

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GARY MICHAEL CONNATSER and TENNESSEE VALLEY AUTHORITY,
WATTS BAR NUCLEAR PLANT, Chattanooga, Tenn.

*Docket No. 96-2184; Submitted on the Record;
Issued October 16, 1998*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation benefits effective April 28, 1996 based on his ability to perform the position of mechanical engineering technician, which it found fairly and reasonably represented his wage-earning capacity.

On February 21, 1983 appellant, then a 33-year-old sheetmetal worker, stepped off a ladder and twisted his right knee. The Office accepted that appellant sustained a right knee strain and early degenerative osteoarthritis.

Appellant returned to work for approximately one year, but experienced a recurrence of disability in 1984 and was terminated from regular duty with the employing establishment effective October 9, 1986. After treating appellant for two years, Dr. J. MacDonald Burkhart, a Board-certified orthopedic surgeon, indicated that appellant was capable of returning to work eight hours per day. However, the employing establishment would not offer permanent, full-time employment to appellant. A referral was made for rehabilitation services including job placement services in the local private sector. From November 1990 through October 1995 rehabilitation services provided the following: training at Pellissippi State Community College with completion of an Associate of Science (A.S.) degree in August 1993; training and attendance at the University of Tennessee -- Knoxville from August 1993 through May 1995 with concentration in biomedical engineering; and job placement services for the period June 22 until October 4, 1995.

However, appellant was academically unable to complete the Bachelor's Degree program at the University of Tennessee. Appellant's cumulative transcript for all course work showed that he earned "F" grades in 8 courses, "D" grades in 4 courses, and withdrew from 6 courses; however, he passed at least 12 courses with a "C" or better. His intelligence quotient tests were reported as showing that his I.Q. was high, ranging from 110 to 138 on 2 separate intelligence tests. Thereafter, job placement efforts proved unsuccessful as appellant denied that he was

qualified for the positions for which he was referred, and on October 4, 1995 the rehabilitation counselor recommended that his case be closed and a loss of wage-earning capacity determination be made. The rehabilitation counselor noted that appellant's resume looked good, but that the greatest hindrance toward job placement was his attitude.

Appellant's rehabilitation counselor, in conjunction with the rehabilitation specialist, found that appellant was vocationally qualified to perform the job of mechanical engineering technician. The qualifying factors were noted to include 11 years of work experience as a metal fabricator/sheetmetal worker, attainment of a general A.S. degree from Pellissippi State Community College and two years of course work at the University of Tennessee -- Knoxville.

The rehabilitation counselor determined that the job of mechanical engineering technician was performed in sufficient numbers within appellant's local commuting area to be defined as reasonably available, as ascertained through local newspaper listings with actual job openings available during the placement process, and with assurance from the Department of Employment Security that job opportunities for this position were ample.

Because appellant's case record lacked current medical documentation of his condition, and because the Office needed to obtain work restrictions to assist in the rehabilitation process, the Office referred appellant for a second opinion evaluation.

By narrative report dated June 13, 1989 and work restriction evaluation form dated August 1, 1989, Dr. James E. Ricciardi, a Board-certified orthopedic surgeon, indicated that appellant could perform the date-of-injury job as sheetmetal worker as written. However, Dr. Ricciardi added a caveat of work restrictions for climbing, squatting, kneeling and lifting over 50 pounds.

The rehabilitation counselor determined that the position of mechanical engineering technician was well within appellant's medically established work tolerance limitations, entailing no squatting, climbing or kneeling, and with a lifting limit of 20 pounds or less. The rehabilitation counselor determined that the average starting salary for a mechanical engineering technician was \$389.27 per week or \$20,242.00 per annum. On the date of injury, appellant was a sheetmetal worker categorized as a Trades & Labor employee earning \$13.76 per hour, and the current pay for a sheetmetal worker is \$15.55 per hour. The *Shadrick* formula was employed and the Office calculated that appellant had a loss of wage-earning capacity in the amount of \$203.65 per 4 weeks, such that his new compensation award for 4 weeks equaled \$886.00.

