

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PAUL R. WILLIAMS and DEPARTMENT OF THE INTERIOR,
NATIONAL PARK SERVICE, Philadelphia, PA

*Docket No. 99-655; Submitted on the Record;
Issued February 5, 2001*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation to reflect a capacity to earn wages in the constructed position of taxicab dispatcher.

On May 10, 1994 appellant, a motor vehicle operator, sustained an injury while in the performance of his duties. The Office accepted his claim for right elbow strain and right acute lateral epicondylitis. Appellant received compensation for temporary total disability.

On June 12, 1996 appellant's attending physician, Dr. R. Bruce Heppenstall, reported that appellant was still having problems with ankylosis of his right elbow: "In regard to his ability to return back to employment, he has a problem with this as he has very limited motion of his elbow." Dr. Heppenstall nonetheless completed a work capabilities form indicating that appellant could work on a full-time basis within specified physical restrictions.

Vocational rehabilitation efforts proved unsuccessful. In a final report dated September 25, 1996, the rehabilitation counselor indicated that a labor market survey was performed to document appropriate job titles available to appellant considering his vocational history and physical abilities. The rehabilitation counselor identified two job titles: taxicab starter (motor transportation)¹ and deliverer, outside (clerical). As to the former, the rehabilitation counselor reported that he confirmed by telephone contact with the state employment service representative that this job was being performed in sufficient numbers so as to make it reasonably available to appellant within his commuting area. The rehabilitation counselor also confirmed through 1994 National Census Wage Data that this position paid \$449.46 per week or \$11.24 per hour.

¹ *Dictionary of Occupational Titles* (DOT) number 913.367-010.

On June 23, 1997 the Office issued a notice of proposed reduction of compensation. The Office found that the position of taxicab dispatcher² was the more suitable position and that it fairly and reasonably represented appellant's wage-earning capacity. The notice recommended a reduction of appellant's compensation and allowed appellant 30 days to submit additional evidence or argument relevant to his capacity to earn wages in the position described.

On August 8, 1997 the Office prepared a memorandum noting that appellant had not responded to the proposed reduction. The memorandum recommended that compensation be reduced effective August 17, 1997 for the reason that the evidence of record established that the position of taxicab dispatcher was suitable under the factors outlined in 5 U.S.C. § 8115.

In a decision dated September 10, 1997, the Office advised that the proposed reduction of compensation was final. The Office advised that the basis for this action was contained in the Office's August 8, 1997 memorandum. The Office stated that in accordance with sections 8106 and 8115 it was adjusting appellant's compensation because the medical evidence showed that appellant was no longer totally disabled for work due to the effects of the accepted employment injury. Based on the residuals of his injury and considering all significant preexisting impairments and pertinent nonmedical factors, the Office found that appellant was able to perform the position of taxicab dispatcher. The Office provided appellant a copy of its calculations and a statement of review rights.

On June 3, 1998 appellant, through his attorney, requested reconsideration. He stated that the data provided by the rehabilitation counselor appeared to be false. Appellant called the same state employment service representative identified as the source of the availability information used by the rehabilitation counselor. This representative advised that she had no data concerning the position of taxicab starter, DOT 913.367-010. She advised appellant that there were so few such positions that data, if it existed, would not be statistically valid. The state employment service representative advised appellant that taxicab starter was a dispatcher position, for which she would place an average hourly rate of \$8.35, less than the pay rate provided by the rehabilitation specialist.

Appellant also contacted the National Census Bureau to confirm the pay rate information reported by the rehabilitation counselor. The National Census Bureau explained that no such data was gathered in 1994. The last two studies were performed in 1992 and 1997. An economist with the U.S. Department of Labor Statistics was also unable to confirm the existence of 1994 National Census Wage Data. Appellant consulted the American Salaries and Wages Survey, 4th ed., which reported an average hourly rate of \$7.75 for the selected position in the state of New York in 1995.

The Office rehabilitation specialist requested information from the rehabilitation counselor concerning the statistics used in appellant's case. On December 9, 1998 the rehabilitation counselor explained that wage statistics are not available for every DOT number, and in most or all cases the Office of Employment Security (OES) number or Census code is

² The position to which the Office referred, taxicab dispatcher, had the same DOT number and job description as did taxicab starter (motor transportation), the position identified by the rehabilitation counselor.

used to tap into statistics available through those two sources. The computer program crosswalks from the DOT code to the appropriate Census code and cites numbers nationally and gives a regression analysis for local wages. The rehabilitation counselor explained, these are national averages for the DOT numbers included in the particular Census code or OES code. They represent the earnings in this larger coding system and, therefore, are specific to the coding system of OES or the Census Bureau.

