

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LAWRENCE E. LEAR and DEPARTMENT OF THE INTERIOR,
NATIONAL PARK SERVICE, Morristown, NJ

*Docket No. 99-1104; Submitted on the Record;
Issued February 5, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly adjusted appellant's compensation effective August 26, 1996 to reflect his wage-earning capacity in the position of a set designer; and (2) whether the Office properly denied appellant's request for reconsideration.

On September 16, 1990 appellant, then a 42-year-old carpenter, filed a notice of traumatic injury and claim for compensation alleging that he sustained a hairline fracture in his left arm as the result of lifting a bag of cement in the performance of duty. The Office accepted the claim for left carpal tunnel fracture. Appellant stopped work on November 8, 1990. He held a temporary appointment at the employing establishment which expired on December 31, 1990. Appellant received continuation of pay and then compensation on the periodic rolls beginning January 1, 1991.

Appellant was initially treated for his work injury by Dr. R. Innella, an osteopath, for a possible occult fracture of the distal radius. Dr. Innella provided appellant with a splint, tennis elbow strap and ordered additional testing.

On November 12, 1990 a bone scan was interpreted as showing a recent mild hairline fracture in the distal portion of the left ulna.

Dr. Innella referred appellant to Dr. Richard Mackessy, a Board-certified orthopedic surgeon. In a report dated March 7, 1991, Dr. Mackessy noted that appellant had a history of a fracture of both bones of the left forearm. He further noted that appellant presented with complaints of left forearm pain and wrist pain for 6 months after he lifted a 90-pound bag of cement at work. Dr. Mackessy noted that x-rays showed an old healed fracture and radiocapitellar arthritis.

Dr. Mackessy performed surgery on appellant's left arm on April 22, 1991 consisting of a release of the radial nerve.

In a CA-20 attending physician's report dated August 13, 1991, Dr. Mackessy diagnosed "an injury to the radial nerve of the left arm" due to the September 16, 1990 work injury. He also stated, "an old healed fracture of both bones of the forearm show a radiocapitellar with a cyst in his lunate."

In an OWCP-5 work evaluation form dated October 25, 1991, Dr. Mackessy opined that appellant was capable of returning to work for 8 hours per day with lifting restrictions of 20 to 50 pounds.

On June 16, 1992 Dr. Mackessy referred appellant for a functional capacity test with regard to his left upper extremity. The therapist who performed the evaluation indicated that appellant could use his left arm for activities that were less demanding than his usual work as a carpenter. It was noted that appellant complained of left arm pain when he lifted objects weighing between 10 to 15 pound, that he exhibited poor tolerance for repetitive activities, but had good ability for fine motor activities.

On January 28, 1992 the Office referred appellant for vocational rehabilitation services to expedite his return to work.

In a July 16, 1992 report, Dr. Mackessy reported that appellant was seen for right arm pain at the right lateral epicondyle due to a tennis injury. On September 16, 1992 appellant underwent repair of the medial and radial nerve of his right arm. He was released back to his "activities" by Dr. Mackessy on January 5, 1993.¹

The record reveals that appellant enrolled in college to pursue a masters' degree in art.

By decision dated September 14, 1993, the Office suspended appellant's compensation on the grounds that he failed to cooperate with vocational rehabilitation.² Appellant was paid compensation for total wage loss through August 21, 1993 and his benefits then ceased effective August 22, 1993.

Appellant subsequently requested a hearing, which was held on June 27, 1994. At the hearing, appellant advised the Office hearing representative that he wished to cooperate with the Office's rehabilitation efforts.

In September 26, 1994 decision, the Office hearing representative affirmed the Office's September 4, 1993 decision. He directed the Office to resume appellant's rehabilitation program and reinstated appellant's compensation effective the date of the hearing.

On February 24, 1995 appellant filed a Form CA-7 claim for a schedule award.

¹ The Office has never accepted appellant's right arm condition as work related, nor did the Office authorize the September 16, 1992 surgery.

² The record indicates that appellant decided to accept a position as an art gallery assistant effective March 17, 1993, working 15 hours per week at a pay rate of \$4.00 per hour. Because the Office did not consider the position to be consistent with appellant's wage-earning capacity, the Office found that appellant was frustrating the rehabilitation efforts.

In a report dated August 18, 1995, the rehabilitation counselor indicated that appellant was pursuing a master's degree in art and that he was supplementing his income performing carpentry work.

In a decision dated August 23, 1995, the Office issued appellant a schedule award for 13 percent permanent impairment of his left upper extremity. The period of the award was May 30, 1995 to March 8, 1996.

On October 31, 1995 appellant underwent a functional capacity evaluation and it was determined that he was capable of returning to work.³ Dr. Mackessy completed a work restriction evaluation Form (OWCP-5) indicating that appellant could perform the following activities eight hours per day: sitting, walking, lifting, bending squatting, climbing, kneeling, twisting and standing. He also noted that appellant had a 20-pound lifting restriction.

