

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of WILLIAM R. BREHM, JR. and DEPARTMENT OF THE AIR FORCE,  
GEORGE AIR FORCE BASE, Calif.

*Docket No. 95-2853; Submitted on the Record;  
Issued January 5, 1998*

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DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,  
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation to reflect his wage-earning capacity in the selected position of lathe operator.

In the present case, the Office accepted that appellant sustained a lumbosacral strain in the performance of duty on March 2, 1990, and appellant received compensation for temporary total disability.<sup>1</sup> In a letter dated November 22, 1994, the Office advised appellant that it proposed to reduce his compensation based on his wage-earning capacity in the selected position of lathe operator, numerical control. By decision dated February 7, 1995, the Office reduced appellant's compensation based on an earning capacity of \$390.00 per week in the selected position. By decision dated April 28, 1995, the Office denied appellant's request for reconsideration without review of the merits of the claim.

The Board has reviewed the record and finds that the Office properly reduced appellant's compensation.

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction in such benefits.<sup>2</sup>

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 wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, his degree of physical

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<sup>1</sup> The Office also authorized lumbar surgery, but it appears from the record that appellant declined to undergo additional surgery.

<sup>2</sup> *Carla Letcher*, 46 ECAB \_\_\_\_ (Docket No. 93-239, issued January 26, 1995).

impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment, and other factors and circumstances which may affect his wage-earning capacity in his disabled condition.<sup>3</sup>

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 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 general labor market in the claimant's commuting area should be made.<sup>4</sup> 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>

In the present case the Office selected the position of lathe operator, numerical control (*Dictionary of Occupational Titles* No. 604.362-010). The physical requirements of the position include occasional lifting of up to 50 pounds, and duties can be performed alternating sitting and standing. With regard to appellant's physical restrictions, an attending physician, Dr. Manmohan Nayyar, a neurologist, completed a work restriction evaluation (OWCP-5) dated October 7, 1993. Dr. Nayyar indicated that appellant could work 8 hours per day, with a lifting restriction of 50 pounds. He also restricted appellant from bending or twisting, and limited the duration of sitting and standing.

There is no indication that the selected position is outside the physical restrictions imposed by Dr. Nayyar. The lathe operator position has a maximum of 50 pounds lifting, can be performed sitting or standing, and there is no indication that it required physical activity beyond the stated limitations. In a December 15, 1994 letter, appellant stated that he had back pain, but he did not assert that he was unable to physically perform the position or discuss any medical evidence showing his inability to perform the position. The Board finds that the evidence establishes the lathe operator position was selected with due regard to appellant's degree of physical impairment.

As noted above, the "availability of suitable employment" must also be considered. A rehabilitation specialist indicated on February 3, 1994 that the lathe operator position was being performed in sufficient numbers in appellant's commuting area. The Board notes that the rehabilitation specialist also reported a lack of job openings and stated that the position was not reasonably available at that time. An Office rehabilitation specialist stated in a February 15, 1994 report that the position existed in sufficient numbers to be reasonably available, although there was a low level of current hiring. The Office rehabilitation specialist opined that appellant's participation in an employee assisted reemployment program would make him more competitive in being considered for available openings. The Board also notes that the private

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<sup>3</sup> See *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); see also 5 U.S.C. § 8115(a).

<sup>4</sup> See *Dennis D. Owen*, 44 ECAB 475 (1993).

<sup>5</sup> 5 ECAB 376 (1953); see also 20 C.F.R. § 10.303.

rehabilitation specialist subsequently contacted employers, and there were employers accepting applications.<sup>6</sup>

Since an Office rehabilitation specialist did opine that the selected position was reasonably available, noting the number of jobs being performed and appellant's participation in a reemployment program, the Board finds that the evidence is sufficient to establish "availability" under 5 U.S.C. § 8115.

Appellant's primary argument appears to be that he was not vocationally qualified for the selected position, as he had no experience or training as a lathe operator. The Office rehabilitation specialist stated in an April 27, 1995 report that appellant was a journeyman machinist with experience in metal and plastics machining equipment. The specialist opined that appellant qualified for employment as a lathe operator. Both of the vocational specialists found that appellant was qualified to perform the selected position, and there is no probative evidence of record to the contrary.

The record indicates, therefore, that the Office gave due regard to the enumerated factors under 5 U.S.C. § 8115(a) in determining that the position of lathe operator represented appellant's wage-earning capacity. The rehabilitation specialist indicated that wages for the position began at \$9.75 per hour, or \$390.00 per week. The Board finds that the Office properly reduced appellant's compensation based on a wage-earning capacity of \$390.00 per week.

The decisions of the Office of Workers' Compensation Programs dated April 28 and February 7, 1995 are affirmed.

Dated, Washington, D.C.  
January 5, 1998

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

Bradley T. Knott  
Alternate Member

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<sup>6</sup> It is not necessary that a rehabilitation specialist find a job for the claimant in the selected position, and being unsuccessful in obtaining jobs in the selected position does not establish that the position was not reasonably available; see *Samuel J. Chavez*, 44 ECAB 431 (1993).