

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DIEGO J. VIGIL and DEPARTMENT OF AGRICULTURE,
CARSON NATIONAL FOREST, Taos, NM

*Docket No. 01-775; Submitted on the Record;
Issued September 13, 2001*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation effective January 8, 2001 based on his capacity to earn wages as a cashier.

The Board finds that the Office properly reduced appellant's compensation effective January 8, 2001 based on his capacity to earn wages as a cashier.

This is the second appeal in this case. In the prior appeal,¹ the Board reversed the October 23, 1998 decision of the Office on the grounds that the Office improperly reduced appellant's compensation because it had not shown that appellant was physically capable of working as a cashier.² The facts and circumstances of the case up to that point are incorporated herein by reference.

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.³ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁴

¹ Docket No. 99-906 (issued June 7, 2000).

² On July 5, 1994 appellant, then a 22-year-old firefighter, sustained an employment-related lumbosacral strain, herniated disc at L5-S1 and S1 radiculopathy. The Office paid compensation for periods of disability. A vocational rehabilitation counselor determined that appellant was capable of working as a cashier. By decision dated October 23, 1998, the Office reduced appellant's compensation effective that date based on his capacity to earn wages as a cashier.

³ *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

⁴ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

Under section 8115(a) of the Federal Employees' Compensation Act,⁵ 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.⁶ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.⁷ The job selected for determining wage-earning capacity must be reasonably available in the general labor market in the commuting area in which the employee lives.⁸

When the Office makes a medical determination of partial disability and 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.⁹

After the Board's prior decision, the Office determined that appellant was vocationally and educationally capable of working as a cashier and that cashier positions were reasonably available in the general labor market in appellant's commuting area.¹⁰ The cashier position involved operating a cash register and required such activities as reaching, handling and lifting up to 20 pounds. By decision dated January 8, 2001, the Office reduced appellant's compensation based on his capacity to earn wages as a cashier.¹¹

The Office properly relied on the opinion of the rehabilitation counselor that appellant was vocationally and educationally capable of performing the duties of the cashier position. In

⁵ 5 U.S.C. §§ 8101-8193; § 8115.

⁶ See *Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

⁷ *Albert L. Poe*, 37 ECAB 684, 690 (1986), *David Smith*, 34 ECAB 409, 411 (1982).

⁸ *Id.*

⁹ 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).

¹⁰ In late 2000, a vocational rehabilitation counselor reaffirmed the earlier determination by another vocational rehabilitation counselor that appellant was capable of working as a cashier.

¹¹ On January 10, 2001 the Office corrected a computational error it had made in its January 8, 2001 decision in connection with its calculation of appellant's wage-earning capacity.

addition, the medical evidence of record reveals that appellant was physically capable of performing these duties. In a report dated September 12, 2000, Dr. James H. Lubowitz, a Board-certified orthopedic surgeon to whom the Office had referred appellant, stated that his examination of appellant did not yield any objective evidence that he had a lower back strain, lumbosacral disc displacement or lumbosacral neuritis. Dr. Lubowitz indicated that appellant had subjective pain which prevented him from performing his regular job but that he was capable of performing limited duty. In an attached work restriction form, he noted that appellant could work 8 hours per day, lift up to 20 pounds and engage in reaching and handling. The Office provided Dr. Lubowitz with a description of the cashier position and, in an October 24, 2000 report, he stated that appellant was capable of performing the position's duties.¹²

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 cashier represented his wage-earning capacity.¹³ The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the duties of cashier and that such a position was reasonably available within the general labor market of appellant's commuting area. Therefore, the Office properly reduced appellant's compensation effective January 8, 2001 based on his capacity to earn wages as a cashier.

The January 8, 2001 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
September 13, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member

¹² Appellant did not submit any evidence or argument showing that he could not vocationally or physically perform the cashier position.

¹³ See *Clayton Varner*, 37 ECAB 248, 256 (1985).