

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JACOB ROUSE and TENNESSEE VALLEY AUTHORITY,  
MARTIN POWER SERVICE CENTER, Martin, TN

*Docket No. 98-2559; Submitted on the Record;  
Issued May 5, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation benefits effective December 12, 1997 based on its determination that the selected position of sales attendant represented his wage-earning capacity.

On August 16, 1993 appellant, then a 51-year-old truck operator, sustained an injury to his right hand, thumb and index finger while in the performance of duty. On the day of the injury, Dr. John Howard, a Board-certified family practitioner, examined appellant and diagnosed right hand contusion. On October 19, 1993 he treated appellant at Volunteer General Hospital reporting that appellant had hurt his right wrist a couple of months before and that it was still bothering him. Dr. Howard recommended that appellant see an orthopedist. Appellant subsequently sought treatment from Dr. Randy Fly, a Board-certified orthopedic surgeon. On April 29, 1994 the Office accepted appellant's claim for right hand contusion, right thumb sprain, right wrist sprain, right shoulder sprain, rotator cuff tear and subsequent right shoulder reconstruction and paid appropriate compensation.

On June 1, 1994 Dr. Fly released appellant to return to work as a machine operator. By report dated August 2, 1994, he indicated that appellant went back to work and continued to have shoulder pain. On September 15, 1994 appellant underwent surgery to repair a torn rotator cuff. On September 26, 1994 he filed a Form CA-2a, claim for recurrence of disability. The Office paid appropriate benefits.

Appellant continued under the care of Dr. Fly, who, in a May 7, 1996 work restriction report, indicated that appellant's restrictions were: "Twenty-pound lifting, no excessive use of the right upper extremity, no repetitive lifting. He is to do no overhead work or work above the shoulder level. No continuous work or work with the arm out away from the side."

The vocational specialist conducted a labor market survey on October 9, 1996 and contacted 19 private enterprises and the Tennessee Department of Employment Services. On

October 24, 1996 the Office rehabilitation specialist recommended the development of a job search plan. Attached were position descriptions of various positions, including sales attendant. The Office noted that appellant had surgery in 1996 on his left shoulder, but that any residual disability, if any, had not been considered in developing the job search plan.

In a vocational rehabilitation report dated January 15, 1997, the rehabilitation counselor discussed his December 4, 1996 meeting with appellant and his numerous efforts in trying to reemploy appellant. The rehabilitation counselor indicated that placement was possible if appellant cooperated. The rehabilitation counselor said that appellant was “adamant that he desired to return to work with” the employing establishment. By letter dated June 18, 1997, the Office informed appellant that the job duties of sales attendant and salesperson were within the work limitations as outlined by Dr. Fly. Additionally, appellant was instructed to cooperate fully with the rehabilitation counselor in finding new employment. By letter dated July 22, 1997, the Office informed appellant that he had discontinued good faith participation in an Office approved job search. In response, appellant’s wife submitted an August 8, 1997 letter disputing her husband’s intransigence. On September 9, 1997 the rehabilitation specialist issued his final report indicating that he was ceasing his rehabilitation efforts.

In a decision dated October 29, 1997, the Office adjusted appellant’s compensation based on his failure to cooperate with vocational rehabilitation efforts.

By a notice of proposed reduction dated November 10, 1997, the Office vacated its October 29, 1997 decision as it had been issued prematurely. The Office further advised appellant of its proposal to reduce his compensation on the basis that he was no longer totally disabled and that he was able to earn the wages of a sales attendant. In its review of the medical evidence, the Office found that appellant had submitted no new medical evidence contrary to Dr. Fly’s May 7, 1996 opinion that appellant was able to work within certain restrictions. Additionally, the Office found that the position of sales attendant was reasonably available in his geographic area and fit within the restrictions outlined by Dr. Fly.

