

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ERIK E. ROST and DEPARTMENT OF THE NAVY,  
NORTH ISLAND NAVAL AIR STATION, San Diego, CA

*Docket No. 01-2263; Submitted on the Record;  
Issued June 14, 2002*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issue is whether the selected position of customer service clerk represented appellant's wage-earning capacity.

Appellant's claim, filed on January 3, 1994, was accepted for acute bilateral wrist strain and appellant, a 36-year-old sheet metal mechanic, returned to light duty doing computer input. Subsequently, appellant was diagnosed with bilateral carpal tunnel syndrome and his occupational disease claim filed on October 13, 1994 was accepted for bilateral wrist tenosynovitis.

The Office of Workers' Compensation Programs referred appellant for vocational training because the employing establishment was unable to provide suitable light duty after October 1996. Appellant underwent physical and vocational testing, completed a six-month course in computer networks and participated in intensive job development.

On June 12, 2000 the Office issued a notice of proposed reduction of compensation based on its determination that appellant had the capacity to earn wages as a customer service clerk.<sup>1</sup> Appellant disagreed with the Office's determination, stating that he had not been trained for this position or for that of a field service representative and that the customer service clerk position had no growth or wage increase potential.

On December 13, 2000 the Office reduced appellant's wage-loss compensation on the basis of his capacity to earn \$313.72 a week as a customer service clerk. The Office noted that appellant completed courses for computer repair technician and customer service specialist, but

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<sup>1</sup> On August 27, 1999 the Office proposed to reduce appellant's wage-loss compensation based on his capacity to earn wages as a field service representative in the computer industry. Appellant disagreed with the Office's determination and the Office voided its decision.

explained that it had rated appellant on the clerk level because the skills he had acquired were transferable to that position.

Appellant requested a review of the written record, which was done on May 30, 2001. By decision dated May 31, 2001, the hearing representative found that the Office met its burden of proof in reducing appellant's compensation.

The Board finds that the position of customer service clerk 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.<sup>2</sup> If a claimant is no longer totally disabled, but has residual partial disability, the Federal Employees' Compensation Act<sup>3</sup> provides that monthly monetary compensation shall be paid equal to 66 2/3 percent of the difference between monthly pay and wage-earning capacity.<sup>4</sup>

Under section 8115(a) of the Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity.<sup>5</sup> 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.<sup>6</sup>

Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.<sup>7</sup> 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.<sup>8</sup>

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's *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,

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<sup>2</sup> *Raymond W. Behrens*, 50 ECAB 221, 222 (1999); *Bettye F. Wade*, 37 ECAB 556, 565 (1986).

<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> 5 U.S.C. § 8106(a).

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

<sup>6</sup> *Richard Alexander*, 48 ECAB 432, 434 (1997); *Pope D. Cox*, 39 ECAB 143, 148 (1988).

<sup>7</sup> *Dim Njaka*, 50 ECAB 425, 433 (1999); *Albert L. Poe*, 37 ECAB 684, 690 (1986).

<sup>8</sup> *Philip S. Deering*, 47 ECAB 692, 699 (1996).

age and prior experience.<sup>9</sup> 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.<sup>10</sup>

In this case, the Office selected the position of customer service clerk (No. 299.367-010) after determining that appellant's training and experience did not provide him with the qualifications necessary for the position of field service representative (field engineer, No. 828.261-014) in the computer industry. The physical requirements of the selected light-duty customer service clerk position included lifting up to 10 pounds frequently and up to 20 pounds occasionally, with no climbing, balancing or crawling and occasional stooping, kneeling and crouching. The general duties of this retail trade position involved taking orders, assisting customers with sales, keeping records, resolving complaints and providing general information to customers.

The rehabilitation counselor reported that appellant had two years of college, had taken many training courses in the Navy and met minimum competencies in all vocational areas, including consumer economics, clerical, business and service fields. Appellant's resume indicated experience and expertise in personnel training and supervision, scheduling and coordination of projects, inventory management, quality assurance and control, and oral and written communication. He worked as a clerk in a convenience store in the early 1980s. Considering appellant's background, experience and training, the rehabilitation counselor stated that appellant could qualify for a "multitude of positions" and thus properly found appellant's skills and abilities to be transferable to the position of customer service clerk.

Dr. G. Charles Roland, a Board-certified orthopedic surgeon, stated in a June 26, 1996 report that appellant could return to modified duty, with no gripping or repetitive motion of his wrists. A report dated August 9, 1997 stated that appellant had reached maximum medical improvement and had a 10 percent disability of both upper extremities due to the accepted conditions. Appellant's work restrictions included no repetitive or forceful grasping, pulling or pushing.

There is no medical evidence in the record that shows a change in the nature and extent of appellant's wrists condition after he left work in October 1996 that would affect his ability to perform the duties of a retail clerk. In fact, appellant's accepted wrist conditions were medically declared permanent and stationary in 1994, and his physical restrictions remained unchanged. Therefore, the Board finds that appellant was physically capable of performing the duties of a customer service clerk.

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 customer service clerk represented appellant's wage-earning capacity.<sup>11</sup> The weight of the evidence of record establishes that

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<sup>9</sup> *Dorothy Lams*, 47 ECAB 584, 586 (1996).

<sup>10</sup> *James R. Verhine*, 47 ECAB 460, 464 (1996); *Albert C. Shadrick*, 5 ECAB 376 (1953).

<sup>11</sup> See *Donald W. Woodall*, 49 ECAB 415, 421 (1998) (finding that the Office followed its established procedures

appellant had the requisite physical ability, skill and experience to work in this field 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 customer service clerk properly reflected appellant's wage-earning capacity.

Appellant argues that he was not tested vocationally for the position of customer service clerk, that he has no experience in this field, that he does not possess the people skills required and that his use of language is below standard. The record reveals that appellant has previously worked as a clerk and that his language capability was rated at 88 percent, well above average. Therefore, the Board rejects these arguments.

The May 31, 2001 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC  
June 14, 2002

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

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for determining that the position of gate guard represented appellant's wage-earning capacity).