# United States Department of Labor
# Employees' Compensation Appeals Board

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| **MICHAEL T. BREMBY, Appellant** | ) | |
| **and** | ) | **Docket No. 04-909** |
| | ) | **Issued: August 4, 2004** |
| **DEPARTMENT OF THE NAVY, NAVAL SYSTEMS COMMAND, NORFOLK NAVAL SHIPYARD, Portsmouth, VA, Employer** | ) | |

*Appearances:*
*Michael T. Bremby, pro se*
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

### ***JURISDICTION***

On February 23, 2004 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated January 30, 2004, in which the Office hearing representative affirmed the reduction of appellant's compensation effective January 26, 2003 to reflect his capacity to earn wages in the constructed position of cashier. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

### ***ISSUE***

The issue is whether the Office properly reduced appellant's compensation effective January 26, 2003, on the grounds that the constructed position of cashier represented his wage-earning capacity.

### ***FACTUAL HISTORY***

On July 21, 2000 appellant, then a 39-year-old apprentice welder, filed a traumatic injury claim alleging that he had experienced a sharp pain in his back on July 20, 2000 during the performance of his duties. The Office accepted his claim for a lumbar strain. On December 18,

2000 appellant filed another traumatic injury claim alleging that he experienced pain in his back while moving a portable machine and pulling welding lines on December 15, 2000. The Office also accepted his claim for a lumbar strain. On April 13, 2001 appellant filed a notice of recurrence and stopped work on or about April 16, 2001. The Office found the recurrence to be compensable and eventually placed appellant on the periodic rolls for receipt of compensation for total disability.

In an August 13, 2001 duty status report, Dr. Steven Blasdell, a Board-certified orthopedic surgeon, indicated that appellant had a 20-pound lifting restriction for 2 hours a day, sitting of 4 hours, standing 4 hours, walking 4 hours, climbing 2 hours, kneeling 1 hour, bending/stooping 1 hour, driving a vehicle 6 hours, operating machinery 4 hours. He was also restricted from any twisting, pulling/pushing or reaching above the shoulder. A handwritten notation on the report stated that permanent partial back restrictions commenced January 3, 2001..

In a November 5, 2001 report, Tracy L. Parr, R.N., a field nurse, indicated that Dr. Blasdell indicated on an October 15, 2001 evaluation that appellant had permanent back restrictions and that the employing establishment was unable to accommodate such permanent work limitations.[1]

The Office referred appellant to a vocational rehabilitation counselor by letter dated December 6, 2001.

In a February 12, 2002 office note, Dr. Blasdell changed appellant's work restrictions from a 20-pound lifting requirement 2 hours per day to a 20-pound lifting requirement 3 hours per day to encompass light-work activities.

On March 29, 2002 appellant underwent vocational testing. On August 7 and 8, 2002, the vocational rehabilitation counselor identified the positions of cashier II, assembler, small products II, and surveillance systems monitor as being within appellant's medical and vocational capabilities. By letter dated August 21, 2002, appellant was informed that he would receive 90 days of assistance for seeking employment in the above identified positions. On August 26, 2002 he signed a training plan and indicated that he was not physically able to perform the identified positions with his work restrictions. Dr. Blasdell continued to submit progress notes on appellant's condition, which offered no change in his restrictions.

In a September 16, 2002 report, the rehabilitation counselor stated:

> "[Appellant] continues to thwart any attempt at job placement. He has accused me of mistreating him, said I told him he wanted a handout not a job and said he would 'take care of me.' I finally told him we would communicate by mail from now on. He has been given jobs to apply for. He has continued to resist in every way by being combative and confrontational. The job contact lists appellant has

[1] Dr. Blasdell's October 15, 2001 evaluation noted examination findings and advised that full back restrictions were permanent.

provided so far indicate that he is ignoring job leads provided by this office and has not applied for any open and available position."

In an October 17, 2002 report, the rehabilitation counselor indicated that although jobs had been identified for appellant, he continued to not apply for those jobs but mailed in contact sheets listing employers, with no job titles. It was noted that he had been asked on September 30 and October 15, 2002 to list job titles, but he had failed to do so. The probability of success was noted as being poor. In a November 8, 2002 report, the vocational rehabilitation counselor noted that 90 days of assistance had been provided and all assistance in job placement had been refused. Accordingly, vocational rehabilitation efforts were closed.

In a December 18, 2002 notice of proposed reduction of compensation, the Office advised appellant that it proposed to reduce his compensation because the factual and medical evidence established that he was no longer totally disabled. The Office advised him that he had the capacity to earn wages of a Cashier II, DOT #211.462-010, at the rate of $304.00 per week and requested that he submit additional evidence or argument within 30 days if he disagreed with the proposed action. The physical demands of a cashier were listed as being light with an occasional lifting of up to 20 pounds with frequent reaching, handling and fingering. A 30-day short demonstration was required and the availability of the position was confirmed by the vocational rehabilitation counselor with an online review of job listings with the State Employment Service in Norfolk, VA, on August 8, 2002.

In a January 9, 2003 letter, appellant asserted that he had cooperated in the rehabilitation effort and that his back condition was worsening. He indicated that Dr. Blasdell had taken some x-rays on December 31, 2002 and he had undergone a magnetic resonance imagining (MRI) scan on January 7, 2003.

Progress reports from Dr. Blasdell dated December 31, 2002 and January 21, 2003 indicated that appellant's same work restrictions continued. The MRI scan was noted to be normal except for mild disc dehydration at L5-S1. There was no mention of appellant undergoing an x-ray on December 31, 2002.