By notice of proposed reduction of compensation dated October 23, 1995, the Office advised appellant that it was proposing to reduce his monetary compensation benefits to reflect his wage-earning capacity based upon his ability to perform the position of mechanical engineering technician. It advised that the evidence of record supported that the position of mechanical engineering technician fairly and reasonably represented appellant's wage-earning capacity.

However, by response dated October 9, 1995, appellant denied that he was qualified for the position of mechanical engineering technician. Appellant alleged that his general A.S. degree was only a stepping stone to his B.S degree in biomedical engineering and did not qualify

him for anything. He claimed that his grades at the University of Tennessee were not good because he was frequently ill, because he did not get the requested tutor, because the course work was all upper level, because he could not sleep adequately due to pain, and because his teeth abscessed. Appellant complained that he had to academically withdraw from the University and did not complete his B.S. degree and therefore could not work, and he alleged a claim for bipolar personality as a result of his accepted employment injury.

By letter to his Congressional representative dated October 25, 1995, appellant retold his story of missed school work due to health problems, denied that he was qualified for engineering technician jobs or other suggested employment, claimed that he was diagnosed as having a bipolar personality, and argued that he was not being treated fairly, that the Office was ridiculous, and that there were alleged due process violations for being "cut off."

In support of his allegations, appellant submitted an October 17, 1995 letter from William Brown, the director of placement at Pellissippi State Community College, which stated that appellant completed a two-year general Associate of Science program there in May 1994 and met the requirements for transferring credits to earn a four-year degree. However, Mr. Brown stated that appellant's "education at Pellissippi State does not qualify him for positions such as an Engineering Technician [M.E.T.], Drafter, or Electronic -- CAD Operator. Based on his academic record at Pellissippi, we would not certify him as having the skills, ability and knowledge for such positions." Mr. Brown did not address appellant's additional qualifications for the position of mechanical engineering technician which included 11 years of successful work experience as a fabricator/sheetmetal worker and four semesters of college work at the University of Tennessee.

By letter dated October 27, 1995, appellant argued that his retraining was illusionary at best, that his B.S degree was not complete, that he was not well, that he had become "manic depressant" from his pain, that there were no jobs available, that no one would hire him because he was too old, that he did not have enough training for low impact jobs, and that his rights were not being protected, and he requested an extension in his retraining to receive enough expertise to become marketable.

By letter dated December 26, 1995, appellant denied that he was qualified for any positions selected by the Office, that no jobs existed within 25 miles of his home, that 2 federal doctors had retired him from manual labor because his right leg was so bad, that he had offered to return to work with the employing establishment but that they would not hire him because of his physical condition, that the Office made him quit school within 20 credits of graduation because of a supposed employing establishment job, and that his civil rights had been violated by both the Office and the employing establishment, and he threatened court action.

By letter dated January 4, 1996, the Office sought clarification from Mr. Brown as to what type of jobs appellant was qualified for. No response from Mr. Brown was forthcoming.

By letter dated January 10, 1996, appellant demanded that certain medical and rehabilitation reports be expunged from his case file, and he engaged in personal attacks upon the rehabilitation counselor, as well as alleging unprofessional conduct and breach of contract.

By letter dated January 15, 1996, appellant denied that his grade point average was the basis for his withdrawing from the University of Tennessee in 1994 but instead alleged that pain and illness was the basis for his withdrawal. Appellant further alleged that his withdrawal in 1995 was due to the Office telling him that he had to go to work and not to academics. He also requested that his psychiatric expenses be reimbursed.

