

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

S.C., Appellant	)	
	)	
and	)	<b>Docket No. 10-243</b>
	)	<b>Issued: August 18, 2010</b>
<b>DEPARTMENT OF DEFENSE, DEFENSE</b>	)	
<b>COMMISSARY AGENCY, Camp Pendleton, CA,</b>	)	
<b>Employer</b>	)	
	)	

*Appearances:*  
Alan J. Shapiro, Esq., for the appellant  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On November 2, 2009 appellant, through her representative, filed a timely appeal from a October 1, 2009 merit decision of the Office of Workers' Compensation Programs, which reduced her compensation to reflect her wage-earning capacity in a constructed position. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.

**ISSUE**

The issue is whether the Office properly reduced appellant's compensation to reflect her capacity to earn wages in the constructed position of order clerk.

**FACTUAL HISTORY**

On November 9, 2004 appellant, then a 48-year-old commissary contractor monitor, filed a claim alleging that she sustained low back pain and leg cramping as a result of increased squatting in the performance of her duties. The Office accepted her claim for lumbar

sprain/strain and later expanded its acceptance to include lumbar spondylosis with stenosis at L2-3 and L3-4 and pseudarthrosis or failed fusion at L4-5, as well as bilateral lower extremity radiculopathy.

On May 22, 2006 appellant underwent authorized lumbar fusion surgery. She would receive compensation for temporary total disability on the periodic rolls.

On April 6, 2007 Dr. Janet Dunlap, appellant's orthopedic surgeon, released appellant to return to full-time limited duty with no lifting, pushing or pulling more than 10 pounds and no bending or twisting through the waist. She repeated these limitations on September 19, 2008 and reported that they were permanent.

An Office rehabilitation counselor determined that appellant had the capacity to earn wages as an order clerk (clerical). The rehabilitation counselor found that the physical demands of the position were within appellant's medical limitations and that she met the specific vocational preparation requirement for such a position. Appellant had worked as a cashier and Quality Assurance Specialist in the Naval Commissary System. She had completed six-months of coursework at Palomar College in Microsoft Office Application and Data Entry/Keyboarding. The rehabilitation counselor conducted a labor market survey and determined that the job of order clerk was being performed in sufficient numbers and with sufficient hiring activity over the most recent six months so as to make it reasonably available to appellant within her commuting area.<sup>1</sup> Based on the labor market survey, she determined that appellant was capable of earning an entry-level wage of \$400.00 a week in the selected position.

On April 30, 2009 the Office notified appellant that, because she was no longer totally disabled for work, it proposed to reduce her wage-loss compensation to reflect her capacity to earn wages as an order clerk. It found that this position was medically and vocationally suitable for her.

Appellant replied that the unemployment rate was at a 30-year high. She submitted unemployment data to support her contention. Appellant felt that it was nearly impossible for her to get a job in a field in which she had little or no experience and would be competing against people with experience, education, youth and no physical limitations.

In a decision dated June 3, 2009, the Office reduced appellant's compensation to reflect her capacity to earn wages as an order clerk. On October 1, 2009 an Office hearing representative affirmed, finding that appellant was no longer totally disabled for work and that the Office met its burden to support the reduction of her compensation for wage loss.

### **LEGAL PRECEDENT**

The Federal Employees' Compensation Act provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of her duty.<sup>2</sup>

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<sup>1</sup> 9 out of 10 employers contacted had openings in the previous six months and 4 out of 10 had current openings.

<sup>2</sup> 5 U.S.C. § 8102(a).

“Disability” means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.<sup>3</sup>

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

Once the Office accepts a claim, it has the burden of proof to justify the termination or modification of compensation benefits.<sup>5</sup> When it 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* (DOT) or otherwise available in the open labor market, that fits the employee’s capabilities in light of 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 *Albert C. Shadrick* will result in the percentage of the employee’s loss of wage-earning capacity.<sup>6</sup>

### ANALYSIS

When appellant injured her low back at work, she became totally disabled from continuing her job at the Commissary. The Office compensated her for her lost wages or for her total incapacity, because of the employment injury, to earn the wages she was receiving at the time of injury. Dr. Dunlap, appellant’s orthopedic surgeon, released her to return to full-time limited duty in 2007. She found that the employment injury was no longer totally disabling. Appellant’s injury-related disability became partial subject to limitations on her capacity for work. To determine how much compensation she should receive for this partial disability, the Office determined her wage-earning capacity under section 8115 of the Act.

Because appellant had no actual earnings, the Office followed standard procedure and referred her to a rehabilitation counselor for the selection of a suitable position listed in the Department of Labor’s DOT. The rehabilitation counselor, an expert in such matters, determined that she had the capacity, notwithstanding her employment injury, to earn wages as an order clerk. The physical demands of this sedentary clerical position were consistent with the

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<sup>3</sup> 20 C.F.R. § 10.5(f).

<sup>4</sup> 5 U.S.C. § 8115(a).

<sup>5</sup> *Harold S. McGough*, 36 ECAB 332 (1984).

<sup>6</sup> *Hattie Drummond*, 39 ECAB 904 (1988); see *Albert C. Shadrick*, 5 ECAB 376 (1953).

permanent limitations Dr. Dunlap prescribed. The rehabilitation counselor well explained how appellant met the specific vocational requirements of the position. As this position was both medically and vocationally suitable for appellant, the rehabilitation counselor conducted a labor market survey, which showed that the job was being performed in sufficient numbers -- and with sufficient hiring activity over the most recent six months -- so as to make it reasonably available to appellant within her commuting area.

The Board finds that the Office gave due regard to relevant factors and properly determined appellant's capacity to earn wages as an order clerk. The Office met its burden to support the reduction of her compensation to reflect this wage-earning capacity. The Board will therefore affirm the Office's October 1, 2009 decision.

The Board has reviewed the record and appellant's arguments against the selection of this position to represent her wage-earning capacity. Broad unemployment figures are not particularly relevant to whether an order clerk and closely-related clerical positions are being performed in sufficient numbers within appellant's commuting area so as to be considered reasonably available to her.<sup>7</sup> The labor market survey establishes that jobs are available and employers were hiring in her local commuting area. This is not a case in which the rehabilitation counselor has reported that clerical jobs are at a low point and openings are at a premium.<sup>8</sup>

It is not determinative whether an actual job offer was forthcoming,<sup>9</sup> or whether appellant feels she is at a competitive disadvantage in the open market. Appellant has no physical limitations when it comes to being an order clerk (clerical). The rehabilitation counselor found that she qualified for an entry-level position, not one that requires significant prior experience. While appellant noted concerns about her age, the Act does not provide for her to receive compensation for total disability when the medical evidence establishes she is not totally disabled for work. The Office properly reduced her wage-loss benefits based on her capacity to earn wages as an order clerk.

### CONCLUSION

The Board finds that the Office properly reduced appellant's compensation to reflect her capacity to earn wages in the constructed position of order clerk.

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<sup>7</sup> The rehabilitation counselor did not include employers on the other side of Camp Pendleton south of Irvine or north toward Perris and San Jacinto.

<sup>8</sup> *James L. Fillmore*, 30 ECAB 265 (1978).

<sup>9</sup> The fact that appellant was not able to secure a job does not establish that the job is not reasonably available. *Karen L. Lonon-Jones*, 50 ECAB 293 (1999) (if the evidence establishes that jobs in the selected position are reasonably available, the selection of such a position is proper even though the claimant has been unsuccessful in obtaining work or has submitted documents from individual employers who indicated they did not have a position for her).

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 1, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 18, 2010  
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