

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES SHIVERS and DEPARTMENT OF THE NAVY,
PHILADELPHIA NAVAL SHIPYARD, Philadelphia, PA

*Docket No. 97-1622; Submitted on the Record;
Issued September 17, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined that the position of "order taker" represented appellant's wage-earning capacity.

In the present case, the Office accepted that appellant, a rigger, sustained a crush injury to his right ring finger with avulsion of extensor tendons, on October 28, 1976. Appellant underwent a number of surgical procedures including a 1978 arthrodesis and excision of the ulnar digital nerve, a 1980 bone graft to the right ring finger, a 1981 partial amputation of the finger, and a 1984 resection of the finger. Appellant received a schedule award for 100 percent loss of his right ring finger. Appellant returned to light work, which he performed until July 15, 1985. The Office thereafter paid appellant compensation benefits for temporary total disability. The Office reduced appellant's compensation benefits on January 22, 1996 to reflect appellant's wage-earning capacity in the constructed position of "order taker." The Office denied appellant's request for reconsideration on April 1, 1997, after merit review of the claim.¹

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.²

¹ On appeal, the Director of the Office has characterized the Office's April 1, 1997 decision as a denial of modification of the loss of wage-earning capacity determination pursuant to *Charles D. Thompson*, 35 ECAB 220 (1983) and *Elmer Strong*, 17 ECAB 226 (1965). In his request for reconsideration dated January 13, 1997, appellant's representative requested reconsideration of the January 22, 1996 decision, or alternative modification of the loss of wage-earning capacity determination on the grounds that appellant's accepted condition had worsened. The Office in its April 1, 1997 memorandum to the Director addressed appellant's request for reconsideration, but did not address modification of the loss of wage-earning capacity determination pursuant to the standards set forth in *Elmer Strong*.

² *James R. Verhine*, 47 ECAB 460 (1996).

The Board finds that the Office did not meet its burden of proof to establish that the position of “order taker” represents appellant’s wage-earning capacity.

A reduction in benefits for partial disability is accomplished under section 8115 of the Federal Employees’ Compensation Act by the determination of appellant’s wage-earning capacity.³ In determining compensation for partial disability, this section of the Act provides that if actual earnings of the employee do not fairly and reasonably represent wage-earning capacity or if the employee has no actual earnings, “... the wage-earning capacity of an employee is determined * * * with due regard to -- (1) the nature of his injury; (2) the degree of physical impairment; * * * [and] other factors or circumstances which may affect his wage-earning capacity in his disabled condition.” Section 10.303(a) of Title 20 of the Code of Federal Regulations explains that a partial disability rate of compensation shall be determined by the Office by selection of a job after having given due regard to the nature of the employee’s injury, the degree of physical impairment and other factors or circumstances which may affect the employee’s wage-earning capacity in his or her disabled condition.

In the present case, the Board finds that the Office improperly determined appellant’s loss of wage-earning capacity as it did not obtain the medical evidence necessary to determine whether the degree of appellant’s physical impairment resulting from the accepted injury would preclude appellant’s performance of the selected position. In previous cases, the Board has emphasized that the Office must obtain a current medical evaluation and determination as to whether the duties of the selected position are within appellant’s work tolerance limitations.⁴ The Board has specifically stated that the Office must ensure that the record contains a detailed current description of appellant’s disabled condition and ability to perform work.⁵ In the present case, the Office failed to ensure that the record contained a detailed current description of appellant’s disabled condition and ability to perform the duties of the selected position.

The Board notes that the only medical evidence included in the case record that could be considered reasonably current to the date of the Office’s January 22, 1996 determination of appellant’s loss of wage-earning capacity was the January 24, 1994 medical records review conducted by the Office medical adviser. This record review was conducted without the benefit of a concurrent physical examination of appellant and was not, therefore, based on current detailed findings. This medical review conducted by the medical adviser some two years prior to the loss of wage-earning capacity determination, relied upon a January 29, 1979 report from appellant’s treating physician, Dr. Lawrence H. Schneider. The Board notes that appellant underwent surgical procedures after 1979 and continued working until 1985 in his light duty position. The January 1979 report was therefore of limited probative value in determining appellant’s medical condition in 1994. Because the Office medical adviser’s 1994 report lacked any current detailed description of appellant’s condition, it could not form a valid basis for a loss of wage-earning capacity determination. The Board also notes that the Office medical adviser in his January 24, 1994 report, did not actually opine that appellant could perform the duties of the

³ 5 U.S.C. § 8115.

⁴ *Keith Hanselman*, 42 ECAB 680 (1991).

⁵ *Anthony Pestana*, 39 ECAB 980 (1988).

selected position, but rather recommended that appellant's treating physician, Dr. Schneider, be provided with a description of the selected position(s), for his opinion as to whether appellant could perform the selected position(s).

In a subsequent report dated January 2, 1997, which appellant submitted in support of his request for reconsideration, Dr. Schneider did not specifically address appellant's ability to perform the "order clerk" position, but he did note that appellant had amputation of the ring finger, with restricted motion in the adjacent fingers, impaired grip, complicated by ongoing pain syndrome. He further indicated that appellant's hand would only be a crude assistive hand in a work environment as appellant only had minimal function between the thumb and index finger. While the Board notes that the medical evidence of record does limit appellant to sedentary work, the medical evidence of record does not establish that given appellant's severe right hand injury, he would be able to perform any and all sedentary work. It was incumbent upon the Office to clarify appellant's ability to work with his right hand. The Office did not obtain a current medical evaluation necessary to assess appellant's ability to perform the duties of the "order clerk" position, with or without use of his right hand. The Office did not meet its burden of proof in this regard.

The decision of the Office of Workers' Compensation Programs dated April 1, 1997 is hereby reversed.

Dated, Washington, D.C.
September 17, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member