

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICHARD ANTON KUBETZ and U.S. POSTAL SERVICE,
POST OFFICE, Green Bay, Wis.

*Docket No. 96-1881; Submitted on the Record;
Issued June 16, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation to zero to reflect his wage-earning capacity in the selected position of assembler of small products.

On January 5, 1991 appellant, then a 26-year-old casual clerk and temporary employee, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that on January 2, 1991 he injured his lower back and right hip when he pulled mail off of APC. The Office initially accepted the claim for no lost time, but later accepted the claim for a herniated disc. Appellant stopped working at the employing establishment on February 17, 1991 as there was no work available for casuals. Appellant was placed on the periodic rolls for temporary total disability effective February 18, 1992.

In a letter dated October 24, 1994, the Office advised appellant that it proposed to reduce his compensation based on his wage-earning capacity in the selected position of assembler of small parts. By decision dated September 8, 1995, the Office reduced appellant's compensation based upon an earning capacity of \$306.00 per week in the selected position effective September 17, 1995.

The Board has reviewed the record and finds that the Office properly reduced appellant's compensation to zero.

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.¹

¹ *Carla Lechter*, 46 ECAB (1995)

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 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 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.²

When the Office makes a 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'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 general labor market in the claimant's commuting area should be made.³ Finally, application of the principles in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.⁴

In the present case, the Office selected the position of assembler, small products (*Dictionary of Occupational Titles* No. 706-684-022). The physical requirements of the position includes lifting of up to 20 pounds and the work is 75 percent inside or more and requires 30 days experience. With regard to appellant's physical restrictions, an attending physician, Dr. Robert A. Gruesen, completed a work capacity evaluation (OWCP-5c) dated September 2, 1994. Dr. Gruesen indicated that appellant could work 8 hours per day, with a lifting restriction of 50 pounds and 35 pounds of repetitive lifting per day. Dr. Gruesen also checked that appellant could perform repetitive motions of the wrist and elbow.

There is no indication that the selected position is outside the physical requirements imposed by Dr. Gruesen. The assembler, small products position has a maximum of 20 pounds lifting and there is no indication that it required physical activity beyond the stated limitations. The Board finds that the evidence establishes the assembler, small products position was selected with due regard to appellant's degree of physical impairment.

As noted above, the "availability of suitable employment" must also be considered. A rehabilitation specialist indicated on November 25, 1994 that the assembler, small products was being performed in sufficient numbers in his commuting area. The Office noted that it used the Wisconsin Career Information System Occupational Handbook 1993-1994: Center on Education and Work, School of Education, the 1992 Wage Survey, Wisconsin DILHR Lake Michigan SDA and telephone contact with the Wisconsin State Employment Service Representative to determine that there are sufficient openings in his commuting area. In a final report dated July 29, 1994, the private rehabilitation counselor advised that based upon appellant's

² See *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992) see also 5 U.S.C. § 8115(a).

³ See *Dennis D. Owen*, 44 ECAB 475 (1993).

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

transferable skills appellant was qualified and could perform the work as an assembler for small products of sales clerk.⁵

Since an Office rehabilitation specialist did opine that the selected position was reasonably available, noting the number of jobs being performed and appellant's participation in a reemployment program, the Board finds that the evidence is sufficient to establish "availability" under 5 U.S.C. § 8115.

Appellant's primary argument appears to be that he is unable to perform the selected position and that he does not have the training or education for any other type of work. Dr. Gruesen, appellant's treating physician, listed lifting restriction of 50 pounds and 35 pounds of repetitive lifting per day which is within the physical capabilities of the selected position. In addition, the Office rehabilitation specialist selected the position of assembler small products based upon the physical restrictions noted by Dr. Gruesen, appellant's previous job experience checking small motors at Emerson's motor for one week and the assessment of the private rehabilitation counselor. Both the Office rehabilitation specialist and the private rehabilitation counselor found that appellant was qualified and able, based upon Dr. Gruesen's physical restrictions, to perform the selected position, and there is no probative evidence of record to the contrary.⁶

The record indicates, therefore, that the Office gave due regard to the factors enumerated under 5 U.S.C. § 8115(a) in determining that the position of assembler, small products represented appellant's wage-earning capacity. The rehabilitation specialist indicated that the wages for the position began \$7.65 per hour, or \$306.00 per week. The rehabilitation specialist indicated that the current wages for the position appellant held when injured was \$7.00 per hour, or \$280.00 per week. The Board finds that the Office properly reduced appellant's compensation to zero based on a wage-earning capacity of \$306.00 per week.

⁵ It is not necessary that a rehabilitation specialist find a job for appellant in the selected position, and being unsuccessful in obtaining jobs in the selected position does not establish that the position was not reasonably available; see *Samuel J. Chavez*, 44 ECAB 431 (1993).

⁶ Subsequent to the proposed notice of reduction, appellant submitted a functional capacity evaluation by a therapist which noted lifting restrictions of 25 pounds floor to waist and 35 pounds horizontal lift maximum, 35 pounds maximum carrying, appellant can tolerate walking for 6-33 percent of an 8 hour work day and standing for only 1-5 percent of the 8 hour day. (R 344-352) The therapist opined that appellant could not perform his the demands of a postal worker. The limitations noted by the therapist are within the requirements of the selected position.

The decision of the Office of Workers' Compensation Programs dated September 8, 1995 is hereby affirmed.

Dated, Washington, D.C.
June 16, 1998

George E. Rivers
Member

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member