

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RAY A. WEATHERS and DEFENSE LOGISTICS AGENCY,
REUTILIZATION & MARKETING, Kelly Air Force Base, TX

*Docket No. 00-2606; Submitted on the Record;
Issued October 24, 2001*

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation effective April 5, 2000, based on his capacity to perform the duties of collection clerk.

On February 5, 1995 appellant, then a 40-year-old hazardous material processor, filed a claim for injuries to his neck and shoulders in an automobile accident on February 2, 1995. The Office accepted the claim for cervical, lumbar and thoracic strains, authorized lumbar fusion surgery and placed appellant on temporary total disability.

Appellant was referred for vocational rehabilitation on July 28, 1998.

On May 13, 1999 the Office referred appellant to Dr. Jerjis J. Denno, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Dr. Ellen I. Leonard, a second opinion Board-certified physiatrist and Dr. Gerardo Zavala, an attending Board-certified neurological surgeon, regarding whether appellant was capable of working eight hours a day.

In a report faxed on July 20, 1999, Dr. Denno concluded that appellant was capable of working eight hours a day with restrictions. He relied on a June 24, 1999 functional capacity evaluation, physical examination, neurological examination, review of medical records, x-ray interpretation and magnetic resonance imaging (MRI) scan. Physical and neurological examination revealed a normal gait, full range of motion in the cervical spine and negative Hoffman's and Lehermitte's signs. Dr. Denno determined that appellant had no objective evidence of thoracic, lumbar and cervical strains and that there were no residuals from his previous strains. Lastly, he indicated that while appellant was disabled from his position as a hazardous material processor he was capable of working eight hours a day with restrictions.

On August 25, 1999 the Office referred appellant to a second impartial medical examiner because Dr. Denno was in practice with Dr. David Dennis, who had previously evaluated appellant at the Office's request.

In a report dated September 24, 1999, Dr. Eradio Arredondo, an impartial Board-certified orthopedic surgeon, diagnosed chronic low back pain syndrome and status post laminectomy, disc excision and bilateral lateral fusion at two levels. A physical examination revealed negative straight-leg raising to 40 degrees bilaterally before having back pain, 1+ bilateral reflexes at his knees, fair range of motion in the low back, poor flexion and no gross sensory or motor loss in the lower extremities and good range of motion in the thoracic and cervical spine. Dr. Arredondo noted that a June 28, 1998 MRI revealed no significant scarring or recurrences of herniation in the lumbar spine. He concluded that appellant required a sedentary position to be gainfully employed.

In a September 30, 1999 work capacity evaluation, Dr. Arredondo concluded that appellant was capable of working eight hours a day with no sitting more than four hours, no walking or standing more than two hours, no reaching more than one hour, no twisting, no more than one hour of operating a vehicle, pushing and carrying of 30 pounds for no more than an hour, no lifting over 10 pounds for an hour, no kneeling or climbing and a 20-minute break every two hours.

On October 26, 1999 the vocational rehabilitation counselor selected the positions of customer-complaint clerk, collection clerk and information clerk as being within appellant's physical capabilities and restrictions noted by Dr. Arredondo. The counselor found that each of the positions was readily available in appellant's commuting area based on information from the state. The position of information clerk had weekly wages of \$240.00 while the positions of customer-complaint clerk and collection clerk had weekly wages of \$300.00.

On February 28, 2000 the counselor indicated that appellant had participated minimally in the job search and believed that he should be given a job by the federal government and not be required to look for a job. He closed his rehabilitation file. The Office then selected the position of collection clerk as being representative of appellant's wage-earning capacity based on the information supplied by the vocational rehabilitation counselor on October 26, 1999 and a report dated February 24, 2000, which indicated that a list of current employment openings from the Texas Workforce Commission was obtained on January 30, 2000.

On March 2, 2000 the Office provided appellant with a notice of a proposed reduction of compensation, based on his ability to perform the duties of a collection clerk. The Office advised appellant that if he disagreed with the proposed action, he could submit additional factual or medical evidence relevant to his capacity to earn wages.

