

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM G. LeQUE and DEPARTMENT OF THE ARMY,
WATERVLIET ARSENAL, Watervliet, NY

*Docket No. 00-1474; Submitted on the Record;
Issued December 20, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, 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 computer systems hardware analyst.

The Office accepted appellant's claim for contusion, osteoarthritis, acromioclavicular separation of the right shoulder and a right elbow fracture. On July 26, 1991 appellant was separated from his job of crane operator, based on a fitness-for-duty examination. On July 29, 1992 appellant was referred for vocational rehabilitation. He obtained a two-year college degree in computer information sciences and took a computer training course.

In a report dated April 12, 1999, Dr. Christopher J. Huyck, a Board-certified internist, opined that appellant was unable to do any heavy lifting or long-term sitting. He added that appellant could use his hands but should restrict prolonged overhead use of his arms. Dr. Huyck stated that appellant was capable of intermittent sitting and walking for four hours and standing for four hours in an eight-hour workday, but that appellant should not lift, bend, climb or twist. In the work restriction form dated April 12, 1999, Dr. Huyck opined that appellant should not lift more than 10 to 20 pounds, should not perform simple grasping and should not reach or work above his shoulders.

In a report dated May 18, 1999, the rehabilitation counselor, Leona Liberty, noted that appellant had a degree in computer information sciences and took a computer technician-training course and was a highly skilled individual who "theoretically should not have any difficulty locating employment." She noted, however, that to date, he had not been hired, even though he stated that he sent out more than 150 resumes, had several job interviews, had credits for being an individual on disability and a disabled vet.

On August 6, 1999 Ms. Liberty identified the job of computer technician in electronics and on September 29, 1999 she identified the job of a computer systems hardware analyst which were within appellant's physical restrictions and were reasonably available. The computer systems analyst was described as sedentary, with no lifting of more than 10 pounds. In a note dated October 8, 1999, the rehabilitation specialist stated that appellant interviewed for a number

of positions within New York State but was not chosen for any of them despite his skills and that he had some problems with interviewing.

In a proposed reduction of compensation notice dated October 8, 1999, the Office found that the position of computer systems hardware analyst most represented appellant's wage-earning capacity because it was "the one most compatible" with his education. The Office found that the physical requirement of the job was sedentary and the lifting restriction was negligible. The Office found that the medical evidence established that appellant was partially disabled and the job of computer systems hardware analyst represented his wage-earning capacity.

By letter dated October 18, 1999, appellant contended that the job of computer systems hardware analyst actually involved sitting for many hours, which he could not do. Appellant stated that at one job interview with John Huffaker at the New York State Department of Health he was told he did not have much experience, and although he tried to persuade Mr. Huffaker he was a fast learner and would be an asset to the department, he was rejected.

By decision dated December 16, 1999, the Office found that the position of computer systems hardware analyst represented appellant's wage-earning capacity and reduced appellant's compensation benefits accordingly.

The Board finds that the Office properly adjusted appellant's compensation to reflect his wage-earning capacity in the position of computer systems hardware analyst.

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

Under section 8115(a) of Federal Employees' Compensation Act, if the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, his or her usual employment, age, qualifications for other employment, the availability of suitable employment, and other factors and circumstances which may affect wage-earning capacity in his or her disabled condition.²

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.³ Finally, application of the principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning

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

² *See Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); *petition for recon. denied*, (Docket No. 92-118, issued February 11, 1993); *see also* 5 U.S.C. § 8115(a).

³ *Raymond Alexander*, 48 ECAB 432 (1997); *Dorothy Lams*, 47 ECAB 584 (1996).

capacity.⁴ The basic rate of compensation paid under the Act is 66 2/3 percent of the injured employee's monthly pay.

In this case, Dr. Huyck's April 12, 1999 work restrictions establish that appellant could work an eight-hour day with lifting from 10 to 20 pounds, standing four hours, and intermittent sitting and walking for four hours. The vocational evidence shows that appellant had a two-year college degree in computer information sciences and had taken an additional training course. The job of computer systems hardware analyst identified by Ms. Liberty on September 29, 1999 was described as sedentary with no lifting of more than 10 pounds. The computer analyst job therefore was within appellant's physical restrictions. The job was also within appellant's vocational experience given his computer training and the college degree he obtained.

Further, Ms. Liberty stated that the computer analyst job was reasonably available. Although appellant stated that his numerous attempts to obtain a position in the computer field were unsuccessful, the Board has held that the fact that appellant is not able to secure a job does not establish that the work is not available or suitable. Where, as here, the evidence establishes that jobs in the selected position are reasonably available, the selection of such a position is proper even though the employee has been unsuccessful in obtaining work or has submitted documents from individuals employers who indicated that they did not have an available position.⁵ Because the position of computer systems hardware analyst was within appellant's physical restrictions and vocational experience and was reasonably available, the job represents appellant's wage-earning capacity.

The December 16, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
December 20, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member

⁴ *Dorothy Lams, supra* note 3; *Albert C. Shadrick*, 5 ECAB 376 (1953).

⁵ *See Karen L. Lonon-Jones*, 50 ECAB 293, 298 (1999).