

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of FRANCISCO BERMUDEZ and DEPARTMENT OF AGRICULTURE,  
SEQUOIA NATIONAL FOREST, Porterville, CA

*Docket No. 98-1395; Submitted on the Record;  
Issued May 11, 2000*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's wage-earning capacity was represented by the position of cashier.

In the present case, the Office accepted that on July 23, 1990, appellant, then a 57-year-old emergency firefighter, sustained a facial contusion and laceration of the left eyebrow and a left shoulder strain causally related to his federal employment. He stopped work that day and was paid temporary total disability compensation by the Office thereafter.

In a report dated October 15, 1991, Dr. Richard L. Pantera, a Board-certified neurologist and appellant's treating physician, diagnosed chronic musculoligamentous strain affecting the left shoulder, now permanent and stationary, and stated that appellant was unable to use his left upper extremity for forceful pushing, pulling or any overhead work. On a work restriction evaluation form received by the Office on April 8, 1992, Dr. Pantera stated that appellant could work 8 hours a day and could perform continuous sitting, walking, bending, squatting, climbing, kneeling, twisting and standing and lift 50 to 75 pounds with his right arm. He emphasized that appellant could not do any lifting at all with his left arm and could not work or reach overhead with his left arm. While Dr. Pantera also checked a box indicating that appellant had no cardiac, visual or hearing impairments, he later recommended, in a report dated April 14, 1992, that appellant be given a complete eye evaluation in light of his continuing complaints of pain in the left eye and on the left side of his head.<sup>1</sup> On October 14, 1992 Dr. David G. Feil, a Board-certified ophthalmologist, evaluated appellant and concluded that appellant had 20/25 vision in his right eye and 20/300 in his left eye, which was not due to any physical trauma but was due to hyperopia, or farsightedness, which had always been present. Dr. Feil further concluded that there was no physical abnormality, which could be causing the pain appellant complained of and

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<sup>1</sup> Dr. Pantera continued to submit periodic reports, in which he stated that appellant's condition was unchanged.

that he felt these complaints were largely psychosomatic. He prescribed glasses, which were subsequently obtained by appellant.

In May 1991, while updated medical information was being gathered, the Office initiated vocational rehabilitation efforts. In the report of her initial appointment with appellant, the vocational rehabilitation counselor noted that appellant's only prior work experience was as a farm laborer and as an emergency firefighter, and that appellant stated, through an interpreter, that he did not speak or understand English and that he had only one year of formal education in Mexico.<sup>2</sup> The rehabilitation counselor stated that prevocational testing revealed that appellant's intelligence quotient was approximately 85, in the lowest end of the average range, but added that on this test appellant may not have scored as highly as would actually reflect his abilities due to his lack of education and the test environment. On the advice of the rehabilitation counselor, on April 27, 1992 appellant was enrolled in a one-year English as a Second Language course. The vocational rehabilitation counselor submitted regular reports, in which she summarized appellant's progress. In her report dated January 31, 1993, the rehabilitation counselor stated that appellant's English skills had only marginally improved and that he still relied heavily on an interpreter. In a report dated March 31, 1993, the rehabilitation counselor stated that appellant's English progress continued to be very slow and that she felt he would require a job training program, which would allow him to rely predominantly on his Spanish speaking skills. The English language classes were extended through July 1993, to compensate for periods of absence due to illness. In her report dated April 30, 1993, the rehabilitation counselor stated that she had determined that the only training program which provided job skills to the Spanish speaking population was at a nearby facility which offered training in cashiering, data entry and auto mechanics. In her report dated May 1, 1993, the counselor stated that appellant still had major difficulties communicating in English.

