

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DIEGO J. VIGIL and DEPARTMENT OF AGRICULTURE,
CARSON NATIONAL FOREST, Taos, NM

*Docket No. 99-906; Submitted on the Record;
Issued June 7, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation effective October 23, 1998 based on his capacity to earn wages as a cashier.

The Board finds that the Office improperly reduced appellant's compensation effective October 23, 1998 based on his capacity to earn wages as a cashier.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.¹ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.²

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 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.³ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment

¹ *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

² *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

³ *See Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

conditions.⁴ The job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives.⁵

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by the Office or 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 labor market, that fits that employee's capabilities with regard to his physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service. Finally, application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.⁶

On July 5, 1994 appellant, then a 22-year-old firefighter, sustained an employment-related lumbosacral strain, herniated disc at L5-S1 and S1 radiculopathy. The Office paid compensation for periods of disability. By decision dated October 23, 1998, the Office reduced appellant's compensation effective that date based on his capacity to earn wages as a cashier.

The Office referred appellant to a vocational rehabilitation counselor who determined that appellant was vocationally and educationally able to perform the cashier position. The Board notes, however, that the Office did not meet its burden of proof to establish that appellant was physically capable of performing the cashier position effective October 23, 1998, the date that it adjusted appellant's compensation.⁷

The Office based the adjustment of appellant's compensation on an August 30, 1995 report of Dr. Leroy J. Miller, a Board-certified neurosurgeon to whom it referred appellant. In his report, Dr. Miller indicated that appellant continued to have an employment-related S1 radiculopathy. Dr. Miller indicated that appellant could not work as a firefighter or lift more than 25 pounds, but he did not provide a clear opinion on the nature and extent of appellant's work restrictions. Moreover, the record contains reports dated in late 1994 and early 1995 in which Dr. Robert A. Feldman, an attending Board-certified neurosurgeon, indicated that appellant was

⁴ *Albert L. Poe*, 37 ECAB 684, 690 (1986), *David Smith*, 34 ECAB 409, 411 (1982).

⁵ *Id.*

⁶ See *Dennis D. Owen*, 44 ECAB 475, 479-80 (1993); *Wilson L. Clow, Jr.*, 44 ECAB 157, 171-75 (1992); *Albert C. Shadrick*, 5 ECAB 376 (1953); see also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8 (December 1993).

⁷ The cashier position required occasional lifting up to 20 pounds, frequent lifting up to 10 pounds, and engaging in walking and standing.

totally disabled due to his employment injury.⁸ It should further be noted that the record does not contain any medical report from around the time of the adjustment of appellant's compensation in late 1998 which outlines appellant's work restrictions or otherwise shows that appellant was physically capable of performing the cashier position. The Office relied upon a report which was more than three years old at the time appellant's compensation was adjusted.

Therefore, the Office did not properly consider all the relevant factors, including appellant's physical limitations, in basing appellant's wage-earning capacity on the position of cashier and the Office improperly adjusted appellant's compensation effective October 23, 1998.

The decision of the Office of Workers' Compensation Programs dated October 23, 1998 is reversed.

Dated, Washington, D.C.
June 7, 2000

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member

⁸ The record also contains an August 13, 1996 report in which Dr. David W. Caldwell, a Board-certified orthopedic surgeon to whom the Office referred appellant, stated that appellant continued to have sciatic symptoms of his disc herniation. Dr. Caldwell indicated that appellant had limitations but did not clearly describe their nature and extent.