

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of ANDREW D. COLEY and DEPARTMENT OF TREASURY,  
BUREAU OF THE MINT, East Philadelphia, PA

*Docket No. 03-1513; Submitted on the Record;  
Issued November 12, 2003*

---

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation to reflect his wage-earning capacity in the selected position of customer service clerk.

On October 13, 1999 appellant, then a 50-year-old metal forming blanking machine operator, filed a traumatic injury claim alleging that he injured his left forearm while in the performance of his federal duties. The Office accepted the claim for laceration/open wound at the wrist with tendon and radial nerve injury and authorized surgery performed on October 14, 1999.<sup>1</sup> Appellant stopped working immediately and returned to light duty on November 10, 1999. His temporary appointment expired effective September 26, 2000, therefore, effective September 27, 2000, he began receiving temporary total disability compensation.

On June 16, 2000 appellant took part in a functional capacity evaluation, upon which he was provided permanent work restrictions. The restrictions included no lifting, pushing, pulling up to 15 pounds, no climbing, repetitive use of left hand or exposure to cold or vibrations, occasionally reaching overhead and no operating equipment such as a forklift. On July 18, 2000 Dr. James Raphael, a Board-certified orthopedic surgeon, reiterated the permanent restrictions outlined by the functional capacity evaluation and limited appellant's occasional overhead reaching to 20 pounds. Dr. Raphael submitted regular monthly progress reports, which continued appellant's modified work restrictions.

---

<sup>1</sup> On December 18, 2002 the Office further authorized a left radial sensory nerve transportation procedure on December 18, 2002 due to appellant's complaints of chronic pain. The procedure was indicated to potentially increase function of the left hand. The Board notes that appellant filed a Form CA-7 claim for a schedule award due to the accepted injury on September 18, 2000; however, the record does not reflect that a schedule award has been issued in this case.

On December 28, 2000 appellant was referred for vocational rehabilitation services. In a report dated June 1, 2001, Dennis L. Mohn, appellant's rehabilitation specialist, determined that, based on appellant's psycho/vocational testing and transferable skills, appellant was an appropriate candidate for the sedentary positions of dispatcher and customer service clerk. Mr. Mohn determined that appellant was vocationally prepared for the positions selected because he participated in approximately three to six months of vocational services. He indicated that appellant had a high school education, was able to read and balance a checkbook and owned a personal computer. Mr. Mohn further stated that appellant had a work history as a group leader and an interest in working with people. He further determined that the positions were being performed in sufficient numbers so as to make it reasonably available to appellant in his commuting area. As vocational efforts did not result in reemployment, the Office consulted with the rehabilitation specialist and determined that out of the two positions selected for appellant, the sedentary position of customer service clerk represented appellant's wage-earning capacity. The weekly wage for the customer service clerk position was \$331.20 for full time.

On August 1, 2001 the Office issued a notice of proposed reduction of compensation based on its determination that appellant had the capacity to earn wages as a customer service clerk. In a letter dated August 29, 2001, appellant's representative stated that, based on appellant's pain complaints and limitations outlined by his physician, that it would be impossible for appellant to perform the selected position. The representative further stated that appellant suffered from considerable stress and anxiety and would require a period of professional counseling to help him adjust to his disability and current life status. Appellant's counsel also argued that appellant tested with low levels in the reading and was of low average intelligence and, therefore, the position was unsuitable.

On February 15, 2002 the Office finalized the loss of wage-earning capacity determination and adjusted appellant's compensation effective February 24, 2002. The Office found that the medical evidence established that appellant was no longer totally disabled and that the duties of the position of customer service clerk reflected his wage-earning capacity.<sup>2</sup>

On March 12, 2002 appellant through counsel requested an oral hearing. Appellant argued that his permanent left hand injury would never improve and that he had begun to have significant problems with his right hand making it impossible to perform the duties of the selected position. Appellant's counsel further argued that appellant's compensation was not based on his original salary but based on the salary he received when he was placed into the lesser paying position, which was grossly unfair.