On August 31, 1993 the rehabilitation counselor prepared a labor market survey and determined, on the basis of the medical evidence of record and information concerning appellant's educational and employment background, that the selected position of cashier was suitable for appellant.<sup>3</sup> The position was described by the vocational rehabilitation counselor as follows: "light, involving exerting of force to 20 pounds occasionally or 10 pounds frequently. The job may involve significant standing/walking/pushing/pulling. This is a job which can also involve stooping, reaching, handling and fingering on a frequent basis. This is a job in which the specific vocational preparation is stated to be 30 days to 3 months. In this job an individual does need average intelligence, verbal skills, numerical skills and clerical perception. Below average aptitudes in special perception, form perception, finger/manual dexterity and motor coordination will be necessary." In describing the duties of the position, the rehabilitation counselor stated that "the cashier will handle money received from their employer's customers to transact business. They receive payments, handle credit transactions, make change, issue receipts and account for money received. The individual does need average eye-hand coordination and finger

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<sup>2</sup> The counselor did state, however, that at one point appellant responded to her question before it had been translated into Spanish, indicating that he had some ability to understand spoken English.

<sup>3</sup> The rehabilitation counselor fully identified the position as cashier-checker retail, Department of Labor, *Dictionary of Occupational Titles* (DOT) 211.462-014.

movement. They also need an average ability to work with numbers. The individual does need to be able to meet and work well with the public and to perform routine and repetitive tasks. This is an indoor occupation, often in a small booth or behind a counter. The job may involve extensive standing. The cashier will need to be able to operate a cash register.” The rehabilitation counselor concluded the survey stating:

“The overall results of the Labor Market Survey would indicate many of the employers are willing to hire an individual who has limited English speaking skills, but the ability to communicate with customers in Spanish. The employers do not indicate a minimum education requirement as being necessary. They do indicate a preference for someone who has experience in working with cash and making change. Some of the employers also indicated it is beneficial for an individual to be able to handle charge card purchases. There is both part[-]time and full[-]time employment available, with entry level wages generally being \$4.25 an hour.... In some instances the jobs involved strictly cashiering without any lifting requirements, whereas in other instances there may be some stocking of retail merchandise; however, in this lifting, the lifting can be limited to 20 pounds or less in most instances. In addition, most lifting or working with the arms is done below the shoulder level as if items are being stocked on shelves they will generally be stocked at a height where they can be reached by the customer.”

In a letter dated December 15, 1993, Dr. Pantera stated: “I have reviewed the job requirements for cashier and I believe the patient can do this. He is, therefore, cleared to enter vocational rehabilitation for that.”

After additional research, the rehabilitation counselor submitted a supplemental report dated January 25, 1994 in which she stated:

“In doing the supplemental labor market research it was determined that many of the employers report lifting of 0 [to] 20 pounds to exist in the job. Many of the employers do have a hand truck to assist in moving merchandise from the area where it is stored to the shelves where it is to be stocked. In some of the employer locations there is lifting of 20 [to] 30 pounds and it would appear lifting in excess of 30 [pounds] is not common. The lifting is commonly to place merchandise on a hand truck to move it to the area where it is to be stocked. Work above the shoulder level is minimal and when it does occur requires working with very limited weight. In reviewing the supplemental information and taking into consideration the medical limitations as outlined by Dr. Pantera it continues to appear as if this is a suitable occupation and within the limitations as outlined on the OWCP-5.”

On August 25, 1994 in order to ensure that appellant had the physical capacity to return to work, appellant was examined by Dr. Archer D. Huott, a Board-certified neurologist and Office second opinion physician. Appellant’s daughter acted as an interpreter. The Office supplied Dr. Huott with a statement of accepted facts, the medical evidence of record and a list of questions to be answered. In his report, after performing a complete review of the record as

well as a physical examination, Dr. Huott listed his impression as: (1) post laceration left eyebrow secondary to industrial injury; (2) decreased vision of [left eye] secondary to amblyopia, unrelated to industrial injury; (3) hypesthesia to pin left side of face felt to be fictitious; and (4) history of musculoligamentous strain left shoulder. In response to the Office's questions, Dr. Huott commented:

“It would seem reasonable t[o] predict that this patient's symptoms would have resolved by now. Perusing the records it is apparent that he has not entered into the full spirit of rehabilitative effort. I think most of his symptoms are being embellished.

“Regarding the statement of facts that this patient has been receiving vocational rehabilitation services as a cashier, I find this incredible since he has only a first grade education. He certainly must be illiterate in Spanish and obviously so in English.”

