

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT L. STARR and U.S. DEPARTMENT OF AGRICULTURE,
FOREST SERVICE, McCall, ID

*Docket No. 98-2151; Submitted on the Record;
Issued October 20, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly adjusted appellant's compensation to reflect his wage-earning capacity in the position of an elementary school teacher.

The Office accepted appellant's claim for left neck and shoulder strain, cervical protrusion at C6, anterior cervical discectomy with Allograft fusion at C4-5 and C5-6, left rotator cuff tear, open subacromial decompression, open acromial joint resection and left rotator cuff repair on May 6, 1993, left shoulder arthrogram on November 9, 1993 and diagnostic arthroscopy with open left rotator cuff repair and neurogenic bladder. Appellant received temporary total disability compensation starting on November 6, 1992 and a schedule award for a 14 percent permanent impairment of his left arm from June 19, 1994 through April 17, 1995. Compensation was suspended from August 20 through December 21, 1995 for failure to cooperate with vocational rehabilitation.

In a report dated March 31, 1995, the referral physicians, Dr. Eugene Wong, a Board-certified psychiatrist and neurologist, Franklin T. Paudler, a Board-certified orthopedic surgeon, and Dr. Russell A. Vandenberg, a Board-certified psychiatrist and neurologist, opined that appellant could not do heavy lifting and carrying but could work. A physical capacities evaluation dated March 29, 1995 stated that appellant was probably able to do medium work as long as it was on a bench or within a reasonable height or office work or teach. In an Ergos evaluation summary report dated March 30, 1995, a physical therapist stated that appellant met the Department of Labor's light work requirements.

In an addendum dated May 4, 1995, Dr. Wong stated that he reviewed many of the 1995 medical reports, including his and Drs. Paudler's and Vandenberg's, and the March 29, 1995 physical capacities evaluation and stated that his conclusions remained the same as in his March 31, 1995 report. He stated that appellant could not lift more than 50 pounds overhead.

In a report dated July 31, 1995, Dr. Joseph G. Daines, Jr., appellant's treating physician and a Board-certified orthopedic surgeon, opined that appellant could return to "light-moderate" work, that he could lift as much as 60 pounds in front of him but should not lift more than 20 pounds toward shoulder height and should have no overhead lifting. He also stated that appellant should not use his arms in repetitive activities. Dr. Daines added that he cleared appellant to return to work as an aide or teacher's aide in the winter of 1994.

The job classification, Form CA-66, dated June 3, 1996 stated that the physical requirements of an elementary school teacher included lifting up to 10 pounds with frequent reaching, handling and fingering. The annual wage was \$18,661.00 per year. The job description from the Department of Labor's *Dictionary of Occupational Titles* stated the work would included teaching elementary school students academic, social, and motor skills in public or private schools.

The record reflects that appellant had an Idaho teaching certificate valid until 2000 and was enrolled at the University of Idaho for the six credits of mathematics required to renew the certificate. The Idaho certificate was issued on the basis of appellant's Massachusetts certificate for teaching elementary school. In addition, appellant was a teacher for special needs students from 1977 to 1985.

In the notice of proposed reduction of compensation dated April 15, 1998, the Office found that the physical requirements of an elementary school teacher which required lifting up to 10 pounds met Dr. Daines' restrictions that appellant should not lift more than 20 pounds. The Office also found that the June 3, 1996 job classification stated that the elementary school teacher position was reasonably available full time. The Office concluded that the position of elementary school teacher fairly and reasonably represented appellant's wage-earning capacity. The position of elementary school teacher in mid-1996 paid \$358.87.00, which was more than appellant's job of maintenance worker in June 1996 paid, *i.e.*, \$267.69; therefore, appellant's compensation would be reduced to zero. The Office gave appellant 30 days to respond.

In a statement dated April 2, 1998, appellant contended that he was 100 percent disabled, that his shoulder condition had worsened and that he took pain medication daily which worsened his stomach problems. He stated that he could barely lift his arms to write on a blackboard and he had to urinate every 20 minutes. Appellant stated that he was unemployable.

By decision dated May 19, 1998, the Office finalized the April 15, 1998 proposed notice of reduction and reduced appellant's wage-earning capacity to zero.

The Board finds that the Office properly adjusted appellant's compensation to reflect his wage-earning capacity in the position of an elementary school teacher.

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.¹

¹ *Francesco Bermudez*, 51 ECAB _____ (Docket No. 98-1395, issued May 11, 2000).

Under section 8115(a) of Federal Workers' 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.² 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, degree of physical impairment, usual employment, age, 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

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 labor 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 open labor market should be made through contact with the state employment service or other applicable service.⁴ 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.⁵

In this case, appellant's treating physician, Dr. Daines, opined that appellant could return to work, should not lift more than 20 pounds above shoulder height, should do no overhead lifting and should not use his arm in repetitive activities.

The other medical evidence of record corroborates Dr. Daines' opinion. Drs. Wong, Paudler and Vandenberg opined that appellant could work if it did not involve heavy lifting or carrying, and in his May 4, 1995 report, Dr. Wong opined that appellant could work but not lift more than 50 pounds. Since the physical requirements of an elementary school teacher involved lifting up to 10 pounds with frequent reaching, handling and fingering, which does not seem to equate with repetitive motion, the June 3, 1996 job description is within the physical limitations described by Dr. Daines.

No medical evidence of record after the date of Dr. Daines' July 31, 1995 report shows that appellant is unable to work. The medical evidence of record therefore establishes that appellant can perform the job of an elementary school teacher, and that the earnings of the elementary school teacher position fairly and reasonably represent his wage-earning capacity.

The decision of the Office of Workers' Compensation Programs dated May 19, 1998 is hereby affirmed.

² 5 U.S.C. § 8115(a).

³ See *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); see also 5 U.S.C. § 8115(a).

⁴ See *Dennis D. Owen*, 44 ECAB 475 (1993).

⁵ 5 ECAB 376 (1953); see also 20 C.F.R. § 10.303.

Dated, Washington, DC
October 20, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member