By letter to the Office dated January 31, 1996, the rehabilitation counselor explained that she had concluded that appellant could perform the position of mechanical engineering technician based upon his past work background, his training at Pellissippi State, and the classes that he successfully passed at the University of Tennessee. The counselor noted that she had contacted several company personnel managers, told them of appellant's past work experience at the employing establishment and in the family heating and air conditioning business, his classes at Pellissippi State, and his classes at the University of Tennessee, and that they all thought that appellant had the qualifications for an engineering technician. The counselor noted that one personnel manager even requested that appellant's resume be sent for consideration for possible employment. The counselor also noted that one personnel manager opined that having a degree was not always the best avenue to obtain employment as the company got many applicants with degrees whom the company was worried about losing to better opportunities, such that they were more apt to hire an individual without a degree who would stay longer. The counselor also went to Pellissippi State and spoke with the department head for engineering technologies, who evaluated appellant's course work at the University of Tennessee and concluded that some University of Tennessee courses could substitute for required courses in the Pellissippi State Mechanical Engineering Technology certificate program, and that appellant needed 18 hours more for an mechanical engineering technology. The rehabilitation counselor opined that appellant had not been truthful with her about his objectives, in that he was approved only for a two-year degree program at Pellissippi State but had instead determined that he wanted a four-year degree at University of Tennessee, and that he had declared his intentions to work toward a career A.S. degree, but had only taken courses for a general A.S. degree in anticipation of transferring to and completing a four-year degree at the University of Tennessee.

In a February 13, 1996 conversation with Mr. Brown, the rehabilitation counselor obtained clarification from Mr. Brown regarding his October 17, 1995 letter, elucidating that Mr. Brown did not mean that appellant could not work at all, but merely that the transfer A.S. degree appellant received "would not solely qualify" appellant for the engineering technology jobs in question.

By letter dated April 19, 1996, the rehabilitation counselor advised the Office that she had contacted the employment analyst with the Knoxville Employment Security Office and provided him with appellant's information, education and training specifics. The employment analyst opined that "anyone with that much education should certainly be able to perform the jobs" of engineering aide and/or sales, mechanical equipment.

On April 19, 1996 the claims examiner recommended that appellant was fully qualified for the position of engineering technician in the open labor market. The claims examiner noted appellant's past duties, achievements and awards as listed on his resume, his training prior to injury, his passing grades in Pellissippi State technical classes, the fact that appellant was

enrolled in the two-year transferring credits program instead of the two-year career-technical program at Pellissippi State, the fact that Mr. Brown considered solely appellant's general A.S. degree program and not his prior work training or experience or his subsequent University of Tennessee classes in his opinion of appellant's qualification for a mechanical engineering technician position, the positive response from local personnel officers regarding appellant's qualifications for mechanical engineering technician jobs, the state response supporting his suitability for such jobs, the fact that the rehabilitation counselor found that a Mechanical Engineering Technology certificate was not required for a mechanical engineering technician job, and the *Dictionary of Occupational Titles* requirements for such a position and the fact that appellant's testing results exceeded such requirements, and he opined that therefore appellant was fully qualified for such a position.

By decision dated April 23, 1996, the Office reduced appellant's compensation effective April 28, 1996 based upon his ability to perform the position of mechanical engineering technician. The Office found that such a position fairly and reasonably represented appellant's wage-earning capacity.

The Board finds that the position of mechanical engineering technician fairly and reasonably represented appellant's wage-earning capacity effective April 28, 1996.

An injured employee who is unable to return to the position held at the time of injury, or to earn equivalent wages, but who is not totally disabled for all gainful employment is entitled to compensation computed on loss of wage-earning capacity.¹

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 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 the injury; his 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.²

The Office's procedures governing the case where wage-earning capacity is to be determined based upon a selected position are set out in the Office's procedure manual at chapter 2.813, paragraph 13.³ Paragraph 13a states that a report must be prepared summarizing why rehabilitation was unsuccessful and identifying two or three jobs which are medically and vocationally suitable for the claimant. The report must include job numbers and descriptions from the Department of Labor's *Dictionary of Occupational Titles*, the duties and physical requirements of each job, pay ranges in the relevant geographical area, and a statement regarding the availability of the job. The procedure manual states, in part: "The positions listed may be

¹ 20 C.F.R. § 10.303(a); *see also Alfred R. Hafer*, 46 ECAB 553 (1995).

² 5 U.S.C. § 8115(a).