The physical demands of the sales attendant position were noted as light: lifting up to 20 pounds, occasional stooping, frequent reaching and handling and occasional fingering. The description stated that a sales attendant performs any combination of duties to provide customer service in a self-service store: aids customers in locating merchandise; answers questions from and provides information to customers about merchandise; obtains merchandise from stockroom when merchandise is not on the floor; arranges stock on shelves or racks; directs or escorts customers to fitting rooms or to cashier; keeps merchandise in order; marks or tickets merchandise; and inventories stock.

By decision dated December 12, 1997, the Office finalized the loss of wage-earning capacity determination and adjusted appellant’s compensation effective December 12, 1997. The Office determined that the position of sales attendant, with wages of \$180.38 per week, fairly and reasonably represented appellant’s wage-earning capacity. The Office found that appellant had a 27 percent wage-earning capacity and it reduced his compensation accordingly.<sup>1</sup>

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<sup>1</sup> Appellant retired from the employing establishment effective October 16, 1994.

In a December 16, 1997 letter, appellant requested reconsideration. In support, appellant submitted Dr. Fly's medical opinion dated December 3, 1997, which reported that appellant had chronic rotator cuff tendinitis and left shoulder pain and has permanent restrictions on his left shoulder equivalent to those on his right. Dr. Fly repeated restrictions consistent with those stated in his May 7, 1996 work restriction evaluation.

By decision dated June 30, 1998, the Office conducted a merit review and found that the evidence was insufficient to warrant modification of the prior decision. In an accompanying memorandum, the Office found appellant's December 10, 1997 letter regarding his left shoulder condition and the December 3, 1997 letter from Dr. Fly concluding that appellant had permanent restrictions on his left shoulder insufficient to support a finding that appellant's left shoulder condition predated his original work injury. The Office further stated that medical conditions arising subsequent to the work-related injury could not be considered in determining wage earnings.

The Board finds that the Office improperly determined that the position of sales attendant 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 of benefits.<sup>2</sup> The Office has not met its burden in the present case.

Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions given the nature of the employee's injuries and the degree of physical impairment, his or her usual employment, the employee's age and vocational qualifications, and the availability of suitable employment."<sup>3</sup> Accordingly, the evidence must establish that jobs in the position selected for determining wage-earning capacity are reasonably available in the general labor market in the commuting area in which the employee lives. Generally, efforts to reemploy an injured worker are focused on reemployment possibilities with the employing establishment.<sup>4</sup> Where reemployment with the employing establishment is not possible, the vocational rehabilitation counselor assists in either additional job training or in job placement efforts. Where vocational rehabilitation efforts are unsuccessful, Office procedures instruct the vocational rehabilitation counselor to identify three positions from the Department of Labor's *Dictionary of Occupational Titles* and obtain information from the state employment service with respect to the availability and wage rate of the position.<sup>5</sup> The

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<sup>2</sup> *James B. Christenson*, 47 ECAB 775, 778 (1996).

<sup>3</sup> *Samuel J. Chavez*, 44 ECAB 431 (1993); see 5 U.S.C. § 8115(a); 2 A. Larson, *The Law of Workmen's Compensation* § 57.22 (1989); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814 (December 1993).

<sup>4</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.6(b) (December 1993).

<sup>5</sup> See *Carla Lechter*, 46 ECAB 452 (1995); *Harold D. Snyder*, 38 ECAB 763 (1987); see also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8 (December 1995).

procedures provide for the claims examiner to select one of the positions in view of such factors as appellant's skills, aptitude, mental alertness, personality factors, etc. and to determine the medical suitability taking into consideration medical conditions due to the accepted work-related injury and any preexisting medical condition. Medical conditions arising subsequent to the work-related injury or disease are specifically excluded from consideration.<sup>6</sup> 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.<sup>7</sup>

In the present case, the Office contacted appellant's employing establishment to determine the feasibility of returning him to work in a limited-duty capacity. As appellant was not able to return to work at the employing establishment, the Office properly referred him for vocational services. Once rehabilitation efforts were found to be unsuccessful, the case was developed to determine appellant's wage-earning capacity.<sup>8</sup>

The Office obtained a May 7, 1996 work restriction evaluation in which Dr. Fly stated that appellant could return to work, albeit with restrictions. Restrictions were noted as: "Twenty-pound lifting, no excessive use of the right upper extremity, no repetitive lifting. He is not to drive for more than an hour continuously. Appellant is to do no overhead work or work above the shoulder level. No continuous work or repetitive work with the arm out away from the side. Repetitive means more than 15 times an hour for the upper extremity." The rehabilitation specialist reviewed appellant's prior work experience, vocational aptitude and, based on a labor market survey of Jackson, Tennessee, concluded that the position of sales attendant was reasonably available. The physical demands and wage ranges of the position were noted.