By decision dated April 19, 2000, the Office reduced appellant's compensation effective April 5, 2000 based on an earning capacity of \$253.76 a week in the selected position of collection clerk. The Board finds that the Office properly reduced appellant's compensation to reflect his wage-earning capacity as a collection clerk.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.¹ If an employee's disability is no longer total, but the employee remains partially disabled, the Office may reduce compensation by determining the employee's wage-earning capacity.² 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

After the Office makes a medical determination of partial disability and of special work restrictions, it may 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 market that fits the employee's capabilities with regard to 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 services or other applicable services. 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 selected the position of collection clerk for appellant (*Dictionary of Occupational Titles* No. 241.357-010) The collection clerk position is described as sedentary, which includes occasionally lifting up to 10 pounds and occasional reaching. The position requires six months to a year of vocational preparation. The job description indicates that the person:

“Notifies or locates customers with delinquent accounts and attempts to secure payment, using postal services, telephone, or personal visit. Mail form letters to customers to encourage payment of delinquent accounts. Confers with customer by telephone in attempt to determine reason for overdue payment, reviewing terms of sales, service, or credit contract with customer. Notifies credit department if customer fails to respond. Contacts delinquent account customer in person [COLLECTOR (clerical) 241.367.010]. Records information about financial status of customer and status of collection efforts. May order repossession or service disconnection, or turn over account to attorney. May sort and file correspondence. May receive payments and post amount paid to customer account. May grant extensions of credit. May use automated telephone dialing system to contact customers and computer to record customer account

¹ *Linda L. Newbrough*, 52 ECAB ____ (Docket No. 00-1100, issued March 27, 2001).

² 5 U.S.C. § 8115(a); *see also* 20 C.F.R. § 10.403(b)

³ *Dorothy Jett*, 52 ECAB ____ (Docket No. 99-297, issued January 29, 2001).

⁴ *Albert C. Shadrick*, 5 ECAB 375 (1953). This case developed the formula for determining loss of wage-earning capacity based on actual earnings, which is codified by regulation at 20 C.F.R. § 10.403(c) of this regulation, provides that wage-earning capacity in terms of percentage is obtained by dividing the employee's earnings by the current pay rate, which means current salary or pay rate for the job held at the time of injury; *see also Robin Bogue*, 46 ECAB 488 (1995).

information. May void sales tickets for unclaimed [C].[O].[D]. and lay-away merchandise. May trace customer to new address by inquiring at post office or by questioning neighbors [SKIP TRACER (clerical) 241.367.026]. May attempt to repossess merchandise, such as automobile, furniture and appliances when customer fails to make payment [REPOSSESSOR (clerical) 241.367.022].”

The rehabilitation counselor, in recommending the position to the Office, found that appellant’s transferable skills and education qualified him vocationally for the position. The rehabilitation counselor relied on the opinion of Dr. Arredondo, the impartial medical examiner, which outlined appellant’s medical restrictions. He indicated that appellant was medically capable of working eight hours a day with restrictions on sitting, walking, standing, reaching, kneeling, climbing and twisting. The physician indicated that appellant’s restrictions required a 20-minute break every two hours.

The Board finds that the Office properly evaluated appellant’s ability to return to the labor market as a collection clerk based on his physical capabilities and transferable skills and education. Furthermore, the Office properly utilized the wage rate for a collection clerk in determining appellant’s wage-earning capacity. It considered the average salary for this position and that appellant held a WG-7, step 5 job on the date of injury and determined the rate of \$566.70 weekly.

In view of the foregoing, the Board finds that the Office properly found that appellant was no longer totally disabled but rather partially disabled as a result of his February 2, 1995 work injury and properly determined that the position of collection clerk represented appellant’s wage-earning capacity.

The April 19, 2000 decision of the Office of Workers’ Compensation Programs is hereby affirmed.

Dated, Washington, DC
October 24, 2001

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member