

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARILYN J. CARTER and DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF INVESTIGATION, Quantico, Va.

*Docket No. 96-1638; Submitted on the Record;
Issued September 8, 1998*

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 determined that appellant had the wage-earning capacity of a lawyer.

In the present case, the Office has accepted that appellant, an investigator, sustained contusion of the left patella, bilateral patellofemoral derangement and osteoarthritis of the left knee as a result of an injury occurring in the performance of her federal employment on May 14, 1980. Following the injury, appellant worked briefly at the employing establishment in a light-duty capacity until October 1980. Appellant thereafter stopped work and received payment of temporary total disability benefits. On June 23, 1994 appellant was referred by the Office for vocational rehabilitation. The vocational rehabilitation specialist ascertained that appellant had a Masters' Degree in counseling, a law degree; that appellant was licensed as a lawyer in New Jersey and New York; and that preinjury appellant had worked as an attorney and as a Professor at two colleges.

Appellant's vocational rehabilitation filed was closed on May 3, 1995. The Office's rehabilitation specialist noted that extensive placement efforts had been provided for nearly six months, but the claimant remained unemployed. By decision dated February 23, 1996, the Office adjusted appellant's compensation on the grounds that the evidence of record established that appellant had the ability to perform the position of lawyer.

The Board finds that the Office properly determined that the position of lawyer 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 in order to justify termination or modification of compensation benefits.¹ If the claimant is no longer totally disabled, but has residual partial disability, the Federal

¹ *Wilson Clow, Jr.*, 44 ECAB 157 (1992).

Employees' Compensation Act provides that disability monthly monetary compensation shall be paid equal to 66 2/3 percent of the difference between monthly pay and monthly 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

Pursuant to section 8115(a) of the Act,⁴ wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent her wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, her wage-earning capacity is determined with due regard to the nature of her injury, her degree of physical impairment, her usual employment, her age, her qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect her wage-earning capacity in her disabled condition.

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's *Dictionary of Occupational Titles* or otherwise available in the open labor 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 service or other applicable service. Finally, application of the principles set forth in the *Shadrick* decision⁵ shall determine the percentage of the employee's loss of wage-earning capacity.⁶

The Office obtained from appellant's treating physician, Dr. Kim Sloan, a work restriction evaluation dated August 14, 1995, wherein he indicated that appellant could return to work eight hours a day, in a sedentary position.

On April 11, 1995 the rehabilitation specialist compiled Forms CA-66 (Job Classification Form) for the positions of Assistant District Attorney and Lawyer. On the Form CA-66 for the lawyer position, the specialist, utilizing a job description provided by the Dictionary of Occupational Titles, noted that the position was sedentary in nature; that appellant had the education and vocational preparation of the position as appellant had completed law school, was admitted to the Bar in New Jersey and New York, had worked as an attorney from June 1979 to

² 5 U.S.C. § 8106(a).

³ See generally, 5 U.S.C. § 8115(a);

⁴ 5 U.S.C. § 8115(a)

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

⁶ *Dennis D. Owen*, 44 ECAB 475 (1993).

April 1980, as a legal assistant from January 1978 to April 1980, and that appellant had also taught business law; that the job was being performed in sufficient numbers so as to make it reasonably available to appellant within her commuting area; and that \$606.00 was an average entry level weekly wage for a lawyer. In an addendum report dated April 21, 1995, the rehabilitation specialist stated that appellant was employable in the lawyer position. The rehabilitation specialist noted that such jobs were reasonably available in the general labor market within a reasonable commute from her home and were within her medical restrictions as indicated by Dr. Sloan. The rehabilitation specialist also stated that an average entry level salary for a lawyer position, based upon appellant's education, experience and credential was \$31,512.00 per year.

The Board finds that the Office properly followed its prescribed procedures in determining appellant's wage-earning capacity. The specialist selected the position of lawyer from the Department of Labor's *Dictionary of Occupational Titles* to fit appellant's capacity for work, determined the position's prevailing wage rate and indicated that the lawyer position was within appellant's geographic locality and existed in sufficient numbers within the local and regional economy to render it suitable for placement consideration. Furthermore, the physical requirements of the selected position did not exceed the work tolerance of appellant as set forth by Dr. Sloan, appellant's treating physician.

Upon notification by the Office that her compensation would be adjusted, appellant argued that even the efforts of the vocational rehabilitation counselor could not secure employment for her as an attorney and that she had been out of the labor market for such period that she did not have the ancillary skills necessary to work as a lawyer.

The Board has held that the fact that the rehabilitation counselor was not able to secure a job offer for appellant in the selected position does not establish that the work is not reasonably available in the area.⁷ Rather, the position must be performed in sufficient numbers within the commuting area to be considered reasonably available. Further, the Board notes that the rehabilitation specialist determined that the position of lawyer was reasonably available in appellant's commuting area. The Board has held that because the rehabilitation specialist is an expert in the field of vocational rehabilitation, the claims examiner may rely on his or her opinion as to whether the job is reasonably available and vocationally suitable."⁸ The rehabilitation specialist properly concluded that lawyer positions were performed in such numbers within appellant's New Jersey commuting area to be considered reasonably available.

The Office also properly considered that appellant, while licensed and able to practice law, had been out of the labor market for many years. The Office evaluated appellant's ability to return to the labor market as a lawyer and found that appellant's vocational background was such that her current skill level would be equivalent to that of an entry level attorney. The Office properly utilized the wage rate for a entry level attorney in determining appellant's wage earning capacity.

⁷ *Supra* note 1.

⁸ *Id.*

In view of the foregoing, the Board finds that the Office properly found that appellant was no longer totally disabled as a result of her May 14, 1980 work injury and properly determined that the position of lawyer represented appellant's wage-earning capacity.⁹

The decision of the Office of Workers' Compensation Programs dated February 23, 1996 is hereby affirmed.

Dated, Washington, D.C.
September 8, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

⁹ The Board also notes that appellant has requested payment of a schedule award. The Office has not, however, yet issued a decision regarding appellant's entitlement to a schedule award, therefore, this issue is not before the Board at this time.