In a February 4, 2003 decision, the Office reduced appellant's compensation, effective January 26, 2003, finding that he was capable of performing the constructed position of cashier II, DOT #211.462-010. The Office noted that this decision did not affect the medical benefits for the accepted condition.

By letter dated March 1, 2003, appellant requested an oral hearing. A hearing was held on November 19, 2003 at which he testified that he had tried to find a cashier job without success. Previously submitted progress notes along with new progress notes from Dr. Blasdell were received, which noted that permanent work restrictions were to be continued. By decision dated January 30, 2004, an Office hearing representative affirmed the Office's February 4, 2003 decision.

## ***LEGAL PRECEDENT***

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[2] An injured employee, who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.[3]

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 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.[4]

The Office must initially determine appellant's medical condition and work restrictions before selecting an appropriate position that reflects appellant's vocational wage-earning capacity. The Board has stated that the medical evidence upon which the Office relies must provide a detailed description of appellant's condition.[5] Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.[6]

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* decision will result in the percentage of the employee's loss of wage-earning capacity.[7]

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[2] *James B. Christenson*, 47 ECAB 775, 778 (1996); *Patricia A. Keller*, 45 ECAB 278 (1993).

[3] 20 C.F.R. §§ 10.402, 10.403; *see Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

[4] 5 U.S.C. § 8115(a); *see Dorothy Lams*, 47 ECAB 584 (1996); *Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

[5] *See William H. Woods*, 51 ECAB 619 (2000); *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

[6] *Carl C. Green, Jr.*, 47 ECAB 737, 746 (1996).

[7] *See William H. Woods*, *supra* note 5; *Hattie Drummond*, 39 ECAB 904 (1988); *see Albert C. Shadrick*, 5 ECAB 376 (1953).

In determining an employee's wage-earning capacity based on a position deemed suitable but not actually held, the Office must consider the degree of physical impairment, including impairments resulting from both injury-related and preexisting conditions, but not impairments resulting from post injury or subsequently acquired conditions.[8] Any incapacity to perform the duties of the selected position resulting from subsequently acquired conditions is immaterial to the loss of wage-earning capacity that can be attributed to the accepted employment injury and for which appellant may receive compensation.

## ***ANALYSIS***

In finding that appellant was physically capable of performing the duties of a cashier, the Office relied upon Dr. Blasdell's most recent progress reports dated December 31, 2002 and January 21, 2003, which indicated that his permanent work limitations continued. A review of the medical evidence reflects that Dr. Blasdell had listed appellant's original work limitations in an August 13, 2001 duty status report and had advised in a February 12, 2002 office note, that appellant's permanent work restrictions were changed to allow for a 20-pound lifting requirement of 3 hours per day instead of 2 hours per day. All progress notes thereafter reflected no change in appellant's permanent restrictions. As such, his current work restrictions indicate that he has the following restrictions: a 20-pound lifting restriction of 3 hours per day, sitting of 4 hours, standing 4 hours, walking 4 hours, climbing 2 hours, kneeling 1 hour, bending/stooping 1 hour, driving a vehicle 6 hours, operating machinery 4 hours and no twisting, pulling/pushing or reaching above the shoulder. The restrictions set forth by Dr. Blasdell represents the weight of the medical evidence in establishing that appellant is capable of performing the duties of the constructed position, which requires an occasional lifting of up to 20 pounds.

Where vocational rehabilitation is unsuccessful, as in this case, the rehabilitation counselor will prepare a final report, which lists two or three jobs which are medically and vocationally suitable for the employee and proceed with information from a labor market survey to determine the availability and wage rate of the position.[9]

In a report dated August 8, 2002, appellant's vocational rehabilitation counselor determined that appellant was able to perform the position of cashier and that state employment services showed the position was available in sufficient numbers so as to make it reasonably available within his commuting area. The rehabilitation specialist also determined that the weekly wage of the position was $304.00, provided a job description for the position of cashier and confirmed that the job was listed as light duty and consistent with appellant's medical restrictions. As a rehabilitation counselor is an expert in the field of vocational rehabilitation, the Office claims examiner may rely on his or her opinion as to whether a job is reasonably available and vocationally suitable.[10] Appellant has not submitted sufficient evidence or argument to show that he could not vocationally or physically perform the cashier position. As previously noted, Dr. Blasdell's restrictions establish that appellant is capable of performing the

[8] *See James Henderson, Jr.*, 51 ECAB 268 (2000).

[9] *Dorothy Jett*, 52 ECAB 246 (2001).

[10] *Id.*

duties of the constructed position. Although appellant stated that his numerous attempts to obtain a cashier position were unsuccessful, the Board has held that the mere fact that appellant is not able to secure a job does not establish that the work is not available or suitable. Where as here, the evidence established that jobs in the selected position were reasonably available, the selection of such a position was proper even though the employee has been unsuccessful in obtaining work.[11]

The Board finds that the Office considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment, age and employment qualifications, in determining that the position of Cashier II represented appellant's wage-earning capacity.[12] Because the weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of cashier and that such a position was reasonably available within the general labor market of appellant's commuting area, the Office properly determined that the position of a cashier reflected his wage-earning capacity.

## ***CONCLUSION***

The Board finds that the Office properly determined that the constructed position of cashier reflected appellant's wage-earning capacity.

[11] *See Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

[12] *See Dorothy Jett*, *supra* note 9.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated January 30, 2004 is affirmed.

Issued: August 4, 2004
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member