

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHIRLEY A. TENBROOK and DEPARTMENT OF THE ARMY,
COMMANDER RED RIVER ARMY DEPORT, Texarkana, Tex.

*Docket No. 95-2708; Submitted on the Record;
Issued February 6, 1998*

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determine that the position of "Cashier II" represented appellant's wage-earning capacity.

The Board has duly reviewed the case record and concludes that the Office did not meet its burden of proof in this case.

In the present case, the Office has accepted that on August 14, 1984 appellant sustained lateral epicondylitis of the left elbow, traumatic subluxation of the carpal-metacarpal of the left thumb, and aggravation of pre-existing spondylosis of C6-7, which required laminectomy and anterior fusion of a herniated disc from C6-7. Appellant was referred for vocational rehabilitation services in April 1994. On January 18, 1995 the Office's rehabilitation specialist report that placement efforts had not been successful and the rehabilitation case had been closed. By decision dated February 28, 1995 the Office determined that the position of "Cashier II" represented appellant's wage-earning capacity. By decision dated July 10, 1995 the Office denied appellant's application for review of the February 28, 1995 decision.

Pursuant to section 8115 of the Federal Employees' Compensation Act,¹ when a claimant is no longer totally disabled but remains partially disabled, compensation for partial disability will be determined by actual earnings, if possible. If actual earnings do not fairly and reasonably represent wage-earning capacity, or if the claimant has no actual earnings, her wage-earning capacity is determined with due regard to the nature of injury, degree of physical impairment, usual employment, her age, 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.⁴

¹ 5 U.S.C. § 8115.

The Office's procedures governing cases where the wage-earning capacity is to be determined based upon a selected position if vocational rehabilitation did not succeed, provide that an assessment shall be made of appellant's suitability for employment with due regard to medical suitability of the selected position, reasonable availability of the selected position (with note that lack of current job openings does not equate to a finding that the position was not performed in sufficient numbers to be considered reasonably available); and vocational suitability. In determining vocational suitability, a description of the position from the *Dictionary of Occupational Titles*, the duties and physical requirement of the position, and pay ranges in the relevant geographical area must be provided.²

The Office did not meet its burden of proof in the present case as it did ascertain that the selected position was medically suitable.

Appellant's treating physician, Dr. Barry M. Green, a Board-certified orthopedic surgeon, reported on September 21, 1994 that appellant could perform sedentary work. In determining the medical suitability of the position, the Office reviewed appellant's work restrictions which were placed by the Office's second opinion physician, Dr. Phillip Osborne. In a report dated March 25, 1995 Dr. Osborne related that appellant had improved since he first evaluated her condition in 1991 and that she could now perform sedentary, light, and medium work, which did not require repetitious use of the left upper extremity for grasping, pushing or pulling. Dr. Osborne stated that he had reviewed the position description and that appellant could perform the position if changes were made in the duties so that no repetitious use of the left upper extremity was required. In a progress note dated February 8, 1995, Dr. Green related that he had reviewed Dr. Osborne's report and that while he agreed overall with his evaluation, he had previously recommended sedentary rather than light or medium work for appellant. Dr. Green recommended that appellant should undergo further examination by the Texarkana Impairment Center to resolve the medical discrepancy. On April 13, 1995 Dr. Green related that appellant had been evaluated at the Texarkana Impairment Center and that while appellant should not do repetitious type work with the upper extremities, especially on the left side, she could perform sedentary light, or medium work.

The position description for "Cashier II" states that it is light work, with less than 20 pounds of lifting required and that the ability to reach, handle, finger and feel is required. The position description notes that duties include computing bills, receiving cash and making change, and may require operation of a cash register with peripheral electronic data processing equipment by passing individual price coded items across electronic scanner to record price, compile printed list, and display cost of customer purchase. While both Dr. Green and Dr. Osborne concurred that appellant could perform light work, both qualified appellant's ability to perform repetitive duties with the left upper extremity. The position description for the "Cashier II" position notes that use of the upper extremities for reaching handling, fingering, and feeling was required, especially in the operation of the cash register and in processing items. As Dr. Osborne indicated that the position would have to be modified before appellant could perform it, and the Office did not clarify with either Dr. Green or Dr. Osborne whether appellant

² *Wilson L. Clow Jr.*, 44 ECAB 157 (1992).

could actually perform the duties of the “Cashier II” position, the Office did not meet its burden of proof in this case. him.”³

The Office therefore did not meet its burden of proof in this case to establish that the selected position reasonably represented appellant’s wage-earning capacity.

The decisions of the Office of Workers’ Compensation Programs dated July 10, 1995 and February 28, 1995 are hereby reversed.

Dated, Washington, D.C.
February 6, 1998

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

³ *Wilson L. Clow Jr.*, 42 157 (1992).