appellant enrolled in a data management program at the Northwestern Technical Institute. He completed his studies in June 2001 and obtained certification as a computer information specialist. Following graduation, appellant was provided 90 days of job placement assistance, however, he did not secure suitable employment during that timeframe.

During the rehabilitation program, appellant was followed by Dr. Redish, who submitted periodic treatment notes in which he addressed appellant's physical therapy and ability to increase standing for longer periods of time. On February 29, 2000 Dr. Redish noted that appellant was walking without external support and x-rays revealed the fracture looked fairly solid and healed in good position. He gave additional work restrictions and advised appellant to

return in three months.<sup>1</sup> On May 30, 2000 Dr. Redish noted that appellant's fracture was completely healed in good position with just a mild degree of lack of ankle dorsiflexion. He advised that appellant was discharged from treatment, with restrictions of unlimited standing, no lifting of over 60 pounds and no repetitive climbing or squatting. On September 1, 2000 Dr. Redish removed the two ankle screws from appellant's lower extremity. On August 10, 2001 he reported on appellant's one-year follow up examination and noted appellant was doing well. Dr. Redish addressed appellant's complaint of some pain around the big toe and recommend that he wear a stiffer shoe. He stated that appellant's ankle looked good and that the bone was solidly healed on x-ray. Dr. Redish advised appellant to return on an as needed basis.

On October 29, 2001 the Office issued a notice of proposed reduction of compensation. The Office advised appellant that the position of insurance clerk, with potential weekly earnings of \$499.27, was both vocationally and medically suitable and, therefore, represented appellant's wage-earning capacity. The Office referenced Dr. Redish's findings as indicative of appellant's current physical condition. Appellant did not respond to the October 29, 2001 notice.

By decision dated November 28, 2001, the Office reduced appellant's wage-loss compensation to zero.

The Board finds that the Office properly found that the selected position of insurance clerk reasonably represented appellant's wage-earning capacity.

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.<sup>2</sup> An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.<sup>3</sup> 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 reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent the employee's wage-earning capacity or if the employee has no actual wages, the 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 factors and circumstances which may affect his wage-earning capacity in his or her disabled condition.<sup>4</sup>

When the Office makes a medical determination of partial disability and of specific 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, *Dictionary of Occupational Titles* or otherwise available in the open labor market, that fits the employee's capabilities with regard to

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<sup>1</sup> On April 29, 2000 Dr. Redish increased appellant to no standing over 4 hours a day and restricted lifting to 40 pounds, with no squatting or climbing.

<sup>2</sup> *James B. Christenson*, 47 ECAB 775, 778 (1996); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

<sup>3</sup> 20 C.F.R. §§ 10.402, 10.403 (1999); see *Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

<sup>4</sup> 5 U.S.C. § 8115(a); see *Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

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 service or other applicable service. 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.<sup>5</sup>

The Office must initially determine appellant's medical condition and work restrictions before selecting an appropriate position that reflects appellant's vocational wage-earning capacity. In this case, the Office made a medical determination that appellant was partially disabled based on the reports of his attending physician, Dr. Redish, who advised as early as December 2, 1999 that appellant was no longer totally disabled due to his accepted fracture and that he could work eight hours a day subject to specified physical limitations. Thereafter, Dr. Redish reported on subsequent examination of appellant and a procedure in which two screws were removed from the site of the surgery on September 1, 2000. He advised that appellant's physical capacity improved and increased the number of hours per day he could stand and the weight of lifting. On August 10, 2001 Dr. Redish advised that his physical examination revealed the ankle in good condition with a solidly healed bone and discharged appellant to return as needed. The Board finds that the reports of Dr. Redish constitute the weight of medical opinion in this case and establish appellant's physical capacity to perform the duties of the selected position of insurance clerk. The physical demand of that position is described as sedentary in nature, with no climbing or squatting as prohibited by Dr. Redish.

Appellant's rehabilitation counselor determined that appellant could perform the position on insurance clerk, *Dictionary of Occupation Titles* No. 201.387-014 and that appellant had completed a 12-month certification program in computer information that provided the necessary job skills for successful performance of the position. The duties of the insurance clerk position include compiling of records of insurance policies, filing records, keeping calendar of premiums due and expiration dates, preparing vouchers and verification of premium payments. Other duties include compiling statistical information for reports to insurance companies and preparation of amortization schedules. The position is performed primarily indoors, away from extremes of temperatures and required a vocational preparation period of from four to six months. The rehabilitation counsel confirmed with the State Employment Service that the position was reasonably available in appellant's commuting area and performed full time at a weekly wage of \$497.60.

The Board finds that the Office considered the proper factors, such as the availability of suitable employment and appellant's physical limitation resulting from his accepted ankle fracture, his usual employment and age and employment qualifications, in determining that the position of insurance clerk represented his wage-earning capacity.<sup>6</sup> The weight of the evidence of record establishes that appellant has the requisite physical ability, skill and experience to perform the duties of the position and that such positions are reasonably available within the general labor market of his commuting area. Therefore, the Office properly determined that the position of insurance clerk reflected appellant's wage-earning capacity.

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<sup>5</sup> *Albert C. Shadrick*, 5 ECAB 376 (1953).

<sup>6</sup> *See Richard Alexander*, 48 ECAB 432 (1997); *Clayton Varner*, 37 ECAB 248 (1985).

The November 28, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
October 1, 2002

Michael J. Walsh  
Chairman

Colleen Duffy Kiko  
Member

Michael E. Groom  
Alternate Member