The rehabilitation counselor also explained that software allowed him to do transferable skills analyses and allowed for the crosswalk to the Census codes and the attending statistics. The rehabilitation counselor attached two printouts, one for the Census wage data and the other for the corresponding national OES data. The attachments showed that the position of taxicab starter corresponded to the OES title dispatcher, except police, fire and ambulance. The estimated mean wage was \$12.77, and the estimated median wage was \$11.89. The attachments also showed that the position of taxicab starter corresponded to the Census occupational title dispatcher, with an estimated median wage of \$12.65 per hour.

On December 18, 1998 the rehabilitation counselor submitted forms showing transferability levels for the position of taxicab starter. The local wage estimate for census occupational title dispatcher, including the DOT position of taxicab starter, was \$13.63 an hour in Philadelphia, Pennsylvania.

In a decision dated December 23, 1998, the Office reviewed the merits of appellant's claim and denied modification of its prior decision.

The Board finds that the Office has not met its burden to justify the reduction of appellant's compensation.

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.³ When the Office makes a medical determination of partial disability and of the specific work restrictions, it should 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 in light of 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. 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.⁴

In this case, the Office received evidence from appellant's attending physician, Dr. Heppenstall, that appellant could work on a full-time basis within specified physical

³ See generally 5 U.S.C. § 8115(a); 2 A. Larson, *The Law of Workmen's Compensation* § 57.22 (1989).

⁴ *Hattie Drummond*, 39 ECAB 904 (1988); see *Albert C. Shadrick*, 5 ECAB 376 (1953).

restrictions. After vocational rehabilitation efforts were unsuccessful, the rehabilitation counselor performed a labor market survey to document appropriate job titles considering appellant's vocational history and physical abilities.⁵ The rehabilitation specialist selected two positions listed in the Department of Labor's DOT For the relevant position of taxicab starter (motor transportation), the rehabilitation counselor reported that the position was reasonably available and had a wage rate of \$449.46 a week, or \$11.24 an hour.

Appellant questioned the availability of the position of taxicab starter (motor transportation). He advised the Office that the state employment service representative was of the opinion there were so few such positions that data, if it existed, would not be statistically valid. The Board notes, however, that the state employment service representative explained to appellant that taxicab starter was in fact a dispatcher position. This was confirmed by the rehabilitation counselor, who reported the position of taxicab starter corresponded to the OES title dispatcher, except police, fire and ambulance. He also provided information that the position of taxicab starter corresponded to the census occupational title dispatcher. Further, in its September 10, 1997 decision, the Office reduced appellant's compensation based on his capacity to earn wages in the constructed position of taxicab dispatcher.⁶ Appellant has offered no evidence, from the state employment service representative or otherwise, that the position of taxicab dispatcher was not being performed in sufficient numbers so as to make it reasonably available to him within his commuting area. On this issue the Office properly denied modification of its September 10, 1997 decision.

Appellant also questioned the wage rate used to reduced his compensation. Appellant advised the Office that he was unable to confirm this figure through the state employment service representative. The Office sought additional information from the rehabilitation counselor, who explained in some detail the procedure used for determining wage statistics. His explanation, however, did not support the wage rate that accompanied his final report of September 25, 1996. The Office reduced appellant's compensation based on a weekly wage of \$449.46, or \$11.24 an hour, but in the rehabilitation counselor's subsequent explanation none of the estimated mean or median wages, local or otherwise, confirmed this rate. Further, state employment service representative apparently advised that for the position of dispatcher she would place an average hourly rate of \$8.35, less than any of the pay rates reported by the rehabilitation specialist. The rehabilitation specialist did not attempt to reconcile this estimate with his own or explain whether one source of wage statistics should be preferred over another.

Once the Office accepts a claim, it has the burden to justify any termination or modification of compensation benefits.⁷ Because there remains a substantial question on the proper wage rate for the selected position, the Board finds that the Office has not met its burden.

⁵ Appellant's disagreement with the Office's constructed wage-earning capacity decision of September 10, 1997 was not with issues of vocational or physical qualification but rather with the information provided on availability and wage rate.

⁶ See *supra* note 2.

⁷ *Harold S. McGough*, 36 ECAB 332 (1984).

The December 23, 1998 decision of the Office of Workers' Compensation Programs is reversed.

Dated, Washington, DC
February 5, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member