In this case, the medical evidence of record does not establish that the duties of sales attendant were within appellant's medical restrictions. The position of sales attendant requires frequent reaching and handling. The job further entails obtaining merchandise from the stockroom and arranging stock on the shelves or racks. These physical tasks appear to be inconsistent with Dr. Fly's May 7, 1996 work restriction evaluation, where he noted that appellant could do no overhead work or work above his shoulder level and could do no continuous work with his arm out away from his side.

Although a claims examiner may rely upon a rehabilitation counselor's opinion as to whether a job is reasonably available and vocationally suitable, the claims examiner has the responsibility to determine whether the medical evidence establishes that appellant is able to perform the job, taking into consideration medical conditions due to the accepted work-related

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<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(d) (December 1995).

<sup>7</sup> *Albert C. Shadrick*, 5 ECAB 376 (1953).

<sup>8</sup> The Board notes that the Office's October 29, 1997 decision indicated that the Office made its decision to reduce appellant's compensation based on his refusal to cooperate with rehabilitation efforts in accordance with 5 U.S.C. § 8113 and adjusted appellant's compensation accordingly. By notice of proposed reduction dated November 10, 1997, the Office vacated this earlier decision and proposed a reduction of compensation under 5 U.S.C. § 8115. However, as the Office did not invoke or discuss 5 U.S.C. § 8113 in a subsequent final decision, the Board does not have jurisdiction over any matter pertaining to section 8113.

injury and preexisting medical conditions. The medical evidence of record at the time of the Office's loss of wage-earning capacity determination does not clearly establish that appellant was able to perform the duties of sales attendant. The evidence of record reveals that the physical requirements of the selected position may have exceeded appellant's medical restrictions. Office procedures require that unless the medical evidence is clear and unequivocal, the job description should be sent to a physician for an opinion as to whether the claimant could perform the position.<sup>9</sup> The evidence was not clear in this case, since Dr. Fly's work restriction evaluation indicated that appellant likely could not perform the reaching or handling requirements of the position. The Office should have sought clarification from Dr. Fly or secured a current medical opinion on whether appellant could perform the position of sales attendant. Additionally, at the time the Office reduced compensation effective December 12, 1997, there was no current medical opinion specifically addressing whether appellant could perform the duties of the selected position.<sup>10</sup>

In determining loss of wage-earning capacity, preexisting ailments must be considered by the Office in determining whether appellant can perform the selected position. However, the Board has repeatedly held that physical ailments acquired subsequent to and unrelated to the accepted injury are excluded from consideration.<sup>11</sup> While appellant contends that he could not perform the job of sales attendant because of current problems with his left shoulder, there is no evidence in the record that appellant's left shoulder injury predated his August 16, 1996 employment injury.

As noted above, the Office must satisfy its burden of proof prior to reducing compensation. The Board finds that the Office has not met its burden in this case.

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<sup>9</sup> Federal (FECA) Procedural Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.8(d) (December 1995).

<sup>10</sup> See *Keith Hanselman*, 42 ECAB 680, 687 (1991) (where the most recent medical evidence was over one year old and was found not to be a sufficient basis for a wage-earning capacity determination).

<sup>11</sup> *John A. Zibutis*, 33 ECAB 1879 (1982); see also *Harvey Jacobs*, 39 ECAB 1439 (1988).

The decisions dated June 30, 1998 and December 12, 1997 of the Office of Workers' Compensation Programs are hereby reversed.

Dated, Washington, D.C.  
May 5, 2000

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member