

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICHARD D. MANLEY and DEPARTMENT OF THE INTERIOR,
BUREAU OF RECLAMATION, Grand Coulee, WA

*Docket No. 01-1190; Submitted on the Record;
Issued July 24, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the selected position of electronics assembler represented appellant's wage-earning capacity.

Appellant's claim for a traumatic injury on March 16, 1981 was accepted by the Office of Workers' Compensation Programs for an effusion strain and torn cartilage after he dislocated his right knee while hauling cable. He received a 20 percent schedule award for permanent impairment of his right lower extremity. Appellant underwent an anterior cruciate ligament reconstruction on October 10, 1983 and several subsequent surgeries aimed at stabilizing his knee.

Appellant attended a pain management clinic in 1990 and was referred for vocational rehabilitation on October 19, 1990. Following extensive retraining and education in welding, Dr. Edward Van Tassel, an osteopathic practitioner in orthopedic surgery and appellant's treating physician, stated in a May 24, 1994 report that appellant should avoid long-term standing and carrying or lifting of more than 10 to 15 pounds repetitively. Dr. Tassel added that appellant should seek sedentary employment. Based on his report, the rehabilitation counselor prepared a job analysis for an electronics assembler and the Office authorized training.

On May 15, 1996 appellant accepted employment as an electronics inspector, but left this position after two days due to a disagreement with his supervisor. He found another electronics job but left after four days' work. The Office closed its rehabilitation file and issued a notice of proposed reduction of compensation on November 19, 1997.

Appellant disagreed with the proposed reduction on the grounds that he was capable of only "modified sedentary work" and the electronics assembler position was classified as light

work. He submitted medical records and a decision from the Social Security Administration granting him disability benefits as of January 1985.¹

By decision dated January 26, 1998, the Office reduced appellant's wage-loss compensation, finding that he was capable of earning \$178.97 a week as an electronics assembler. Appellant requested an oral hearing, which was held on November 15, 1999.

On March 6, 2000 the hearing representative remanded the case for the Office to determine whether appellant's right knee replacement on April 20, 1998 was work related.² The hearing representative also instructed the Office to issue a decision on appellant's request for reconsideration of the January 26, 1998 decision reducing his compensation.³

On March 21, 2000 the Office denied appellant's request on the grounds that the evidence and legal argument submitted in support of reconsideration were insufficient to warrant modification of its January 26, 1998 decision. The Office noted that the physical limitations provided for appellant fell into the "light" category and that the selected position therefore represented appellant's ability to earn wages.

The Board finds that the selected position of electronics assembler represented appellant's wage-earning capacity.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened to justify termination or modification of compensation.⁴

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.⁶ 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.⁷

¹ Appellant received a lump-sum payment of \$50,052.75.

² On March 21, 2000 the Office reversed its denial of authorization for appellant's total knee replacement.

³ The Office overlooked a January 27, 1999 request for reconsideration from appellant's representative, who asked that the wage-earning capacity determination be set aside because the Office erred in relying on the report of a general practitioner.

⁴ *Raymond W. Behrens*, 50 ECAB 221, 222 (1999); *Bettye F. Wade*, 37 ECAB 556, 565 (1986).

⁵ 5 U.S.C. §§ 8101-8193.

⁶ 5 U.S.C. § 8115(a); *Penny L. Baggett*, 50 ECAB 559, 560 (1999).

⁷ *Richard Alexander*, 48 ECAB 432, 434 (1997); *Pope D. Cox*, 39 ECAB 143, 148 (1988).

Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.⁸ 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.⁹

After 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 specialist for selection of a position, listed in the Department of Labor, *Dictionary of Occupational Titles* or otherwise available in the open labor market; this position must fit that employee's capabilities with regard to his physical limitations, education, age and prior experience.¹⁰ Once this selection is made, a wage rate and the availability of the selected position in the open labor market should be determined through contact with the state employment service or other applicable service.¹¹

In this case, the Office selected the position of electronics assembler after determining from Dr. Van Tassel's report that appellant was no longer capable of the medium to heavy-duty labor required in the welding field. The specific position was that of a circuit board assembler (No. 726.684-070). Physical demands were listed as sedentary, with lifting limited to 10 pounds, sitting up to 2 hours a day for a total of 5 to 7 hours and walking and standing limited to 1 hour a day.

