

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HAROLD R. CAGLE and TENNESSEE VALLEY AUTHORITY,
BROWNS FERRY NUCLEAR POWER PLANT, Decatur, AL

*Docket No. 00-705; Submitted on the Record;
Issued May 10, 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 dispatcher.

In a decision dated July 27, 1999, the Office adjusted appellant's compensation effective August 15, 1999 because the medical evidence showed that he was no longer totally disabled for work due to the effects of his accepted employment injury. Based on the residuals of appellant's injury and considering all significant preexisting impairments and pertinent nonmedical factors, the Office found that appellant was able to perform the position of dispatcher.

In its notice of proposed reduction of compensation, the Office found that the attending orthopedic surgeon, Dr. Frank Hatchett, Jr., had released appellant to resume modified duties within restrictions provided on a work restriction form dated November 11, 1996. An individual placement plan was developed with the goal of placement with a new employer as a dispatcher, as the duties of this position were within the physical limitations imposed by Dr. Hatchett on November 11, 1996. When vocational rehabilitation efforts were unsuccessful, two positions were offered as being suited to appellant's vocational capabilities and preparation: dispatcher and escort vehicle driver. The Office found that both were within the restrictions imposed by Dr. Hatchett on November 11, 1996 and both were found to be reasonably available. The Office determined that the position of dispatcher was probably more conducive to appellant's perceived comfort level.

The Office explained that, since the medical evidence of record indicated that appellant was not totally disabled, he was not entitled to compensation for temporary total disability. Vocational testing, a labor market survey and a review of the medical evidence of record

indicated that appellant was capable of performing the duties of a dispatcher, which position was considered reasonably available.¹

In addition, the Board notes that a rehabilitation specialist, Dr. Eric R. Beck, evaluated appellant on August 19, 1998. In a report to Dr. Hatchett signed on September 9, 1998, Dr. Beck stated that he evaluated appellant based on the history, physical examination, ergometric testing and a review of the record. Based on this evaluation, he concluded that appellant had the following work restrictions: occasional lifting of 25 pounds from floor to knuckle; frequent lifting of 10 pounds from floor to knuckle; occasional pushing and pulling; no working overhead; no climbing; and no working at unprotected heights.

In a decision dated December 7, 1999, the Office reviewed the merits of appellant's claim and denied modification of its July 27, 1999 decision.

The Board finds that the Office properly reduced appellant's compensation to reflect a capacity to earn wages in the constructed position of dispatcher.

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.² Because the Office reduced appellant's compensation to reflect his capacity to earn wages as a dispatcher, it bears the burden of proof to establish such a wage-earning capacity.

Section 8115(a) of the Federal Employees' Compensation Act provides that in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his actual earnings, if his actual earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings of the employee do not fairly and reasonably represent his wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity as appears reasonable under the circumstances 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.³

In this case, appellant's attending orthopedic surgeon, Dr. Hatchett, released appellant to resume modified duties within restrictions provided on a work restriction form dated November 11, 1996. The duties of the position of dispatcher are within the physical limitations imposed by Dr. Hatchett and within the work restrictions reported by Dr. Beck on September 9, 1998. Vocational testing further indicated that appellant was capable of performing the duties of the selected position and a labor market survey indicated that the

¹ The Office determined that the constructed position fairly and reasonably represented appellant's capacity to earn wages. Under 5 U.S.C. § 8115(a), such a determination is appropriate only in cases involving actual wages received, not when the employee has no actual earnings.

² *Harold S. McGough*, 36 ECAB 332 (1984).

³ 5 U.S.C. § 8115(a).

position was reasonably available. The Board notes that the record contains no medical evidence that appellant remains totally disabled for work.

The medical evidence in this case is clear and unequivocal in establishing that the selected position is consistent with appellant's work restrictions. The Office followed proper procedures and gave due regard to the factors listed in section 8115(a) of the Act. The Office has met its burden of proof in adjusting appellant's compensation to reflect his capacity to earn wages in the constructed position of dispatcher.

The December 7 and July 27, 1999 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
May 10, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member