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“I feel the claimant suffers residuals from the injury of July 23, 1990. They are the following: 1. Laceration of the left eyebrow. 2. History of contusions and abrasions left side of face with residual pain which is mild to moderate intermittent. It is conceivable that the tree branch could also have injured his left shoulder and this is the reason for the musculoligamentous strain diagnosed by Dr. Pantera. This being the case, the claim of just facial laceration and contusions is incorrect and should include the shoulder injury.

“Because of this latter injury, I do not feel he could perform the position of a firefighter; obviously from review of the attached physical requirements of a firefighter.”

Dr. Huott concluded his report by recommending a course of treatment for appellant's left shoulder. He did not submit the requested work capacity evaluation form.

On August 29, 1994 appellant began a training program in cashiering, scheduled to run through December 23, 1994. The course, taught at the California Technical Training Center, also included classes in English as a second language. A progress report from the training center for August and September indicated that appellant was progressing poorly in every area, including “[10] key” operation, business math and both conversational and written English as a second language. The instructor further noted that appellant had poor attendance, poor class participation, was unable to understand the theory, unable to focus on the subject matter and had poor reading and writing skills. The instructor stated that appellant had missed 10-days during the months of August and September, but also noted that appellant's absenteeism was mostly due to the fact that he depended on another student for transportation. The instructor stated that appellant's other problems included problems with eyesight, with watery, red eyes and an inability to focus. The instructor explained that appellant had never attended any type of schooling and, therefore, had to start from the basic alphabet and learn to identify numbers. The instructor further stated that appellant did not want to learn the 10 key or learn anything new.

The instructor concluded that appellant did not have the traits necessary to succeed in the chosen field, as he was a slow learner and had poor eyesight. He noted that to date in the class, appellant had just learned his numbers and had gotten no further than that, due to his incapacibilities.

In an entry dated December 7, 1994, the rehabilitation counselor related her most recent discussion with the training center instructor regarding appellant's progress. The instructor indicated that although appellant was showing more enthusiasm and was participating in class more, to date he had had no exposure to using the cash register and was still working on his initial assignments using the "[10-]key," and taking 10 to 15 minutes to do 1 math problem involving addition. The instructor stated that it was possible that appellant could be taught the difference on the cash register between taxable and nontaxable items, but was unsure whether appellant could ever be employed in a mini-mart setting, stating that this was too fast paced. In an entry dated December 14, 1994, the rehabilitation counselor noted that appellant had started working with the cash register, but was reported to be having difficulty with this activity and the instructor was expressing concerns regarding how far appellant would get before the ending date of the training course. When asked whether it would benefit appellant to extend the training course approximately three weeks, to make up for his periods of absence, the instructor advised that she was not sure this would make any difference. In an entry dated December 22, 1994, the rehabilitation counselor confirmed that appellant would complete his training the following day, based on the opinion of the training center instructor that an extension of training would not increase appellant's job skills.

On March 28, 1995 the rehabilitation counselor submitted a final report, indicating that the positions of cashier/checker, No. 211.462-014, was within appellant's capabilities, was reasonably available in his commuting area and had a starting wage of \$4.35 an hour, or \$174.00 a week.<sup>4</sup> The position of cashier/checker was described as:

"Operates cash register to itemize and total customer's purchases in grocery, department or other retail store. Collects cash, check or charge payment from customer and makes change for cash transactions. Counts money in cash register at beginning and end of shift."

The position was further described as requiring light strength, lifting up to 20 pounds, and the ability to reach, handle, finger, feel, talk, hear and see. In support of her final recommendation, the rehabilitation counselor stated that appellant participated in a training program, which was in excess of three months in length and that the training did include working with 10-key, cash register and training in state sales tax issues.