In a series of rehabilitation action reports dating between March 18 and 28, 1996, the rehabilitation counselor indicated that appellant was sent to two different job interviews but expressed disinterest in both positions. It was noted that appellant was under the impression that he could pick and choose the job interviews he wished to attend for the positions most attractive to him. The rehabilitation counselor advised that appellant had attended an interview on his own and accepted a full-time job with William F. Butler builders and renovators starting on April 1, 1996, working 30 to 40 hours per week. It was decided that the rehabilitation counselor would conduct a labor market survey since the position accepted by appellant was not deemed to reasonably and fairly represent his wage-earning capacity.

In a report dated June 6, 1996, the rehabilitation counselor identified three positions that were within appellant's vocational preparation level and consistent with his physical restrictions. Of the jobs listed, the rehabilitation counselor deemed the position of set designer under the Dictionary of Occupational Titles (DOT) (142.061-046) to be the most compatible with appellant's education and work experience.⁴ It was noted that the average starting salary for a set designer was \$596.00 per week and that position was reasonably available within appellant's commuting area.

On July 12, 1996 the Office issued a notice of proposed reduction of compensation. The Office determined that the position of a set designer was medically and vocationally suitable for appellant and that he had the capacity to earn wages in the amount of \$596.00 per week. Appellant was given 30 days to submit additional evidence or argument relevant to his capacity to earn wages in the position described.

In an August 26, 1996 decision, the Office reduced appellant's wage-loss compensation to reflect his wage-earning capacity in the position of a set designer.

³ Appellant accepted a position with Americorp from November 1, 1995 until January 1, 1996 refurbishing old historic trails.

⁴ The physical demands of the job were identified as light duty with a maximum lifting requirement of 20 pounds.

Appellant requested a hearing, which was held on December 9, 1997. He argued at the hearing that he was unable to perform the job of a set designer because he was precluded from repetitive lifting by his treating physician. Appellant submitted a November 26, 1997 report by Dr. Mackessy stating that appellant was still very much impaired following the surgery on his left and right arms and that he was not capable of doing “multiple repetitive activities or manual labor.”

Appellant then submitted post-hearing a December 31, 1997 report from Dr. Mackessy. He stated:

“In the job description that you give me, the set designer job requires [appellant] to carry push and pull up to 25 pounds and to climb and balance while working. He is not able to climb and balance that amount of weight while working. I think he could lift up to 25 pounds, but it would just be a couple of times a day. I think that he could lift probably 10 pounds. He could not climb and balance while doing this with both of his arms, however, neither could he lift 10 pounds many times a day. It would be something he could probably do for an hour and then have to take an hour off. If those are indeed the requirements of a set designer, then he would not be able to do that.”

In a decision dated February 23, 1998, an Office hearing representative affirmed the Office’s August 26, 1996 decision.

On September 4, 1998 appellant requested reconsideration.

In support of his reconsideration request, appellant submitted a June 9, 1998 report by Dr. Mackessy which stated:

“[Appellant] had decompression of his median nerves proximally in his forearm. On [April 22, 1991] he had compression of his radial nerve in his proximal forearm. He had exploration of his median and radial nerves in his right arm and a release of his lateral epicondylitis in his right arm. Subsequent to this he still has problems doing repetitive work which is completely expected. We sent him for a work capacity evaluation, a copy of which is enclosed. Certainly these compressive neuropathies in the upper extremity are going to limit him from doing repetitive tasks and will make him somewhat weaker than he would normally be.”⁵

In a November 2, 1998 decision, the Office denied reconsideration on the grounds that the evidence was insufficient to warrant a merit review.

⁵ Appellant also submitted a copy of a June 16, 1992 work-capacity evaluation report.

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.⁶

Under Section 8115(a) of the Federal Employees' Compensation Act,⁷ wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent wage-earning capacity, or 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, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect wage-earning capacity in the employee's disabled condition.⁸ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.⁹ Where vocational rehabilitation is unsuccessful, the rehabilitation counselor will prepare a final report, which lists two or three jobs which are medically and vocationally suitable for the employee and proceed with information from a labor market survey to determine the availability and wage rate of the position.¹⁰

The Office procedures pertaining to vocational rehabilitation services emphasize returning partially disabled employees to suitable employment.¹¹ If the employment injury prevents the injured worker from returning to the job held at the time of injury, vocational rehabilitation services are provided to assist the employee in placement with the previous employer in a modified position or, if not feasible, developing an alternative plan based on vocational testing which may include medical rehabilitation, training and/or placement services.¹²

In the instant case, the Office properly found that appellant was no longer totally disabled for work due to his employment injury. Appellant's treating physician specifically found that appellant could perform work for eight hours per day with certain physical restrictions.

