

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of L. SHAUN O'RILEY and DEPARTMENT OF THE NAVY,
MILITARY SEALIFT COMMAND, PACIFIC, Oakland, CA

*Docket No. 00-1329; Submitted on the Record;
Issued July 16, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation to reflect his wage-earning capacity in the selected position of assistant manager-fast foods.

On June 5, 1996 appellant, then a 50-year-old boatswain mate, filed an occupational disease claim (Form CA-2) alleging that his heart condition was due to his employment. The Office accepted the claim for atrial fibrillation and subsequently was placed on the automatic rolls for temporary total disability by letter dated December 4, 1996.

In a February 26, 1997 report, Dr. D. Randall Pritza, an attending Board-certified internist with a subspecialty certificate in cardiovascular disease, opined that appellant's "diagnosis is consistent with paroxysmal atrial fibrillation" and that appellant was totally disabled from performing his position as a boatswain mate due to the high stress nature of the position.

Appellant was referred to Dr. Richard R. Miles, a Board-certified internist with a subspecialty certificate in cardiovascular disease, for a second opinion evaluation on May 8, 1997. In a May 13, 1997 report, he opined that the diagnosis of atrial fibrillation was erroneous and that appellant was capable of performing work with restrictions on activities such as lifting, bending or stooping and working in high places. Dr. Miles concluded that there were no current medical findings that appellant had any residual disability due to appellant's cardiac arrhythmia.

The Office issued a notice of proposed termination of medical and wage-loss compensation benefits on May 26, 1998. The Office concluded that appellant was no longer totally disabled due to his accepted injury and was capable of performing his usual employment based upon Dr. Miles' report.

By letter dated June 9, 1998, appellant disagreed with the proposed termination and submitted evidence in support of his claim. In a report dated June 15, 1998, Dr. Pritza disagreed with Dr. Miles and reiterated that appellant was totally disabled from performing his usual employment as the stressors of that position would cause a recurrence of appellant's atrial fibrillation. Dr. Pritza opined that appellant was totally disabled from performing the position of boatswain mate due to cardiac problems.

On August 7, 1998 the Office referred appellant, together with a statement of accepted facts, list of questions and medical records, to Dr. Michael G. Del Core, a Board-certified internist with subspecialty certificates in cardiovascular disease and interventional cardiology, for an impartial medical examination to resolve the conflict in the evidence between Drs. Miles and Pritza as to whether appellant's atrial fibrillation had resolved and whether he was capable of performing his usual employment duties.

In an August 29, 1998 report, Dr. Del Core opined that, while appellant is capable of performing the duties of a boatswainmate, that appellant should not return to his position as a boatswainmate as the "environment surround his duties would increase his risk of having recurrent arrhythmias." He indicated that appellant was "able to tolerate any physical activities with minimal risk of recurrent problems" from a physical standpoint. In an attached work capacity evaluation, (Form OWCP-5b) dated August 28, 1999, Dr. Del Core concluded that appellant was capable of working eight hours per day providing he did not "participate in high volume work and had access to medical care."

The Office requested clarification from Dr. Del Core regarding whether appellant was capable of performing his usual employment duties and advised the physician that compensation is not paid for the possibility of a future injury.

In a response letter dated October 20, 1998, Dr. Del Core stated that appellant's job duties as a boatswainmate were "one of many contributing factors which put him at risk for developing recurrent supraventricular tachyarrhythmias" and that the anxiety and emotional stress appellant experienced while working "would contribute to his problem."

On November 16, 1998 the Office referred appellant for vocational rehabilitation services.

In a status report dated April 1, 1999, the rehabilitation specialist indicated that vocational training was not required and recommended direct placement in one of three positions listed in the individual placement plan. The positions suggested included a warehouse supervisor, shipping clerk and production/assembler.

In an April 8, 1999 letter, the Office advised appellant that the positions listed by the rehabilitation specialist were within his limitations and would provide a wage-earning capacity of \$14,435.00 to \$14,872.00 per year.

In a status report dated August 30, 1999, the rehabilitation specialist noted that appellant "finalized an agreement with a franchise partner and the subway corporation" and that he would be an assistant manager with a salary of \$20,000.00 per year.

In a status report dated October 15, 1999, the rehabilitation specialist indicated that appellant was unsuccessful in his contract for a fast food franchise with Mr. Goodcents. In an attached job classification form, an assistant manager -- fast food, DOT Number 185.137-010 is described as (1) directing, coordinating and participating in “preparation of, cooking wrapping or packaging types of food served or prepared by establishment, collecting monies in-house or take-out customers, or assembling food orders for wholesale customers;” (2) coordinating the “activities of workers engaged in keeping business records, collecting and paying accounts, ordering or purchasing supplies and delivery of foodstuffs to wholesale or retail customers;” and (3) hiring, training and interviewing personnel. The physical demands of the job were listed as light and requiring vocational training of six months to one year.

In an October 15, 1999 status report, the Office noted that appellant had been unsuccessful in his franchise option, but was looking at other fast food franchise options. It was determined that the manager position at the fast food franchise of Mr. Goodcents was appropriate and that a loss of wage-earning capacity should be issued.

On November 10, 1999 the Office issued a notice of proposed reduction of compensation based upon the position of assistant manager -- fast food.

In a letter dated November 18, 1999, Stephen J. Schill, the rehabilitation specialist stated that appellant had advised him in August 1999 that he was in the process of setting up a franchise and had retained an attorney to help him. He concluded that the position of assistant manager -- fast food was within appellant’s physical and mental capabilities and that according to Department of Labor State Employment Projections the rate of growth was estimated at 35 percent.

In a decision dated January 11, 2000, the Office finalized the reduction of benefits based upon appellant’s ability to perform the duties of the selected position of assistant manger -- fast food.

The Board finds that the Office improperly reduced appellant’s compensation to reflect his wage-earning capacity in the selected position of assistant manager -- fast foods.

Section 8115 of the Federal Employees’ Compensation Act¹ provides that 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 the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, the degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect his wage-earning capacity in his disabled condition.²

¹ 5 U.S.C. §§ 8101-8193, 8115.

² *Alfred R. Hager*, 46 ECAB 553, 556 (1995).

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 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 that employee's capabilities with regard to his physical limitations, education, age and prior experience.

In the instant case, there is no evidence supporting that appellant had the vocational qualifications to perform the position of assistant manager -- fast food with yearly wages of \$20,000.00. Initially, the Office considered appellant capable of performing as a laborer for a yearly salary of \$14,435.00 to \$14,872.00 and subsequently determined that the assistant manager -- fast food position was within appellant's capabilities after appellant had advised them he was in negotiations to obtain a contract for a fast food franchise. Appellant's contract for a franchise was never finalized and the evidence of record does not establish that appellant was vocationally qualified to perform the selected position of assistant manager -- fast foods. Therefore, the Office did not meet its burden of proof in reducing appellant's compensation based on his capacity to perform the duties of an assistant manager -- fast foods.

The January 11, 2000 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, DC
July 16, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member