In a letter dated July 12, 1996, the Office advised appellant that it proposed to reduce his compensation based on his capacity to earn wages in the constructed position of cashier/checker. With regard to appellant's medical restrictions, the Office indicated that Dr. Pantera, appellant's treating physician, had reviewed the job requirements for cashier and stated that he believed

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<sup>4</sup> The rehabilitation counselor also included data for the position of cashier, self-service gas station, No 211.462-010; however, this is not the position which was ultimately selected by the Office.

appellant could perform them. By decision dated August 14, 1996, the Office determined that appellant's wage-earning capacity was represented by the selected position of cashier/checker and reduced appellant's compensation accordingly.

Appellant, through counsel, requested an oral hearing and submitted additional documentary evidence in support of his claim. At the hearing, held on August 28, 1997, appellant was interviewed through an interpreter. In a decision dated December 5, 1997, an Office hearing representative affirmed the Office's prior decision.

The Board has reviewed the record and finds that the wage-earning capacity determination in this case was improper.

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.<sup>5</sup>

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.<sup>6</sup>

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case 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 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 service or other applicable service.<sup>7</sup> 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.<sup>8</sup>

The initial question presented is whether the selected position of cashier was determined with due regard to the nature of appellant's employment injury and the degree of physical impairment. The Office selected the position of cashier/checker<sup>9</sup> as a position within appellant's

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<sup>5</sup> *Carla Letcher*, 46 ECAB 452 (1995).

<sup>6</sup> *See Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); *see also* 5 U.S.C. § 8115(a).

<sup>7</sup> *See Dennis D. Owen*, 44 ECAB 475 (1993).

<sup>8</sup> 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.303.

<sup>9</sup> Department of Labor, *Dictionary of Occupational Titles*, DOT No. 211.462-014. (4<sup>th</sup> ed. 1981).

work limitations. The job was described by the rehabilitation counselor and the Office claims examiner as light, requiring the ability to lift up to 20 pounds, reach, handle, finger, talk and hear. The *Dictionary of Occupational Titles*, however, actually describes the position as follows:

“Operates cash register to itemize and total customer’s purchases in grocery, department, or other retail store. Reviews price sheets to note price changes and sale items. Records prices and departments, subtotals taxable items and totals purchases on cash register. Collects cash, check or charge payment from customer and makes change for cash transactions. Stocks shelves and marks prices on items. Counts money in cash drawer at beginning and end of shift. May record daily transaction amounts from cash register to balance cash drawer. May weigh items, bag merchandise, issue trading stamps and redeem food stamps and promotional coupons. May cash checks. May use electronic scanner to record price. May be designated according to items checked as [g]rocery [c]hecker (retail trade).”

In the present case, the Office relied on a work restriction evaluation from Dr. Pantera as well as Dr. Pantera’s December 15, 1993 report, in which he stated that he had reviewed the job requirements for cashier and believed appellant could perform these duties. At the hearing, however, appellant submitted evidence that indicated that Dr. Pantera was not aware of the complete physical requirements of the position. In a letter dated June 27, 1994, he enclosed the description of the cashier position which was provided to him, which is that for job number 211.462-010, not 211.462.014 and which describes the position as “light requiring exerting force to 20 [pounds] occasionally or 10 [pounds] frequently” but does not actually indicate that the position requires lifting or stocking shelves. It is evident that at the time of the wage-earning capacity determination in this case Dr. Pantera’s opinion that appellant could perform the duties of a cashier was not based on a complete and accurate description of the physical requirements of the position. Specifically, no lifting or stocking of shelves is mentioned in the copy forwarded to the physician. While Dr. Pantera earlier indicated that appellant could lift with his right arm, he specifically stated that he could perform no lifting at all with his left arm. Thus, any lifting appellant would be required to do would have to be performed one handed. As there is no indication in the record that Dr. Pantera or any other physician reviewed the complete and accurate job duties of the position and offered an opinion that appellant could perform the duties of the selected position,<sup>10</sup> the Office has failed to establish that it gave due regard to the factors enumerated under section 8115 in *determining* wage-earning capacity. It is the Office’s burden to justify a subsequent reduction in compensation and it has failed to meet its burden in this case.