An oral hearing was held on December 9, 2002 and appellant with counsel offered testimony. Following the hearing, appellant's counsel submitted a letter dated January 10, 2003, in which she maintained that the selected position, which required reaching, handling and fingering was unsuitable for appellant. She also submitted supplemental progress reports from Dr. Raphael from March 28, 2000 through December 31, 2002, which had been previously

---

<sup>2</sup> The record reflects that the Office issued a preliminary finding of overpayment on June 25, 2003 advising appellant that he was overpaid benefits in the amount of \$8,796.89 due to a delay in reducing appellant's compensation for wage-earning capacity purposes. The record does not contain a final decision regarding an overpayment of compensation, therefore, the issue will not be addressed on appeal.

submitted and a July 25, 2001 report from Dr. Barry Marks, an osteopath, who performed a consultative examination at the request of the Social Security Administration.

In the July 25, 2001 report, Dr. Marks reviewed appellant's medical and employment history and his physical examination of appellant and concluded that appellant would not be able to do anything with his left hand, including reaching, fingering, lifting and handling because of chronic pain syndrome and reflex sympathetic dystrophy syndrome. He noted that the examination of appellant's right arm was normal and that there was normal range of motion of in his cervical and lumbar areas. In the progress reports resubmitted by Dr. Raphael, he discussed that overall appellant had done fairly well but had some residual problems including chronic pain related to his left nerve injury and a new onset of some pain in the right wrist. Dr. Raphael discussed the possibility of appellant undergoing nerve blocks, radial sensory nerve transportation on the left and splinting and reevaluation on the right. He maintained that appellant could continue modified work.

By decision dated March 5, 2003, the hearing representative found that the Office met its burden of proof in reducing appellant's compensation.

The Board finds that the position of customer service clerk represents appellant's wage-earning capacity.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened to justify termination or modification of compensation.<sup>3</sup> If a claimant is no longer totally disabled, but has residual partial disability, the Federal Employees' Compensation Act<sup>4</sup> provides that monthly monetary compensation shall be paid equal to 66 2/3 percent of the difference between monthly pay and wage-earning capacity.<sup>5</sup>

Under section 8115(a) of the 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>6</sup>

The Office's procedures pertaining to vocational rehabilitation services emphasize returning partially disabled employees to suitable employment.<sup>7</sup> If the employment injury

---

<sup>3</sup> *Raymond W. Behrens*, 50 ECAB 221, 222 (1999); *Bettye F. Wade*, 37 ECAB 556, 565 (1986).

<sup>4</sup> 5 U.S.C. §§ 8101-8193.

<sup>5</sup> 5 U.S.C. § 8106(a).

<sup>6</sup> *Richard Alexander*, 48 ECAB 432, 434 (1997); *Pope D. Cox*, 39 ECAB 143, 148 (1988).

<sup>7</sup> Federal (FECA) Procedure Manual, Part -- 2 Claims, *Vocational Rehabilitation Services*, Chapter 2.813 (December 1993).

prevents the injured worker from returning to the job held at the time of injury, vocational rehabilitation services are provided to assist the employee in placement with the previous employer in a modified position or, if not feasible, developing an alternative plan based on vocational testing, which may include medical rehabilitation, training and/or placement services.<sup>8</sup>

After the Office makes a medical determination of partial disability and specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by the Office or to an Office specialist for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open labor market; this position must fit that employee's capabilities with regard to his physical limitations, education, age and prior experience.<sup>9</sup> Once this selection is made, a wage rate and the availability of the selected position in the open labor market should be determined through contact with the state employment service or other applicable service.<sup>10</sup>

In this case, the Office considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment and age and employment qualifications, in determining that the position of customer service clerk represented appellant's wage-earning capacity. The Office selected the position of customer service clerk (No. 249.362.026) after determining that appellant had not been placed by a new employer within the recommended period of rehabilitation. The physical requirements of the selected sedentary customer service clerk position includes lifting up to 10 pounds and requires the ability to reach, handle, see, hear and finger. The general duties of this position are described as:

“Process orders for material or merchandise received by mail, telephone or personally from customer or company employee, manually or using computer or calculating machine. Edits orders received for price and nomenclature. Informs customers of unit prices, shipping date(s), anticipated delay and any additional information needed by customer, using mail or telephone. Writes or types order forms and enter data into computer to determine total cost for customer. Records or files copy of orders received according to expected delivery date. May ascertain credit rating of customer.”