Appellant participated in additional electronics training and the rehabilitation counselor assisted appellant in securing employment as an assembler (No. 726.684-018). While appellant held various temporary jobs, he failed to secure a permanent position by the time the rehabilitation file was closed on August 1, 1996.

In her closing report dated August 28, 1996, the rehabilitation counselor stated that appellant's skills and training qualified "him for employment with a wide range of employers in the local community." She consulted the state job service specialist who confirmed that the job of assembler was reasonably available within appellant's commuting area. The rehabilitation counselor added that the electronics assembler job was entry level with a high turnover rate and that at least 400 positions were currently available. She stated that the job was classified as light duty and was within the restrictions imposed by appellant's work-related knee condition.

In a report dated April 16, 1997, Dr. James W. Lamberton, an osteopathic practitioner in orthopedics who was associated with Dr. Van Tassel, stated that appellant was capable of "fairly sedentary work" in a job in which he could sit, stand and walk alternatively. Dr. Lamberton recommended that appellant remain active and continue with full range of motion exercises for

⁸ *Dim Njaka*, 50 ECAB 425, 433 (1999); *Albert L. Poe*, 37 ECAB 684, 690 (1986).

⁹ *Philip S. Deering*, 47 ECAB 692, 699 (1996).

¹⁰ *Dorothy Lams*, 47 ECAB 584, 586 (1996).

¹¹ *James R. Verhine*, 47 ECAB 460, 464 (1996); *Albert C. Shadrick*, 5 ECAB 376 (1953).

his knee. He added that appellant was not capable of prolonged standing or walking and should not carry or lift more than 20 pounds or 10 pounds repetitively.

Although Dr. Lamberton did not complete a physical capacities evaluation, his physical restrictions and limitations on sitting, standing and walking fall within those of the assembler position, which lists lifting up to 20 pounds occasionally and up to 10 pounds frequently. Further, appellant's treating physician, Dr. Van Tassel, indicated on February 14, 1996 that the circuit board assembler position, described as sedentary duty, was suitable. This position listed sitting from five to seven hours a day, two hours at a time, with standing and walking up to one hour.

There is no medical evidence in the record that shows that appellant's knee condition following his replacement surgery in April 1998 would affect his ability to do the job of electronics assembler. Rather, three physicians to whom the Office referred appellant agreed on September 1, 1998 that he was capable of performing the duties of the selected position.

Dr. Russell Vandenberg, a Board-certified psychiatrist, found no evidence of any current psychiatric syndrome and stated that any determination of disability or employability should be based on objective physical findings. Dr. Kathryn Collins, Board-certified in physical medicine and rehabilitation, found that appellant was capable of working on a sedentary basis, changing from standing, sitting and walking hourly or less, with a lifting restriction of 20 pounds. Dr. Neal H. Shonnard, a Board-certified orthopedic surgeon, concluded that appellant could do sedentary work with no sustained sitting or standing for more than half an hour and no lifting more than 25 pounds. Therefore, the Board finds that appellant was physically capable of performing the duties of an electronics assembler.¹²

The Board also finds that the Office considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment and age and employment qualifications, in determining that the position of electronics assembler represented appellant's wage-earning capacity.¹³ The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to work in the electronics industry in a light position and that such positions were reasonably available within the general labor market of appellant's commuting area. Therefore, the position of electronics assembler properly reflected appellant's wage-earning capacity.

¹² Appellant submitted a claim for compensation from April 20, 1998 and continuing. On October 20, 2000 the Office accepted the claim for total disability benefits through September 12, 1998 but found that appellant was capable of working as an electronic assembler after that. Appellant timely requested an oral hearing, which was scheduled for April 25, 2001. The Office has not issued a final decision on whether appellant was totally disabled after September 12, 1998. Therefore, this issue is not before the Board in this appeal.

¹³ See *Donald W. Woodall*, 49 ECAB 415, 421 (1998) (finding that the Office followed its established procedures for determining that the position of gate guard represented appellant's wage-earning capacity).

The March 21, 2000 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
July 24, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member