The Board further finds that the evidence of record does not establish that appellant was capable by virtue of his educational background and mental capacity to perform the duties of cashier/checker, the job selected by the Office to represent his wage-earning capacity.

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<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.8(d) (December 1995) (“if the medical evidence is not clear and unequivocal, the CE [claims examiner] will seek medical advice from the DMA [district medical adviser], treating physician, or second opinion specialist as appropriate”).

The job description of a cashier, as set forth in the *Dictionary of Occupational Titles*, states that the position requires a level two mathematical ability, described as: “add subtract, multiply and divide all units of measure. Perform the four operations with like common and decimal fractions. Compute ratio, rate and percent. Draw and interpret bar graphs. Perform arithmetic operations involving all American monetary units.”<sup>11</sup> The position also requires a level two language ability, described as: “Passive vocabulary of 5,000[ to ]6,000 words. Read at rate of 190 to 215 words per minute. Read adventure stories and comic books, looking up unfamiliar words in dictionary for meaning, spelling, and punctuation. Read instructions for assembling model cars and airplanes. Write compound and complex sentences, using cursive style, proper end punctuation and employing adjectives and adverbs. Speak clearly and distinctly with appropriate pauses and emphasis, correct pronunciation, variations in word order, using present, perfect and future tenses.”<sup>12</sup> However, the rehabilitation counselor noted in her reports that appellant’s intelligence quotient was at the lowest end of average, that he had only one year of formal education and that he could neither read nor write in either Spanish or English. In addition, although appellant completed a year of English as a second language and further completed a three month course in cashiering, it is clear from the reports of the rehabilitation counselor that he neither learned to speak English nor mastered the skills required of a cashier. While the record does support the rehabilitation counselor’s assertion that there are numerous positions available in appellant’s area, for which the ability to speak Spanish is a benefit, there is no evidence in the record that there are any positions available for a person with English language skills equivalent to those of appellant. The record further reveals that appellant spent at least half of his cashier training course learning to recognize numbers and letters and that he did not begin to work with the cash register until the last week of class. The training instructor specifically stated that appellant needed 10 to 15 minutes to complete an addition problem using a 10-key, that he lacked the traits necessary to succeed as a cashier and that he would not benefit from any additional training. Therefore, the totality of the evidence of record puts into doubt appellant’s ability to perform the duties required of a cashier.<sup>13</sup>

The Office should redetermine appellant’s loss of wage-earning capacity taking into account any impairments which preexisted his employment injury as well as taking into account his work experience and educational background. Should the Office deem it necessary to further develop the record concerning appellant’s preexisting impairments or general background, it should do so.

The Board further notes, in light of appellant’s assertions on appeal, that it is unclear from the record whether the Office ever determined whether appellant was a “career seasonal” employee for the purposes of pay rate computation.<sup>14</sup> Information as to the career seasonal

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<sup>11</sup> Department of Labor, *Dictionary of Occupational Titles*, DOT No. 211.462-014 (1981); Department of Labor, *Selected Characteristics of Occupations Defined in the Dictionary of Occupational Titles*, p 470-71 (1981).

<sup>12</sup> *Id.*

<sup>13</sup> See *David Framer*, 31 ECAB 1608.

<sup>14</sup> The Office procedure manual describes career seasonal employees as follows:

“Career Seasonal. Some employees regularly work only part of a calendar year, usually for the



status of an employee may appear on Forms CA-4 or CA-7. However, when, as in this case this information is not contained on such forms, the Office must obtain this information from the employing agency.<sup>15</sup> Therefore, the Office should clarify appellant's employment status and pay rate for compensation purposes.

The December 5, 1997 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, D.C.  
May 11, 2000

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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same general period each year and at the same type of job. This type of employment is often of a highly specialized or unique nature. Firefighters employed by the Forest Service during the peak summer fire season are an example. An individual who has worked in such a position during more than one calendar year is considered to be a career WAE [when actually employed] employee. Such an employee is entitled to receive compensation on the same basis as a full-time permanent employee of the same grade and step of the position occupied by the claimant."

Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.4(a)(1) (December 1995).

<sup>15</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.4(c) (December 1995).