

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DENNIS RODOLICO and DEPARTMENT OF THE NAVY,
PHILADELPHIA NAVAL SHIPYARD, Philadelphia, PA

*Docket No. 00-636; Submitted on the Record;
Issued September 26, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation effective November 8, 1998 based on his capacity to earn wages as a billing machine operator.

On February 3, 1995 appellant, then a 42-year-old electrical worker, filed a claim for a twisted left knee sustained on February 3, 1995 when he slipped on a metal plate. The Office accepted that appellant sustained internal derangement of his left knee and accepted that his left total knee replacement performed on June 20, 1995 was related to his February 3, 1995.

On August 13, 1998 the Office, which was paying appellant compensation for temporary total disability, issued a notice of proposed reduction of compensation on the basis of appellant's capacity to earn wages as a credit reporting clerk. The Office then determined that this position was not suitable for appellant due to a speech impediment.

On September 8, 1998 the Office issued a notice of proposed reduction of compensation on the basis of appellant's capacity to earn wages as a billing machine operator. By decision dated October 29, 1998, the Office reduced appellant's compensation effective November 8, 1998 on the basis of his capacity to earn wages as a billing machine operator.

By letter dated August 31, 1999, appellant, through his attorney, requested reconsideration and submitted additional evidence. By decision dated September 8, 1999, the Office found that the additional evidence was not sufficient to warrant modification of its prior decision.

The Board finds that the Office improperly reduced appellant's compensation effective November 8, 1998.

Once the Office determines that an employee is totally disabled as a result of an employment injury, it has the burden of justifying a subsequent reduction in compensation

benefits.¹ As part of its burden, the Office must show that the employee is physically capable of performing the duties of the job selected as representative of his or her wage-earning capacity.²

A wage-earning capacity determination must be made on a reasonably current medical evaluation.³ At the time of the Office's October 29, 1998 decision reducing appellant's compensation based on his capacity to earn wages at a billing machine operator, the most recent medical report assessing appellant's capacity to work was a July 15, 1996 report from his attending physician, Dr. John P. Salvo. As this report was over two years old at the time of the Office's determination of appellant's wage-earning capacity, it cannot form a valid basis for that determination.⁴ The June 17, 1999 reports from Dr. George L. Rodriguez that appellant submitted with his August 31, 1999 request for reconsideration indicate that appellant can work only four hours per day, which is not consistent with the Office's determination that he could work full time as a billing machine operator.

The Office also has not shown that the position of billing machine operator was appropriate with regard to appellant's qualifications for this position.⁵ Vocational testing done for the Office on July 9 and 10, 1996 indicated that appellant's reading and arithmetic were at a five-grade level, and his spelling at a third-grade level. The description of the position of billing machine operator listed mathematical skills that included algebra and geometry, and language skills including writing reports and essays with proper format, punctuation, spelling, and grammar, using all parts of speech." Also included in language skills was "Speaking: Speak before an audience with poise, voice control, and confidence, using correct English and well-modulated voice." The exercise of this required skill would seem to be precluded by appellant's speech impediment.

In summary, the Office has not met its burden of proving that the position of billing machine operator represents appellant's wage-earning capacity effective November 8, 1998. The Office should reinstate appellant's compensation for temporary total disability retroactive to that date.

¹ *Harold S. McGough*, 36 ECAB 332 (1984).

² Section 8115(a) of the Federal Employees' Compensation Act requires that, in determining wage-earning capacity, due regard be given to the nature of the injury and the degree of physical impairment.

³ *Carl C. Green*, 47 ECAB 737 (1996).

⁴ *Keith Hanselman*, 42 ECAB 680 (1991); *Ellen G. Trimmer*, 32 ECAB 1878 (1981); *Samuel J. Russo*, 28 ECAB 43 (1976).

⁵ Section 8115(a) of the Act requires that the Office give due regard to an employee's "qualifications for other employment." See *Lucius E. Pearson*, 39 ECAB 1244 (1988) for a comparison of qualifications to narrative job requirements.

The decision of the Office of Workers' Compensation Programs dated September 8, 1999 is reversed.

Dated, Washington, DC
September 26, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member