

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN J. GLOFF and DEPARTMENT OF THE NAVY,
NAVAL TRAINING CENTER, Great Lakes, IL

*Docket No. 98-795; Submitted on the Record;
Issued March 22, 2000*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to establish that the selected position of an "Order Clerk" reasonably represented appellant's wage-earning capacity.

On October 15, 1986 appellant, then a 43-year-old machinist, injured his back while lifting a 60- to 80-pound box. The Office accepted the conditions of a lumbosacral strain with subluxation at L3-5, an L5-S1 herniated disc and an L5-S1 microdiscectomy. Appropriate compensation was paid.

Appellant received vocational rehabilitation services, following a work capacity evaluation. Subsequently, a rehabilitation counselor and the Office rehabilitation specialist found the position of Computerized Numerical Control Clerk -- Customer Order Clerk to be medically and vocationally suitable for appellant.

On January 25, 1995 the Office issued a notice of proposed reduction in compensation to reflect appellant's wage-earning capacity as a Computerized Numerical Control Clerk -- Customer Order Clerk. Appellant was given 30 days to respond to the proposed action.

By letter dated February 1, 1995, appellant responded to the Office's proposed action with various statements about his case. No medical or vocational evidence was provided to substantiate his response that he could not perform the selected position with a good faith effort.

By decision dated July 24, 1995, the Office issued a formal rating of wage-earning capacity and reduced appellant's compensation on the grounds that he was medically and vocationally capable of performing the duties of a Computerized Numerical Control Clerk -- Customer Order Clerk.

In an August 15, 1995 letter, appellant requested reconsideration. Appellant argued that none of the physicians reported that he would work eight hours and also commute for three

hours; that he did not understand computers; that the navy had lost his medical records and, therefore, was unable to hire him; that the medical examinations conducted by a Dr. Richard Sidell and Dr. Thomas F. Gleason, a Board-certified orthopedist, were inappropriate; that the Department of Labor did not assist him in obtaining another job; and that the rehabilitation counselors did not adequately perform their job. He also submitted a brief medical note and work restriction form from Dr. Burt E. Schell, his attending physician.

By decision dated October 13, 1995, the Office denied appellant's request on the grounds that the evidence submitted was insufficient to warrant modification of its prior decision.

By letter dated July 25, 1997, appellant's attorney, Jeffrey P. Zeelander, requested reconsideration. Appellant's attorney set forth six points of error. First, he stated that the statement of accepted facts used in the second opinion and independent medical examiner's decisions was flawed because it contained the rehabilitation counselor's ruling that the selected position of Computerized Numerical Control Clerk -- Customer Order Clerk (hereinafter CNC-COC) was "medically and vocationally suitable for the claimant." He argued that "the inclusion of the sentences in the SOAF [statement of accepted facts] destroys any appearance that the specialists selected by the district Office carried out an independent and unbiased evaluation." Second, the *Dictionary of Occupational Titles* (DOT) does not contain a listing for the selected position of CNC-COC. Third, the case file fails to reveal a completed CA-66 form. Fourth, the evidence does not support that appellant possesses the vocational preparation to perform the position of customer order clerk. Fifth, the evidence fails show that the position is geographically available or that the wage rate is accurate. And sixth, that there is no evidence indicating that the position of CNC-COC is performed in sufficient numbers. "Nor is there proper evidence as to what is the wage for the specific position."

By decision dated November 24, 1997, the Office modified the July 24, 1995 decision based upon the customer order clerk position at \$8.75 per hour. The Office determined that reconsideration beyond the one-year time limit was warranted as July 24, 1995 wage-earning capacity was in error. Specifically, the Office determined that the DOT did not list the CNC-COC title. The Office found that the suitability review, labor market survey and loss in wage-earning capacity decision all used the customer order clerk job, DOT No. 249-362.026, with an average wage pay rate of \$8.75 per hour. The Office found that, although the actions leading to wage-earning capacity decision were based upon the customer order clerk job title, the July 24, 1995 decision was based upon the CNC-COC title, which had a higher hourly wage. The Office found that the effect of combining job titles and basing the loss in wage-earning capacity on the higher paying rate was in error as it had the effect of erroneously lowering appellant's loss in wage-earning capacity payments.

