

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VINCENT C. GRIMALDI, SR. and DEPARTMENT OF THE INTERIOR,
MINUTE MAN NATIONAL HISTORICAL PARK, Concord, Mass.

*Docket No. 96-1447; Submitted on the Record;
Issued September 14, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation, effective March 31, 1996, based on his capacity to perform the duties of an office manager.

The Board has reviewed the case record and finds that the Office properly reduced appellant's compensation on the basis that he was capable of earning the wages of an office manager.

Under the Federal Employees' Compensation Act,¹ once the Office has accepted a claim and paid compensation benefits, it has the burden of proof to establish that an employee's disability has ceased or lessened, thus justifying termination or modification of those benefits.² An injured employee who is unable to return to the position held at the time of injury or to earn equivalent wages but who is not totally disabled for all gainful employment is entitled to compensation computed on the loss of wage-earning capacity.³

Wage-earning capacity is the measure of the employee's ability to earn wages in the open labor market under normal employment conditions.⁴ Section 8106(a)⁵ of the Act provides for compensation for the loss of wage-earning capacity during an employee's disability by paying

¹ 5 U.S.C. §§ 8101-8193 (1974).

² *James B. Christenson*, 47 ECAB ____ (Docket No. 95-1106, issued September 5, 1996); *Wilson L. Clow, Jr.*, 44 ECAB 157, 170 (1992).

³ 20 C.F.R. § 10.303(a); *Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

⁴ *Dennis D. Owen*, 44 ECAB 475, 479 (1993); *Hattie Drummond*, 39 ECAB 904, 907 (1988).

⁵ 5 U.S.C. § 8106(a).

the difference between his monthly pay and his monthly wage-earning capacity after the beginning of the partial disability.⁶

Section 8115 provides that the wage-earning capacity of an employee is determined by his actual earnings if these fairly and reasonably represent his or her wage-earning capacity.⁷ If the actual earnings do not fairly and reasonably represent the employee's wage-earning capacity, or if the employee has no actual wages, wage-earning capacity is determined by considering the nature of the injury, the degree of physical impairment, the employee's usual employment, age, and 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.⁸ A job in the position selected for determining wage-earning capacity must be reasonably available in the general labor market in the commuting area in which the employee lives.⁹

In this case, appellant, then a 42-year-old maintenance mechanic foreman, filed a notice of occupational disease on May 10, 1991, claiming stress resulting from his employment. The Office accepted the claim for situational adjustment reaction with depressed mood and paid appropriate compensation.

Following efforts at returning appellant to work with the employing establishment and a medically indicated relocation, the Office referred appellant to a rehabilitation counselor on January 9, 1995. She met with appellant in March 1995 and appellant signed a job search agreement on May 11, 1995.

On November 27, 1995 the Office issued a notice of proposed reduction of compensation, based on appellant's wage-earning capacity of \$28,000.00 per year as an office manager. The Office noted that appellant had exceeded the 90-day period of assistance in job placement, which began on July 22, 1995, but granted a 30-day extension.

By letter dated December 24, 1995, appellant opposed the proposed reduction on the grounds that the Office failed to follow its job placement procedures and that appellant's "exemplary" but unsuccessful efforts to secure an office manager's position demonstrated that he did not possess the necessary qualifications.

On February 20, 1996 the Office made the proposed reduction final, effective March 31, 1996, on the grounds that the position of office manager fairly and reasonably represented appellant's wage-earning capacity. The Office noted that the rehabilitation counselor had

⁶ 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, as 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. 20 C.F.R. § 10.303(b).

⁷ 5 U.S.C. § 8115(a); *Lawrence D. Price*, 47 ECAB ____ (Docket No. 93-2007, issued October 4, 1995).

⁸ *Mary Jo Colvert*, 45 ECAB 575, 579 (1994); *Samuel J. Chavez*, 44 ECAB 431, 436 (1993).

⁹ *Barbara J. Hines*, 37 ECAB 445, 450 (1986).

complied with job placement requirements in meeting with appellant, referring him to potential employers, and determining that the position of office manager was suitable to appellant's background and training and reasonably available in his commuting area.

