



## **FACTUAL HISTORY**

This is the fourth appeal in OWCP File No. xxxxxx612.<sup>1</sup> On April 29, 1991 appellant, a 41-year-old engineering equipment operator, sustained a left elbow injury while reorganizing a storage building, which the Office accepted for tendinitis. It later accepted chronic lateral epicondylitis and approved surgery. The Office consolidated this case with those of appellant's right knee claims.<sup>2</sup> Appellant received compensation for temporary total disability on the periodic rolls. The facts of this case as set forth in the previous Board decisions are hereby incorporated by reference.

Dr. Stephen J. Burns, a Board-certified attending orthopedist, examined appellant on April 3, 2006 and advised the Office that he could not return to his job as an equipment operator but could work eight hours a day with permanent restrictions. He completed a work capacity evaluation on May 19, 2006.

The Office referred appellant to vocational rehabilitation services. Appellant underwent vocational testing and discussed job goals. He expressed an interest in computer training. It was agreed that appellant would take three courses at Purdue University Continuing Education School. On March 15, 2007 the Office rehabilitation counselor identified the position customer complaint clerk. She found that appellant met the specific vocational preparation of the job, as he had positive communication skills and would obtain the required computer skills.<sup>3</sup>

On May 14, 2007 appellant began his computer training. He completed the first course and received a certificate of completion. Appellant completed the second course but felt it was a

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<sup>1</sup> Docket Nos. 98-396 and 98-522 (issued January 27, 2000); Docket No. 01-1453 (issued July 29, 2002); Docket No. 02-2385 (issued February 12, 2003).

<sup>2</sup> On April 24, 1987 appellant injured his right knee climbing out of a trash hopper. The Office accepted an aggravation of chronic anterior cruciate ligament instability. OWCP File No. xxxxxx431. On October 5, 1987 appellant loaded a truck with equipment and felt his right knee move to the side. The Office accepted a sprain/strain. OWCP File No. xxxxxx172. However, on July 29, 1991 appellant hyperextended his right knee when he descended a pay loader and stepped onto loose gravel. The Office accepted a sprain. OWCP File No. xxxxxx161.

<sup>3</sup> The Department of Labor's *Dictionary of Occupational Titles* provides the following job description for Customer-Complaint Clerk (clerical), DOT #241.367-014, alternate title Adjustment Clerk, Customer Service Clerk: "Investigates customer complaints about merchandise, service, billing or credit rating: Examines records, such as bills, computer printouts, microfilm, meter readings, bills of lading and related documents and correspondence and converses or corresponds with customer and other company personnel, such as billing, credit, sales, service or shipping, to obtain facts regarding customer complaint. Examines pertinent information to determine accuracy of customer complaint and to determine responsibility for errors. Notifies customer and designated personnel of findings, adjustments and recommendations, such as exchange of merchandise, refund of money, credit of customer's account or adjustment of customer's bill. May recommend to management improvements in product, packaging, shipping methods, service or billing methods and procedures to prevent future complaints of similar nature. May examine merchandise to determine accuracy of complaint. May follow up on recommended adjustments to ensure customer satisfaction. May key information into computer to obtain computerized records. May trace missing merchandise and be designated Tracer Clerk (clerical). May investigate overdue and damaged shipments or shortages in shipments for common carrier and be designated Over-Short-And-Damage Clerk (clerical). May be designated according to type of complaint adjusted as Bill Adjuster (clerical), Merchandise-Adjustment Clerk (retail trade) and Service Investigator (utilities; tel. & tel.)."

little bit over his head. He had some trouble understanding all the material. Appellant started his third and final course and stated it was very difficult. The class was small, but it was over his head. On August 7, 2007 appellant advised that he did not attend the last class due to illness. As the school was not providing make-up classes, he was not sure if he would receive a certificate of completion.

The rehabilitation counselor reported: "The injured worker completed the short-term computer training course and will begin job placement activities." On August 22, 2007 she again reported that appellant had completed his computer skills training and would be looking for sedentary work. Therefore, job placement with a new employer proved unsuccessful.

The Office provided Dr. Burns with a statement of accepted facts and a work capacity evaluation form and asked for an update on appellant's work restrictions. Dr. Burns completed the work capacity evaluation on August 28, 2007 with few changes.