Dr. Raphael, a Board-certified orthopedic surgeon and appellant's treating physician, stated in a July 18, 2000 Form OWCP-5 that, based on a functional capacity evaluation performed June 16, 2000, appellant could work full modified duty, with no pushing, pulling or lifting over 15 pounds, occasional reaching above the shoulder of less than 20 pounds, no climbing or repetitive movements of the left wrist and limitation of fine motor tasks of the left.

Appellant through counsel argued that he was unable to use his left arm and that he additionally had other conditions that render the selected position medically unsuitable including

---

<sup>8</sup> *Id.* at 2.813.6(b).

<sup>9</sup> *Dorothy Lams*, 47 ECAB 584, 586 (1996).

<sup>10</sup> *James R. Verhine*, 47 ECAB 460, 464 (1996); *Albert C. Shadrick*, 5 ECAB 376 (1953).

chronic pain syndrome, compensating right hand problems, anxiety, stress and depression. There is no medical evidence in the record that any of these conditions are disabling or affect his ability to perform the sedentary duties of the selected position.

The Board also finds that the Office considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment and age and employment qualifications, in determining that the position of customer service clerk represented appellant's wage-earning capacity.<sup>11</sup> The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to work in this field in a light position and that such positions were reasonably available within the general labor market of appellant's commuting area. Therefore, the position of customer service clerk properly reflected appellant's wage-earning capacity.

Appellant argued that his reading and arithmetic skills were below standard and that appellant had a below average level of intelligence. The record reveals that appellant has a high school education, is able to read and utilizes a personal computer. Further, vocational testing indicated that appellant had showed an interest in working with people and that he has work experience of serving as a group leader. Appellant's evidence and arguments were considered by the Office, which was not persuaded that its proposal was in error and the loss of wage-earning capacity was finalized and affirmed following a hearing on the issue. The Board accordingly finds that the evidence of record establishes that the selected position of customer service clerk was medically and vocationally appropriate.

The Board further finds, however, that the Office failed to properly calculate appellant's loss of wage-earning capacity.

The loss of wage-earning capacity is determined in accordance with the principles set forth in *Shadrick*.<sup>12</sup> The Office, in the March 5, 2003 decision, briefly discussed how it calculated appellant's weekly pay rate to reduce compensation to reflect his wage-earning capacity; however, the Office indicated that it had not formally adjudicated that issue. The Office reported that appellant's pay rate when injured was \$313.38 per week although the record shows that his hourly pay of \$13.58, which at 40 hours a week, actually equaled \$543.20. The Office apparently applied section 8114(d)(3) since appellant was noted to have been in a temporary appointment and determined that the pay rate should have been calculated using \$13.58 an hour, 8 hours a day, 150 days a year, divided by 52 weeks, which was equal to \$313.38 as described under section 8114(d)(3) of the Act. As a temporary employee in a position that would not have afforded employment for substantially a whole year, appellant's pay rate is determined under section 8114(d)(3).<sup>13</sup> The Act<sup>14</sup> provides for different methods of computation of average annual earnings depending on whether the employee worked in the

---

<sup>11</sup> See *Donald W. Woodall*, 49 ECAB 415, 421 (1998) (finding that the Office followed its established procedures for determining that the position of gate guard represented appellant's wage-earning capacity).

<sup>12</sup> See *Albert C. Shadrick supra* note 10.

<sup>13</sup> 5 U.S.C. § 8114(d)(3).

<sup>14</sup> 5 U.S.C. §§ 8101-8193.

employment, in which he was injured substantially for the entire year immediately preceding the injury and would have been afforded employment for substantially a whole year, except for the injury. This section was apparently utilized in calculating wage-earning capacity even though his temporary appointment ran from at least November 10, 1999, when he returned to light duty following surgery through September 2000, which was essentially a whole year. In any case, the Office has not sufficiently explained its application of the established procedures for determining appellant's employment-related loss of wage-earning capacity, using the principles set forth in the *Shadrick* decision. Therefore, the case shall be remanded to the Office for a proper decision utilizing the principle set forth in *Shadrick*.

The decision of the Office of Workers' Compensation Programs dated March 5, 2003 is hereby set aside and the case remanded for further action consistent with this decision of the Board.

Dated, Washington, DC  
November 12, 2003

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member