

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WARREN W. ROZELLE and DEPARTMENT OF THE NAVY,
PHILADELPHIA NAVAL SHIPYARD, Philadelphia, Pa.

*Docket No. 97-478; Submitted on the Record;
Issued January 7, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation benefits, effective October 13, 1996, based on its determination that the selected position of accounting clerk fairly and reasonably represented appellant's wage-earning capacity.

On September 28, 1993 appellant, then a 56-year-old shipfitter, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that he injured his hip when the bounding angle he stepped on broke and he fell to the shell of the ship which was four to five feet. The Office accepted the claim for sprain/strain right thigh, contusion right thigh and abrasions right leg on December 16, 1993. The Office placed appellant on the periodic rolls for temporary total disability effective January 9, 1994.

On May 5, 1994 the Office referred appellant to a rehabilitation counselor for vocational rehabilitation.

In a work restriction evaluation (Form OWCP-5) dated June 15, 1995, Dr. Kenneth P. Heist, appellant's attending physician, indicated that appellant had reached maximum medical improvement and could work eight hours per day. He checked that appellant could do intermittent walking for one hour per day, intermittent sitting for eight hours, no lifting, bending, squatting, climbing or twisting, and kneeling and standing up to one hour per day. Dr. Heist indicated that appellant had a lifting restriction of up to 20 pounds and no hand restrictions. He checked "no" to the question of whether appellant had any cardiac, visual or hearing limitations.

In a letter dated December 8, 1995, Dr. Heist stated that appellant "had been trained for computer use and several job descriptions have been reviewed and forwarded to appropriate agencies."

In a report dated June 14, 1996, the vocational rehabilitation counselor indicated as appellant had been twice placed and chose not to remain in those positions, that the file would be closed and a labor market survey conducted. In a letter dated July 18, 1996, the rehabilitation

counselor indicated that he had previously documented the availability of account clerk positions with a salary of \$340.00 per week and electronic data processing assistant with a salary ranging from \$380.00 to \$398.00 per week within appellant's training and labor market. The rehabilitation specialist noted that the position of accounting clerk was defined in the Department of Labor's *Dictionary of Occupational Titles* as sedentary.

On July 22, 1996 the Office rehabilitation specialist confirmed the availability of the position of accounting clerk within appellant's commuting area and his job restrictions.

In a note dated August 8, 1996, the Office medical adviser advised that the position of accounting clerk was within appellant's restrictions as the job is sedentary and does not require heavy lifting, bending or squatting.

On August 13, 1996 the Office issued a notice of proposed reduction of compensation and an accompanying memorandum. The Office found that appellant was partially disabled and had the wage-earning capacity of an accounting clerk. The Office further found that appellant was a good candidate for work in an office position and with the computer, that the job of accounting clerk was available in sufficient numbers within appellant's commuting area to be considered readily available, and that the physical requirements of the job, classified as sedentary, were in line with the limitations set by appellant's attending physician. The Office, therefore, proposed to reduce appellant's compensation to account for appellant's wage-earning capacity as an account clerk.

Appellant submitted an August 21, 1996 report from Dr. Heist. In the letter, Dr. Heist stated:

“[Appellant] stated that he has attempted to increase his activity and was experiencing some pain. He stated that he had a job offer for an alarm company, because of the loss of hip motion directly related to his navy yard job, [appellant] was unable to perform that activity. It was felt that the patient still presents many restrictions and would have difficulty in standing for long periods of time as well as lifting any heavy objects. He cannot climb or squat to any significant degree, and it was felt that the patient's job requirements will greatly limit the patient from obtaining any gainful occupation. Consideration would be retirement, based on his medical condition.”

By decision dated October 6, 1996 and an accompanying memorandum, the Office determined that the selected position of accounting clerk represented appellant's wage-earning capacity. In the accompanying memorandum, the Office determined that Dr. Heist's August 21, 1996 report was of diminished probative value as the physician referred to a job at an alarm company, not for the position of accounting clerk. The Office found that the medical and factual evidence established that appellant was partially disabled and capable of performing the position of accounting clerk.

The Board finds that the Office properly reduced appellant's compensation benefits based on its determination that the selected position of accounting clerk fairly and reasonably represented appellant's wage-earning capacity.

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.¹

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 accurately represent wage-earning capacity, or if the employee has no actual earnings, then the wage-earning capacity, as appears reasonable under the circumstances, is determined with due regard to the factors enumerated in section 8115(a).² These factors, which are also incorporated into the Office procedures,³ include the nature of the injury, the degree of physical impairment including impairments resulting from both injury-related and preexisting conditions, the usual employment, claimant's age and qualifications for other employment and the availability of the employment.⁴

When the Office makes a medical determination of partial disability and of specific restrictions, it may refer the employee's case to an Office wage-earning capacity specialist for a 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 labor market should be made through contact with the state employment services or other applicable service.⁵ 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.⁶

Following established procedures, the Office referred appellant to a vocational rehabilitation counselor, who selected a position in the Department of Labor's *Dictionary of Occupational Titles* to fit appellant's capabilities. The counselor performed a labor market survey and determined the position's prevailing wage rate and its availability in the open market. The counselor also determined that appellant had satisfied the vocational requirements of the position. After placement of appellant in two jobs which appellant subsequently chose not to remain in, an Office rehabilitation specialist confirmed the continued availability and salaries of the positions identified by the previous rehabilitation counselor and concurred that the position of accounting clerk was reasonably available at a weekly salary of \$340.00

With respect to appellant's physical limitations, the Board notes that appellant's attending physician, Dr. Heist, indicated on a work restriction evaluation form dated June 15,

¹ *Carla Letcher*, 46 ECAB 452 (1995); *David W. Green*, 43 ECAB 883 (1992).

² 5 U.S.C. § 815(a); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.184 (December 1993).

⁴ *Id.*

⁵ *Dennis D. Owen*, 44 ECAB 475 (1993).

⁶ *Id.*; *Albert C. Shadrick*, 5 ECAB 376 (1953); see 20 C.F.R. § 10.303.

1995, that appellant had reached maximum medical improvement and could return to work 8 hours a day, provided he was not required to lift more than 20 pounds, he had intermittent walking for 1 hour per day, intermittent sitting for 8 hours, no lifting, bending, squatting, climbing or twisting, and kneeling and standing up to 1 hour per day. He also indicated that appellant had no cardiac, visual or hearing limitations. Based on this evaluation, the Office sought employment opportunities that complied with the physical limitations set by the physician. In response to the Office's August 13, 1996 notice of proposed reduction of compensation, appellant submitted an August 21, 1996 report from Dr. Heist which stated that appellant was incapable of performing a job at an alarm company. However, he does not state that appellant could not perform the position of accounting clerk. Furthermore, the Office medical adviser reviewed the position description of accounting clerk and indicated that it complied with the physical restrictions set by Dr. Heist. The Board finds that the selected position of accounting clerk fairly and reasonably reflects appellant's wage-earning capacity under the circumstances.

As the medical evidence established that appellant was capable of performing sedentary work with restrictions, and as the Office followed established procedures for determining vocational suitability and reasonable availability of the position selected, the Board finds that the Office, having given due regard to the factors specified at section 8115(a) of the Act, properly reduced appellant's monetary compensation on the grounds that he has the capacity to work as an accounting clerk.

The decision of the Office of Workers' Compensation Programs dated October 6, 1996 is hereby affirmed.

Dated, Washington, D.C.
January 7, 1999

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member