U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KENNETH TAPPEN and DEPARTMENT OF THE NAVY, NAVAL WEAPONS STATION, Yorktown, Va.

Docket No. 95-2157; Submitted on the Record;
Issued February 11, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM, BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined appellant's loss of wage-earning capacity effective May 14, 1995; and (2) whether appellant has greater than a seven percent permanent loss of use of his left arm.

The Office accepted that appellant sustained a torn rotator cuff while removing equipment from a truck on January 20, 1990 and paid compensation for total disability beginning September 18, 1990, the date appellant's temporary appointment at the employing establishment expired. The Office also paid for rotator cuff repair surgeries performed on September 27, 1990 and November 29, 1993.

On February 11, 1995 the Office issued appellant a notice of proposed reduction of compensation stating that the evidence established that he was only partially disabled. By decision dated May 3, 1995, the Office reduced appellant's compensation effective May 14, 1995 on the basis that his wage-earning capacity was represented by the position of cashier. On June 2, 1995 the Office issued appellant a schedule award for a seven percent permanent loss of use of his left arm.

The Board finds that the Office properly determined appellant's loss of wage-earning capacity effective May 14, 1995.

Section 8115 of the Federal Employees' Compensation Act,[1] titled "Determination of Wage-Earning Capacity" states in pertinent part:

> "In determining compensation for partial disability, … [i]f the actual earnings of the employee do not fairly and reasonably represent his wage-earning capacity or

[1] 5 U.S.C. § 8115.

if the employee has no actual earnings, his wage-earning capacity as appears reasonable under the circumstances is determined with due regard to --

(1) the nature of his injury;

(2) the degree of physical impairment;

(3) his usual employment;

(4) his age;

(5) his qualifications for other employment;

(6) the availability of suitable employment; and

(7) other factors or circumstances which may affect his wage-earning capacity in his disabled condition."

In the present case, appellant had no actual earnings after the termination of his temporary appointment with the employing establishment. In accordance with its procedures, the Office selected the position of "cashier" from the Department of Labor's *Dictionary of Occupational Titles*[2] to represent appellant's wage-earning capacity.[3] A rehabilitation counselor contacted the state employment service and confirmed that this position was reasonably available in appellant's commuting area. The fact that the rehabilitation counselor was not able to secure a job offer for appellant as a cashier does not establish that this position was not available in appellant's area.[4] Appellant's perception that he would not be hired for the selected position because of his age is not a basis for finding that the selected position is not available or does not represent his wage-earning capacity.[5] The *Dictionary of Occupational Titles* lists the specific vocational preparation for the position of cashier as six months to one year, but the rehabilitation counselor noted, "Employers will train." The rehabilitation counselor reviewed appellant's employment history, education and the results of vocational testing in determining that the position of cashier was appropriate for appellant. There is no indication that the position of cashier is not vocationally suitable for appellant.

Regarding appellant's physical ability to perform the selected position, the *Dictionary of Occupational Titles* indicates that the physical requirements of the position of cashier are sedentary, with maximum lifting of 10 pounds and the ability to reach, handle, finger and feel. In a report dated March 1, 1995, appellant's attending physician, Dr. Thomas E. Fithian, a

[2] *Dictionary of Occupational Titles* No. 211.362-010.

[3] For the Office's procedures for determining wage-earning capacity in cases where vocational rehabilitation was not successful, *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8 (December 1993).

[4] *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

[5] *Alfred R. Hafer*, 46 ECAB 553 (1995).

Board-certified orthopedic surgeon, stated, "He is apparently being considered for a cashier's job and I think this would be good as long as it meets his *restrictions which remain*: no use of the left arm at or above shoulder level, no lifting more than [five pounds]. And no heavy push[ing]/pull[ing] with the left arm." (Emphasis in the original.) As noted by the Office in its May 3, 1995 decision, this report did not list a lifting restriction for appellant's right, uninjured arm, but Dr. Fithian did list a right arm lifting restriction in a January 19, 1994 report. This restriction, 10 pounds, would not prevent appellant from performing the position of cashier. The medical evidence establishes that appellant was physically capable of performing the position of cashier effective May 14, 1995.

The Office considered the factors set forth in section 8115 of the Act. The evidence establishes that the position of cashier represents appellant's wage-earning capacity.

The Board finds that the Office did not properly determine the percentage of appellant's permanent loss of use of the left arm.

The schedule award provision of the Act[6] and its implementing regulation[7] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of specified members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The American Medical Association, *Guides to the Evaluation of Permanent Impairment* has been adopted by the Office and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.[8]

An Office medical adviser indicated that he or she applied the tables of the fourth edition of the A.M.A., *Guides* to the findings reported by Dr. Fithian in an April 24, 1995 evaluation of appellant's permanent impairment of the left arm. The Office medical adviser, however, did not list percentages of impairment for each of the ranges of motion of appellant's shoulder, but instead only listed a final percentage of seven and indicated it was on the basis of reduced range of motion. The Board notes that Figures 38, 41 and 44 of Chapter 3 of the fourth edition of the A.M.A., *Guides* lists the following percentages of impairment for the ranges of motion reported by Dr. Fithian on April 24, 1995: 1 percent for 165 degrees of flexion, 1 percent for 40 degrees of extension, 4 percent for 90 degrees of abduction, 1 percent for 20 degrees of adduction, 2 percent for 55 degrees of internal rotation and 0 percent for 60 degrees of external rotation. Adding these percentages, as the A.M.A., *Guides* instructs, results in a nine percent impairment of the left arm. In addition, the Office medical adviser did not assign any percentage of impairment for the weakness and pain reported by Dr. Fithian. Although Dr. Fithian estimated the additional impairment for pain, weakness and crepitus at six percent, Dr. Fithian did not demonstrate that he used the A.M.A., *Guides*, which provide a basis for determining

[6] 5 U.S.C. § 8107.

[7] 20 C.F.R. § 10.304.

[8] *Quincy E. Malone*, 31 ECAB 846 (1980).

impairments due to pain and weakness, to arrive at this estimate. The case will be remanded to the Office for recalculation of the percentage of appellant's permanent loss of use of the left arm, taking into account his pain and weakness and the nine percent impairment for loss of motion.

The decision of the Office of Workers' Compensation Programs dated May 3, 1995 is affirmed. The decision of the Office dated June 2, 1995 is set aside and the case remanded to the Office for further action consistent with this decision of the Board.

Dated, Washington, D.C.
February 11, 1998

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member