

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MONIQUE F. SMITH and DEPARTMENT OF TRANSPORTATION,  
U.S. COAST GUARD, ENGINEERING LOGISTICS CENTER, Columbia, MD

*Docket No. 00-473; Submitted on the Record;  
Issued February 16, 2001*

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DECISION and ORDER

Before DAVID S. GERSON, A. PETER KANJORSKI,  
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof in reducing appellant's compensation based upon her ability to work as a resident counselor; and (2) whether the Office abused its discretion in denying appellant's request for reconsideration.

On July 2, 1991 appellant, then a 38-year-old packer, sustained bilateral knee contusions, a lip laceration and a lumbosacral strain in the performance of duty when she tripped and fell.

Effective October 12, 1996 appellant was placed on the periodic compensation rolls to receive compensation benefits for temporary total disability.

In a report dated December 8, 1997, Dr. Nicholette Martin, appellant's attending Board-certified physiatrist, provided work restrictions, which included no repetitive bending or twisting at the waist, occasional overhead work, standing and walking limited to 1 hour intervals with breaks in between, lifting limited to 5 to 10 pounds, repetitive motions of the elbow and wrist permitted for up to 8 hours a day at 2 hour intervals with 15 minute breaks in between. Dr. Martin indicated that appellant could work for eight hours a day.

In a report dated May 29, 1998, a rehabilitation counselor noted appellant's work restrictions, provided the results of ability and aptitude testing and indicated that she had a knowledge of computer operations, business administration and office procedures as well as counseling ability.

In a report dated November 20, 1998, a rehabilitation counselor found that the jobs of resident counselor and substance abuse counselor were available in appellant's area and provided job descriptions, weekly wages and physical requirements of the positions.

In a report dated February 18, 1999, an Office rehabilitation specialist stated that the position of resident counselor<sup>1</sup> met appellant's physical and vocational requirements and was reasonably available in appellant's area according to the state's department of employment and economic development.

By letter dated April 14, 1999, the Office advised appellant that it proposed to reduce her compensation benefits based upon her ability to earn the wages of a resident counselor and noted that the position was within the physical restrictions set by her attending physician.

By letter dated April 19, 1999, appellant stated her disagreement with the proposed reduction of compensation benefits and noted that she had not been hired for a resident counselor position.

By decision dated May 20, 1999, the Office reduced appellant's compensation benefits effective May 23, 1999 on the grounds that she was capable of earning the wages of a resident counselor.

By letter dated June 10, 1999, appellant requested reconsideration and stated that she had been unable to find a position as a resident counselor.

By decision dated August 6, 1999, the Office denied appellant's request for reconsideration.<sup>2</sup>

The Board finds that the Office met its burden of proof in reducing appellant's compensation benefits based upon her ability to work as a resident counselor.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.<sup>3</sup>

Under section 8115(a) of the Federal Employees' Compensation Act,<sup>4</sup> wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent her wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity, or 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

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<sup>1</sup> Department of Labor's *Dictionary of Occupational Titles*, No. 045-107-038.

<sup>2</sup> The Board notes that the case record contains evidence, which was submitted subsequent to the issuance of the Office's August 6, 1999 decision. The Board has no jurisdiction to review this evidence for the first time on appeal; see 20 C.F.R. § 501.2(c); *Robert D. Clark*, 48 ECAB 422, 428 (1997).

<sup>3</sup> *Sylvia Bridcut*, 48 ECAB 162, 164 (1996); *James B. Christenson*, 47 ECAB 775, 778 (1996).

<sup>4</sup> 5 U.S.C. §§ 8101-8193.

availability of suitable employment and other factors or circumstances, which may affect wage-earning capacity in his or her disabled condition.<sup>5</sup>

After the Office makes a medical determination of disability and of special 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 the selection is made, a determination of wage rate and availability in the open market should be made through contact with the state employment services or other applicable services. 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>6</sup>

In this case, Dr. Martin provided specific work restrictions and indicated that appellant could work for eight hours a day. The Office referred appellant to a vocational rehabilitation counselor, who stated that the position of resident counselor met appellant's physical and vocational requirements and was reasonably available in appellant's area.

Appellant argued that she had not been hired for a resident counselor position. However, if 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 individual employers who indicated they did not have a position for her.<sup>7</sup>

Following its determination that the selected position of resident counselor was vocationally and medically suitable and reasonably available, the Office properly calculated appellant's wage-earning capacity using the *Shadrick* formula.<sup>8</sup> The Office, therefore, met its burden of proof in reducing appellant's compensation based on her wage-earning capacity as a resident counselor.

The Board further finds that the Office did not abuse its discretion in denying appellant's request for reconsideration.

The Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.<sup>9</sup> When an application for review of the merits of a claim does not meet at least one of these

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<sup>5</sup> See *Wilson L. Clow, Jr.*, 44 ECAB 157, 170-71 (1992); see also 5 U.S.C. § 8115(a).

<sup>6</sup> *Albert C. Shadrick*, 5 ECAB 376 (1953).

<sup>7</sup> See *Frank Hampton Bratton*, 31 ECAB 114, 120-21 (1979).

<sup>8</sup> See *Albert C. Shadrick*, *supra* note 6.

<sup>9</sup> 20 C.F.R. § 10.606(b)(2) (1999).

requirements, the Office will deny the application for review without reviewing the merits of the claim.<sup>10</sup>

In her June 10, 1999 request for reconsideration, appellant stated that she had not been able to find a position as a resident counselor. However, this argument does not constitute relevant and pertinent evidence not previously considered by the Office as appellant made this argument prior to the Office's May 20, 1999 decision. As appellant did not show that the Office erroneously applied or interpreted a specific point of law, did not advance a relevant legal argument not previously considered by the Office and did not submit relevant and pertinent evidence not previously considered by the Office, the Office was within its discretion in denying appellant's request for reconsideration.

The August 6 and May 20, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC  
February 16, 2001

David S. Gerson  
Member

A. Peter Kanjorski  
Alternate Member

Priscilla Anne Schwab  
Alternate Member

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<sup>10</sup> 20 C.F.R. § 10.608(b) (1999).