Following established procedures, the Office referred the case record to a vocational rehabilitation counselor, who selected positions listed in the Department of Labor's *Dictionary of Occupational Titles* to fit appellant's capabilities, including that of a set designer. The counselor performed a labor market survey and determined the prevailing wage rate and the availability in the open labor market for the selected position. Although appellant did not reach the goal of

⁶ *James B. Christenson*, 47 ECAB 775 (1996); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

⁷ 5 U.S.C. § 8115(a).

⁸ *See Richard Alexander*, 480 ECAB 432 (1997); *Pope D. Cox*, 39 ECAB 143 (1988).

⁹ *Id.*

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.814.8 (December 1993).

¹¹ *Id.*

¹² *Id.* at Chapter 2.813.6(b); *see Sylvia Bridcut*, 48 ECAB 162 (1996); *Clayton Varner*, 37 ECAB 248 (1985).

placement, the counselor determined that had he been successful he would have been capable of earning wages as a set designer and, accordingly, reduced his compensation in accordance with the formula set forth in the *Shadrick* decision.¹³

Appellant contends that he is unable to perform the job of a set designer based on the reports of Dr. Mackessy dated November 26 and December 16, 1997. Although Dr. Mackessy opined that appellant can not perform repetitive lifting, there is no mention in the (DOT) job description of a set designer of the requirement of repetitive lifting. The Board notes that while the job of set designer identifies balancing and climbing as a job requirement, there is no mention that appellant would be required to simultaneously climb and balance while lifting as suggest by Dr. Mackessy. In his November 6 1995 (Form OWCP-5) work evaluation report, Dr. Mackessy specifically stated that appellant could perform light duty with no lifting over 20 pounds.¹⁴ Because the job of a set designer falls within the physical restrictions listed by Dr. Mackessy, the Board finds the position to be suitable for appellant. Inasmuch as the rehabilitation counselor determined that appellant has the capacity to earn wages as a set designer, the Board concludes that the Office properly reduced appellant's compensation effective August 26, 1996.

The Board also finds that the Office did not abuse its discretion by refusing to perform a merit review.

Section 8128(a) of the Act vests the Office with the discretionary authority to determine whether it will review an award for or against compensation.¹⁵ The Office, through its regulations, has imposed a one-year time limitation for a request of review to be made following a merit decision of the Office.¹⁶ The regulations provide that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.¹⁷ When application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.¹⁸ Evidence that repeats or duplicates evidence already in the case record has no

¹³ *Albert C. Shadrick*, 5 ECAB 376 (1953).

¹⁴ In his December 16, 1997 report, Dr. Mackessy suggests that appellant could only lift 10 pounds for an hour and 25 pounds just a couple times a day. To the extent that the change in appellant's medical restrictions from November 6, 1995 reflect complications with appellant's right upper extremity, the Board notes that such restrictions must be excluded from consideration since appellant's right arm condition arose after his September 16, 1990 work injury of the left arm. Moreover, the Board does not find Dr. Mackessy's December 16, 1997 report to be sufficiently reasoned as he does not offer any explanation for the change in appellant's medical restrictions from 1995 to 1997. This is significant since the doctor had opined that appellant reached maximum medical improvement in his left arm during 1995.

¹⁵ 5 U.S.C. § 8128; *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹⁶ 20 C.F.R. § 10.138(b)(2).

¹⁷ 20 C.F.R. § 10.138(b)(1).

¹⁸ *Id.* at § 10.138(b)(2).

evidentiary value and does not constitute a basis for reopening a case.¹⁹ Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.²⁰ Where a claimant fails to submit relevant evidence not previously of record or advance legal contentions not previously considered, it is a matter of discretion on the part of the Office to reopen a case for further consideration under section 8128 of the Act.²¹

In conjunction with his reconsideration request, appellant submitted a June 9, 1998 report from Dr. Mackessy, which the Office determined was not relevant to the issue of the case and therefore was insufficient to warrant a merit review of the record. The Board agrees with the Office's determination. In his June 9, 1998 report, Dr. Mackessy reiterates his prior opinion that appellant is unable to perform repetitive work, and also references a work evaluation report that was previously considered by the Office. Dr. Mackessy's assessment of a 22 percent permanent impairment of the arm is also not relevant as to whether appellant is capable of performing the job of a set designer.²² Because appellant failed to submit new and relevant evidence on reconsideration as required by section 8128, the Board finds that the Office properly refused to perform a merit review.

The decisions of the Office of Workers' Compensation Programs dated November 2 and February 23, 1998 are hereby affirmed.

Dated, Washington, DC
February 5, 2001

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁹ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

²⁰ *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

²¹ *Gloria Scarpelli-Norman*, 41 ECAB 815 (1990); *Joseph W. Baxter*, 36 ECAB 228 (1984).

²² Dr. Mackessy does not distinguish between impairment related to appellant left arm versus his right arm.