The Board finds that the medical evidence establishes that appellant is capable of performing the same type of work as he did at the time of the onset of his emotional condition, except that he cannot return to his previous employer. Both the August 22, 1994 report of Dr. Robert L. Leighton, appellant's treating psychiatrist, and the October 28, 1993 opinion of the impartial medical examiner, Dr. Paul D. Garson, Board-certified in psychiatry and neurology, concluded that appellant was mentally able to return to work but that he should not be employed in the location in which the emotional trauma occurred and should relocate to be nearer his family. These reports do not establish appellant's total disability for work.

The Board also finds that the selected position fairly and reasonably represents appellant's wage-earning capacity. After placement efforts with the employing establishment ultimately proved fruitless and appellant was referred to the rehabilitation counselor,¹⁰ she identified the office manager position, listed in the Department of Labor's *Dictionary of Occupational Titles*, as vocationally suitable for appellant, noting the similarities between the general duties of an office manager and appellant's specific tasks as a foreman supervisor of maintenance.

The record shows that appellant's experience included supervision of personnel, budget development and management, organizational duties, problem-solving, and initiation of time and money-saving procedures, and that these skills are reasonably transferable to the requirements of an office manager position—coordinating personnel activities, analyzing and organizing office procedures, planning cost reduction programs, and preparing reports. As the rehabilitation counselor stated in her January 29, 1996 report, a labor market survey and several employers who had not hired appellant indicated that his qualifications and skills were suitable for the job openings for which he had applied. Further, appellant received extensive training in supervisory management during his tenure at the employing establishment. Therefore, the position of office manager is vocationally suitable.

The Board also finds that the selected position of office manager was reasonably available in appellant's geographic area within a reasonable commuting distance. The record reveals that appellant lived about midway between Poughkeepsie and Albany, New York, and indicated that he would seek work in both areas. Appellant's own account of his job-seeking activities demonstrates that he applied for positions in five counties. The rehabilitation counselor reported on January 29, 1996 that the state agency had confirmed numerous job openings for office manager or administrator in the Albany-Poughkeepsie area during the past three months. While

¹⁰ The Office's procedures regarding vocational rehabilitation emphasize returning partially disabled employees to suitable work. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Vocational Rehabilitation Services*, Chapter 2.813 (December 1993). If vocational rehabilitation is unsuccessful, the rehabilitation counselor will prepare a final report listing two or three jobs which are medically and vocationally suitable.

appellant may have been unsuccessful in being selected, there is no evidence in the record that jobs were not reasonably available within his commuting area.¹¹

Appellant argued that the rehabilitation counselor failed to document adequately her efforts to assist appellant in obtaining work and failed to follow Office procedures in providing job placement and determining suitable vocational goals.

The Office provides vocational rehabilitation to disabled claimants but is not an employment agency; while the Office is obligated by the statute to assist claimants under the Act to return to work, a claimant has the duty to seek and obtain suitable employment.¹² Unsuccessful efforts do not entitle a claimant to continuing disability compensation.

In this case, the January 29, 1996, November 14, October 25, July 22 and May 22, 1995 reports from the rehabilitation counselor detailed her ongoing efforts in contacting and assisting appellant in his job search. As the rehabilitation counselor noted, appellant was strongly motivated to find work and waived further psychological testing and vocational training because he “wants to work!” In letters dated November 14 and 28, 1995, the rehabilitation counselor advised appellant of three job openings, for which he subsequently applied. Thus, the Board finds that the Office provided the required assistance to appellant in obtaining work.

Moreover, the Office used the financial information provided by the rehabilitation counselor concerning the prevailing wage rate for an office manager in the area and properly followed its established procedures¹³ for determining appellant’s wage-earning capacity.¹⁴ Accordingly, the Board finds that the Office has met its burden of justifying a reduction in appellant’s compensation for total disability.

¹¹ See *Dorothy Lams*, 47 ECAB ____ (Docket No. 94-1577, issued May 8, 1996) (finding that appellant failed to submit evidence specifically showing the unavailability of the selected position in his immediate labor market).

¹² *Samuel J. Chavez*, 44 ECAB 431, 436 (1993).

¹³ The Office’s procedures governing the determination of wage-earning capacity based upon a selected position are set forth in Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.814.8 (December 1993).

¹⁴ See *Phillip S. Deering*, 47 ECAB ____ (Docket No. 94-2050, issued August 20, 1996) (finding that the Office properly applied the principles set forth in *Albert C. Shadrick*, 5 ECAB 376 (1953), for determining appellant’s loss of wage-earning capacity).

The February 20, 1996 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
September 14, 1998

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member