The Board finds that the Office met its burden of proof to reduce appellant's compensation benefits based on the position of order clerk.

Pursuant to section 8115 of the Federal Employees' Compensation Act,¹ when a claimant is no longer totally disabled but remains partially disabled, compensation for partial disability

¹ 5 U.S.C. § 8115.

will be determined by actual earnings, if possible. If actual earnings do not fairly and reasonably represent wage-earning capacity, or if the claimant 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.²

The Office's procedures governing cases where the wage-earning capacity is to be determined based upon a selected position if vocational rehabilitation did not succeed, provide that an assessment shall be made of appellant's suitability for employment with due regard to medical suitability of the selected position, reasonable availability of the selected position (with note 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); and vocational suitability. In determining vocational suitability, a description of the position from the DOT the duties and physical requirement of the position and pay ranges in the relevant geographical area must be provided.³

In this case, the Office modified its July 24, 1995 decision, to reflect that appellant was vocationally qualified and physically capable of doing the selected position of Order Clerk at an \$8.75 wage per hour. The Board notes that the Office properly found that the selected position was within appellant's medical restrictions. In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.⁴ In this case, finding that a conflict of medical opinion existed, the Office referred appellant to Dr. Gleason, to provide an impartial evaluation. In a comprehensive report dated October 31, 1994, Dr. Gleason advised that he had the opportunity to review appellant's medical record along with a job description of an order clerk taken from the DOT, Titles Volume I, Fourth Edition. After performing a complete physical examination, he advised that appellant could perform the selected position. He also advised that appellant was restricted in terms of heavy lifting greater than 10 pounds, excessive bending or repetitive twisting. Dr. Gleason recommended that appellant be allowed to adjust his position approximately every 30 minutes. There is no indication that the selected position is not within appellant's medical restrictions. The Office, therefore, met its burden of proof to establish that the selected position was within appellant's medical restrictions.

Regarding the reasonable availability of the selected position, the Office obtained the March 30, 1994 report from the vocational rehabilitation counselor, which indicated that the U.S. Census Data demonstrated that there were significant numbers of workers performing the selected position of Customer Order Clerk, DOT No. 249.362-026, in the Chicago area

² *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8 (December 1993).

⁴ *See Kathryn Haggerty*, 45 ECAB 383 (1994); *Edward E. Wright*, 43 ECAB 702 (1992).

economy. Contact with six employers had identified customer service representative positions in both the real estate and industrial fields with an average wage of survey respondents reported as being \$6.80 per hour. The vocational rehabilitation counselor indicated that the 1993 median wage reported by the U.S. Department of Labor for customer service representatives in the Chicago area was \$8.75 per hour. The Office based appellant's loss of wage-earning capacity on the 1993 median wage of \$8.75 per hour. The Board notes that the selected position involved the duties of "processing orders for material or merchandise received by mail, telephone, or personally from customer or customer employee, manually or by using computer or calculating machine." The report from the vocational rehabilitation counselor indicated that a number of companies in the area had customer service representative positions available. Although appellant properly notes that wage and availability of the selected position was based on that of a customer service representative, the Board finds that these customer service representative positions identified by the vocational rehabilitation counselor are consistent with the description of the selected position of a customer order clerk, which involves sedentary semi-skilled employment. The nature of a customer service representative position along with the fact that the location of these positions within appellant's commuting area was verified is enough to establish that the Office properly ascertained the reasonable availability of the selected position, within appellant's commuting area.

Finally, the vocational rehabilitation specialist found that appellant had 11 years of experience with welding equipment, machine tools and engines, as well as keyboard skills. Based on appellant's work background and vocational testing, the Office could properly determine the pay rate of the selected position by utilizing the median wage of \$8.75 per hour as opposed to the average hourly wage.

Thus, the Office properly followed its established procedures for determining appellant's wage-earning capacity.⁵

⁵ See *Phillip S. Deering*, 47 ECAB 692, 698 (1996) (find that the Office properly applied the principles set forth in *Albert C. Shadrick*, 5 ECAB 376 (1953), for determining appellant's loss of wage-earning capacity).

The November 24, 1997 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
March 22, 2000

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member