

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VINCENT K. BERARDINI and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Butler, PA

*Docket No. 00-2672; Submitted on the Record;
Issued April 19, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation effective September 12, 1999 based on his capacity to earn wages as a computer security specialist.

In April 1992, appellant, then a 38-year-old supervisory respiratory therapist and registered cardiovascular technologist, filed a claim alleging that he sustained a respiratory condition due to being exposed to solvent fumes at work.¹ The Office accepted that he sustained extrinsic asthma and paid him compensation for various periods of disability. In 1993, appellant began to participate in a vocational rehabilitation program. As part of this effort, he took courses at Slippery Rock University towards a degree in computer science or information systems. By decision dated September 10, 1999, the Office reduced appellant's compensation effective September 12, 1999 based on his capacity to earn wages as a computer security specialist.

The Board finds that the Office improperly reduced appellant's compensation effective September 12, 1999 based on his capacity to earn wages as a computer security specialist.

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.² The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.³

Under section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and

¹ Appellant had previously sustained an employment-related respiratory injury on January 7, 1992.

² *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

³ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

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.⁴ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.⁵ The job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives.⁶

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 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.⁷

In the present case, Dr. Hilary Stroud, an attending Board-certified family practitioner, found that appellant was not totally disabled for work and had a partial capacity to perform work for four hours a day subject to specified work restrictions. Appellant's vocational rehabilitation counselor determined that he was able to perform the position of computer security specialist and that state employment services showed the position was available in sufficient numbers so as to make it reasonably available within appellant's commuting area. By decision dated September 10, 1999, the Office reduced appellant's compensation effective September 12, 1999 based on his capacity to earn wages as a computer security specialist. The Office determined that appellant was able to work four hours a day in this position.

The Board finds that the Office has established that appellant is physically capable of performing the computer security specialist position for four hours a day. The position is sedentary in nature and requires lifting up to 10 pounds and the ability to reach, handle and finger. In a report dated August 4, 1999, Dr. Stroud indicated that he had reviewed a description of the duties required by the position and that appellant was able to perform them.⁸ In a work restriction form dated August 4, 1999, Dr. Stroud noted that appellant could sit for 4 hours a day,

⁴ See *Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C § 8115(a).

⁵ *Albert L. Poe*, 37 ECAB 684, 690 (1986), *David Smith*, 34 ECAB 409, 411 (1982).

⁶ *Id.*

⁷ 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).

⁸ Dr. Stroud noted that appellant should be in a temperature and humidity controlled environment.

lift up to 10 pounds and engage in simple grasping, pushing and pulling and fine manipulation with his hands. He stated that appellant could work for four hours a day. These restrictions would be within the job requirements of the computer security specialist position.

The Board further finds, however, that the Office did not establish that appellant is vocationally capable of performing the computer security specialist position. The position involves regulation of access to computer files; monitoring of data file use; updating of computer security files; entering commands into computers; and modifying security files. Appellant's vocational rehabilitation counselor indicated that the computer security specialist position required one to two years of specific vocational preparation.

However, it is not clear from the record that appellant has the proper vocational training to perform the computer security specialist position. He took courses at Slippery Rock University over a span of three years. Appellant experienced delays in completing his coursework due to repeated withdrawal from classes and was unable to complete his degree. Although appellant earned 63 credits for coursework during this period, he completed only about a semester of coursework in the computer science and information systems fields.⁹ The facts of the present case do not support a finding that appellant was capable of performing the computer security specialist position as of September 1999.¹⁰ The Office did not present sufficient evidence to show that appellant was vocationally capable of performing the position.¹¹

Therefore, the Office did not adequately consider all the proper factors, including appellant's qualifications in determining that the position of computer security specialist represented his wage-earning capacity. The Office improperly reduced appellant's compensation effective September 12, 1999 based on his capacity to earn wages as a computer security specialist.

⁹ Appellant completed about 9 to 12 credits of coursework in classes related to computer science or information systems.

¹⁰ Appellant's vocational rehabilitation counselor stated that appellant had completed three years of computer science and information systems training at Slippery Rock University. This statement is not supported by the factual evidence of record.

¹¹ The record does not otherwise show that appellant had training or experience which would have prepared him for the position.

The September 10, 1999 decision of the Office of Workers' Compensation Programs is reversed.

Dated, Washington, DC
April 19, 2002

Alec J. Koromilas
Member

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member