³ *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992)

those in which placement was attempted. It should be noted 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.”⁴

With regard to the person preparing the report, while the procedure manual contemplates that the report will be prepared by the rehabilitation counselor and notes that the rehabilitation counselor’s expertise may be relied upon as to whether a job is vocationally suitable and reasonably available, Office procedure does not require the claims examiner to rely on the rehabilitation counselor’s report, and notes that the Office rehabilitation specialist “should be evaluating these w[age] e[arning] c[apacity] selections to make sure that the r[ehabilitation] s[pecialist] is doing a proper labor market survey, etc....” Office procedure further contemplates that, at times, it may be appropriate for the rehabilitation specialist to provide services directly to the claimant.⁵

In the instant case, appellant was referred for rehabilitation counseling in 1990, and on October 4, 1995 the counselor indicated that appellant had completed his A.S. degree but had not been academically successful in completing his B.S. degree and that multiple job referrals had not resulted in appellant being offered a position, such that she was closing his case and recommending that a wage-earning capacity determination be made. The rehabilitation counselor concluded that with appellant’s past work experience and his educational preparation and training he was qualified for the position of mechanical engineering technician, which she found was reasonably available in the geographical area as demonstrated by the advertisements for such positions advertised in the local newspaper. Appellant’s current medical work restrictions were delineated, and the rehabilitation counselor determined that the position of mechanical engineering technician was well within his work tolerance limitations. Thereafter the rehabilitation counselor determined the salary for a mechanical engineering technician, and determined the current pay for appellant’s date-of-injury job.

The Office then determined that appellant had no actual earnings and thereafter determined that the position of mechanical engineering technician represented his wage-earning capacity. In accordance with Office procedures and the rehabilitation counselor’s recommendation, the Office selected the position of mechanical engineering technician from the Department of Labor’s *Dictionary of Occupational Titles* for which appellant possessed the necessary education and experience, as stated in the position description, and the duties of which were within his medical restrictions.⁶ The Office then used the pay rates determined by the rehabilitation counselor and employed the *Shadrick* formula to calculate appellant’s loss of wage-earning capacity.

Appellant was provided with proper notice of the proposed reduction in compensation, and on October 9, 1995 and thereafter he availed himself of the opportunity to present evidence and argument in opposition. Appellant argued that he was not qualified for such a position and

⁴ *Id.*

⁵ *Id.*

⁶ See *Wilson L. Clow, Jr., supra* note 3.

that such positions were not available. His evidence and arguments were considered by the Office, which was not persuaded that its proposal was in error, and it finalized the modification of compensation on April 23, 1996.

The Board finds that the evidence of record amply supports the Office's conclusion that the position of mechanical engineering technician fairly and reasonably represents appellant's wage-earning capacity. Appellant has 11 years of working experience with the employing establishment performing as a foreman in fabrication/sheetmetal working and has additional experience, from his resume, as a vice president in a family business in heating and air conditioning, training from DeVry Institute in electronics engineering, Air Force training in Teletype and Crypto maintenance, training from Williamson School of Engineering in air flow design, an Associate of Science degree from Pellissippi State Community College, and course work at the University of Tennessee in biomedical engineering. He also is computer literate, has extensive knowledge of the graphic language, knows electrical schematic language, has the ability to read and implement the employing establishment and Becthel General Assembly drawings, and has training in quality assurance and control. The Board finds that appellant's claim that he is not qualified for a position of a mechanical engineering technician is not supported by the record, and, in fact, he is not too far from being qualified for a position of an engineer at the Baccalaureate level of preparation. Appellant's allegations that jobs are not available is also not supported by the record which contains photocopies of job advertisement from a local newspaper, and appellant's allegations that he is too old are also not supportable, as personnel directors opined that appellant was qualified and were interested in his resume. The position as described is also entirely consistent with appellant's medical restrictions. The Office therefore properly determined that appellant's wage-earning capacity was fairly and reasonably represented by the position of mechanical engineering technician, and properly reduced his compensation benefits accordingly.

Consequently, the decision of the Office of Workers' Compensation Programs dated April 23, 1996 is hereby affirmed.

Dated, Washington, D.C.
October 16, 1998

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member