

U. S. DEPARTMENT OF LABOR
Employees' Compensation Appeals Board

In the Matter of CECIL H. BROYLES, JR. and DEPARTMENT OF THE AIR FORCE,
LANGLEY AIR FORCE BASE, Va.

*Docket No. 95-1314; Submitted on the Record;
Issued January 6, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation benefits, effective January 8, 1995, based on its determination that the selected position of cashier fairly and reasonably represented appellant's wage-earning capacity.

The Board finds that the Office properly reduced appellant's compensation benefits, effective January 8, 1995, based on its determination that the selected position of cashier fairly and reasonably represented appellant's wage-earning capacity.

Once the Office accepts a claim, it has the burden of justifying termination of modification of compensation.¹ If an employee's disability is no longer total, but the employee remains partially disabled, the Office may reduce compensation benefits by determining the employee's wage-earning capacity.² 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 vocational qualifications, and the availability of suitable employment.³ After the Office makes a medical determination of partial disability and of special 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's *Dictionary of Occupational Titles* or otherwise available in the open market, that 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 open labor market should be made through contact with the state employment services or other applicable services. Finally, application of

¹ *Betty F. Wade*, 37 ECAB 556 (1986).

² 20 C.F.R. § 10.303(a).

³ *Samuel J. Chavez*, 44 ECAB 431 (1993).

the principles set forth in the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.⁴

In the present case, the Office accepted that appellant sustained a herniated lumbar disc at L5-S1 on the left side and left leg sciatica due to an October 5, 1976 employment injury. The Office authorized a lumbar laminectomy on October 29, 1976 and placed appellant on the periodic rolls effective March 3, 1977.

The record indicates that, while receiving compensation for total wage-loss disability from the Office, appellant worked from 1979 to 1988 at an appliance center. In his job, appellant lifted over 100 pounds and traveled 100 miles per day. By decision dated November 28, 1989, the Office found that appellant received an overpayment of compensation in the amount of \$146,817.74 because he worked from January 1, 1979 through September 23, 1988 while receiving compensation for total disability. By decision dated June 6, 1990, the Office found that appellant forfeited his entitlement to compensation from January 1, 1979 to October 5, 1988 under 5 U.S.C. § 8106 because he knowingly failed to report his earnings during this period. In an accompanying memorandum, the Office found that the overpayment of compensation caused by the forfeiture should be recovered by deducting 25 percent from appellant's continuing compensation benefits and applying the amount to the overpayment. On December 4, 1990 appellant was convicted of theft of government property and for making false statements in order to obtain benefits from the Office.

In a work restriction evaluation dated October 26, 1992, Dr. David E. Lannick, a Board-certified orthopedic surgeon, opined that appellant was capable of performing light-duty employment with restrictions. The Office, therefore, properly found that appellant was no longer totally disabled for work as a result of his employment injuries, and referred appellant for vocational rehabilitation.

The rehabilitation counselor, after conducting an extensive job search on behalf of appellant, identified three occupations listed in the Department of Labor's *Dictionary of Occupational Titles* which were within appellant's work restrictions, including cashier, order clerk, and telephone solicitor. The counselor performed a labor market survey and determined the prevailing wage rate and the availability in the open labor market of the position.

In a work restriction evaluation dated May 11, 1993, Dr. Lannick opined that appellant could sit, walk, kneel, stand, and lift up to 10 pounds for 2 hours per day, climb for 1 hour per day, but could not bend, squat or twist.

In a report dated September 1, 1994, Dr. Douglas L. Griffith, a Board-certified neurosurgeon, found that appellant could perform light-duty employment with restrictions on lifting over 15 pounds regularly and bending.

On December 16, 1994 the Office provided appellant with a notice of proposed reduction of compensation indicating that the position of cashier fairly and reasonably represented his

⁴ *Albert C. Shadrick*, 5 ECAB 376 (1953).

wage-earning capacity. The Office advised appellant that if he disagreed with the proposed action, he could submit additional factual or medical evidence relevant to his capacity to earn wages.

By letter dated January 6, 1995, appellant advised the Office that he could not perform the position of cashier due to his limited education and physical restrictions. Appellant resubmitted the October 1992 work restriction evaluation by Dr. Lannick.

By decision dated January 18, 1995, the Office reduced appellant's compensation benefits on the grounds that the selected position of cashier represented his wage-earning capacity.

The Office has stated that in some situations extensive rehabilitation efforts will not succeed. In such circumstances, the Office procedures instruct the vocational rehabilitation counselor to identify positions from the Department of Labor's *Dictionary of Occupational Titles*, and proceed with information from the labor market survey to determine the availability and wage rate of the position.⁵ The Office does not guarantee that an employee will obtain employment in the selected position, nor is the loss of wage-earning capacity determination erroneous if the employee is unable to secure employment in the selected position.⁶

As the medical evidence established that appellant could perform light work with restrictions, and as the Office followed established procedures for determining the vocational suitability and reasonable availability of the position selected, the Board finds that the Office, having given due regard to the factors specified at section 8115(a) of the Act, properly reduced appellant's monetary compensation on the grounds that he has the capacity to earn wages as a cashier.

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8 (December 1993).

⁶ *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

The decision of the Office of Workers' Compensation Programs dated January 18, 1995 is affirmed.

Dated, Washington, D.C.
January 6, 1998

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member