

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RANDALL J. FOWLER and DEPARTMENT OF THE ARMY,
RED RIVER ARMY DEPOT, Texarkana, TX

*Docket No. 99-2583; Submitted on the Record;
Issued January 10, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
VALERIE D. EVANS-HARRELL

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation effective May 23, 1999 based on his capacity to earn wages as a forklift operator.

The Board finds that the Office properly reduced appellant's compensation effective May 23, 1999 based on his capacity to earn wages as a forklift operator.

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.¹ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.²

Under section 8115(a) of the Federal Employees' 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. 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, his degree of physical impairment, his usual employment, his age, his 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 Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment

¹ *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

² *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

³ *See Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

conditions.⁴ The job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives.⁵

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. 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.⁶

In September 1990 the Office accepted that appellant, then a 26-year-old warehouse worker, sustained an employment-related ganglion, tendinitis and carpal tunnel syndrome of his right wrist. He received compensation for periods of disability; the Office authorized surgery for his right wrist. In 1997 appellant began to participate in vocational rehabilitation efforts. By decision dated May 11, 1999, the Office reduced his compensation effective May 23, 1999 based on his capacity to earn wages as a forklift operator.

Beginning in 1994, the Office received information from appellant's attending Board-certified neurosurgeon, Dr. Warren D. Long, Jr., who found that appellant was not totally disabled for work and had a partial capacity to perform work for eight hours per day subject to work restrictions. Appellant's vocational rehabilitation counselor later determined that appellant was able to perform the position of forklift operator and that state employment services showed the position was available in sufficient numbers so as to make it reasonably available within appellant's commuting area.⁷ The Office properly relied on the opinion of the rehabilitation counselor that appellant was vocationally capable of performing the forklift operator position and a review of the evidence reveals that appellant is physically capable of performing the position. Dr. Long was provided with a description of the forklift operator position and on June 20, 1998 he provided an opinion that appellant was able to perform the position.

Appellant did not submit any evidence or argument showing that he could not vocationally or physically perform the forklift operator position. He claimed that he could not perform the position due to his left arm condition.⁸ However, appellant did submit medical evidence to support this assertion and his left arm condition arose subsequent to his employment

⁴ *Albert L. Poe*, 37 ECAB 684, 690 (1986), *David Smith*, 34 ECAB 409, 411 (1982).

⁵ *Id.*

⁶ See *Dennis D. Owen*, 44 ECAB 475, 479-80 (1993); *Wilson L. Clow, Jr.*, 44 ECAB 157, 171-75 (1992); *Albert C. Shadrick*, 5 ECAB 376 (1953).

⁷ The forklift operator position required lifting up to 50 pounds.

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(d) (December 1995).

injury. In determining wage-earning capacity based on a constructed position, consideration is not given to conditions which arise subsequent to the employment injury.⁹ Appellant also asserted that his failed attempts to find employment showed that he was unable to perform the forklift operator position. The Board notes that the fact that an employee has been unsuccessful in obtaining work in the selected position does not establish that the work is not reasonably available in his commuting area.¹⁰

The Office considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment, age and employment qualifications, in determining that the position of forklift operator represented appellant's wage-earning capacity.¹¹ The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of forklift operator and that such a position was reasonably available within the general labor market of appellant's commuting area. Therefore, the Office properly based appellant's wage-earning capacity effective May 23, 1999 on the position of forklift operator.

The decision of the Office of Workers' Compensation Programs dated May 11, 1999 is affirmed.

Dated, Washington, DC
January 10, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Valerie D. Evans-Harrell
Alternate Member

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(d) (December 1995).

¹⁰ See *Leo A. Chartier*, 32 ECAB 652, 657 (1981).

¹¹ See *Clayton Varner*, 37 ECAB 248, 256 (1985).