On December 3, 2007 the Office rehabilitation specialist found that appellant was able to perform the job of customer complaint clerk at an average weekly wage of \$432.00. He listed the general educational proficiencies as R4, M3 and L4. The Office rehabilitation specialist found that appellant met the specific vocational preparation of six months to a year, as he had "positive communications skills and has obtained computer training necessary for this position to qualify." He confirmed that the job was being performed in sufficient numbers so as to make it reasonably available to appellant within his commuting area.

On December 6, 2007 the Office notified appellant that it proposed to reduce his wage-loss compensation because the medical and factual evidence established that he was no longer totally disabled for work but had the capacity to earn \$432.00 a week as a customer complaint clerk. It afforded appellant 30 days to submit any evidence or argument.

Appellant disputed that he could work eight hours a day. He noted that he was able to work only four hours a day in 2004. Appellant stated that with his computer training classes "a lot went wasted on me." He attached what he contended as a typical customer service listing and stated that he did not know how to use a spreadsheet, e-mail or a word processing program. "At best, I'm a novice." Appellant submitted the only responses he had received to his job applications. He stated that he applied for over 50 jobs and none of them paid more than six to eight dollars an hour. Appellant wrote: "In closing, the fact you have chosen a certain job title does not mean an employer feels the same. I have been unemployed for 16 years, which effects how an employer considers my hiring."

In a decision dated January 9, 2008, the Office reduced appellant's compensation for wage loss to reflect his capacity to earn wages in the constructed position of customer complaint clerk.

Appellant requested reconsideration. On March 16, 2008 he informed the Office that he had returned to the workforce as a maintenance/custodial assistant, working 20 hours a week at \$5.85 per hour, for Michigan Resources, an organization that works with people with disabilities.

On April 25, 2008 the Office reviewed the merits of appellant's claim and denied modification of its prior decision.

Appellant again requested reconsideration. He argued that the Office rehabilitation counselor had hurt his chances of employment by hiding on his résumé his receipt of workers' compensation and making it appear that he had an unexplained gap of 17 years in his work history. Appellant stated that he was not qualified for the position of customer service representative.

In a decision dated November 26, 2008, the Office denied appellant's request for reconsideration. It found that appellant's argument was irrelevant because his compensation was reduced based on his capacity to earn wages, not on his failure to obtain employment.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8115(a) of the Federal Employees' Compensation Act provides that in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his actual earnings, if his actual earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings of the employee do not fairly and reasonably represent his wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity as appears reasonable under the circumstances is determined with due regard to the nature of his injury, the degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment, and other factors or circumstances which may affect his wage-earning capacity in his disabled condition.<sup>4</sup>

When the Office makes a medical determination of partial disability and of the 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 in light of his 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 *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.<sup>5</sup>

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.<sup>6</sup>

### **ANALYSIS -- ISSUE 1**

The Office reduced appellant's compensation for wage loss on the grounds that he had the capacity to earn wages as a customer complaint clerk. The Office rehabilitation specialist reported that appellant met the specific vocational preparation for this position (six months to a

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<sup>4</sup> 5 U.S.C. § 8115(a).

<sup>5</sup> *Hattie Drummond*, 39 ECAB 904 (1988); see *Albert C. Shadrick*, 5 ECAB 376 (1953).

<sup>6</sup> *Harold S. McGough*, 36 ECAB 332 (1984).

year) because he had positive communication skills “and has obtained computer training necessary for this position to qualify.”

While it is true that appellant received some computer training, the record does not show that he ever completed that training. The record establishes instead that he did not complete the third and final course and there is no evidence that he received a certificate of completion for that course. While the Office rehabilitation specialist did not clearly set forth the specific vocational preparation necessary or explain how the course work that was completed was germane to the six month to one year training expected: “The injured worker completed the short-term computer training course and will begin job placement activities.” That finding is not fully supported by the evidence.

The burden of proof is on the Office to establish that appellant has the wage-earning capacity of a customer complaint clerk. This requires it to establish how appellant met the specific vocational preparation for the selected position. Because the Office has not met that burden, the Board will reverse the Office’s January 9, 2008 decision reducing appellant’s compensation for wage loss and the Office’s April 25, 2008 decision denying modification. Given the Board’s disposition of the merits of this case, the issue raised by the Office’s December 2, 2008 denial of a merit review is moot.

### **CONCLUSION**

The Board finds that the Office has not met its burden of proof to justify reducing appellant’s compensation to reflect a capacity to earn wages as a customer complaint clerk.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 25 and January 9, 2008 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: October 9, 2009  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board