

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RONALD L. IVERSON and DEPARTMENT OF THE NAVY,
MILITARY SEALIFT COMMAND - PACIFIC, Oakland, CA

*Docket No. 02-227; Submitted on the Record;
Issued June 27, 2003*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that the selected position of sales clerk represented appellant's wage-earning capacity.

On September 24, 1994 appellant, then a 46-year-old able bodied cable man, sustained an injury while lifting heavy cable in the performance of duty. He stopped working on October 1, 1994. The Office accepted appellant's claim for lumbosacral strain.¹ Appellant received appropriate wage-loss compensation and the Office placed appellant on the periodic compensation rolls effective September 17, 1995.

Based on the available medical evidence at the time, the Office determined that appellant was disabled from performing his date-of-injury job as he could no longer perform the heavy lifting required of the position.² Accordingly, the Office referred appellant for vocational rehabilitation in March 1996. The rehabilitation process was prolonged due to interruptions brought about by appellant's medical condition and in one instance, his lack of cooperation. In April 1999, the Office rehabilitation counselor developed a plan for placement as a sales clerk or sales attendant. The plan included participation in a training program for retail merchandising, which appellant completed on June 18, 1999. It was also anticipated that appellant would receive 90 days of placement assistance through September 16, 1999. However, placement services were interrupted approximately two weeks shy of the 90-day target date because appellant had scheduled surgery on September 9, 1999 to repair a hernia. Appellant did not subsequently avail himself of the additional placement services and, in January 2000, the rehabilitation counselor recommended that the case be closed. Vocational rehabilitation was concluded on March 31, 2000.

¹ The record reveals preexisting spina bifida occulta and spondylolisthesis at L5-S1.

² The employing establishment terminated appellant's employment effective November 3, 1995.

The Office rehabilitation specialist provided a November 7, 2000 report in which he identified the constructed positions of sales clerk and sales attendant as being suitable with respect to both appellant's aptitude and his physical abilities. Additionally, the identified positions were reported to be reasonably available in the labor market on both a part-time and full-time basis.

On April 10, 2001 the Office issued a notice of proposed reduction of compensation. The notice advised appellant that the medical and factual evidence established that he had the capacity to earn weekly wages of \$292.00 as a part-time sales clerk, working 30 hours per week.

In a decision dated May 30, 2001, the Office finalized its April 10, 2001 proposed reduction of compensation. Accordingly, the Office reduced appellant's compensation benefits effective June 17, 2000 to reflect his wage-earning capacity as a part-time sales clerk.

The Board finds that the Office improperly determined that the selected position of sales clerk represented appellant's wage-earning capacity.

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.³ An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.⁴

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 reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent the employee's wage-earning capacity, or if the employee has no actual wages, the wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, the employee's usual employment, age, qualifications for other employment, the availability of suitable employment, and other factors and circumstances which may affect his wage-earning capacity in his or her disabled condition.⁵

The Office must initially determine appellant's medical condition and work restrictions before selecting an appropriate position that reflects appellant's vocational wage-earning capacity. The Board has stated that the medical evidence upon which the Office relies must provide a detailed description of appellant's condition.⁶ Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.⁷

³ *James B. Christenson*, 47 ECAB 775, 778 (1996); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

⁴ 20 C.F.R. §§ 10.402, 10.403 (1999); *see Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

⁵ 5 U.S.C. § 8115(a); *see Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

⁶ *Samuel J. Russo*, 28 ECAB 43 (1976).

⁷ *Carl C. Green, Jr.*, 47 ECAB 737, 746 (1996).

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case 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 the employee's capabilities with regard to his or her 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.⁸

In finding that appellant was physically capable of performing the duties of a sales clerk, the Office relied on the August 17, 1999 report of Dr. John G. Lane, a Board-certified orthopedic surgeon.⁹ With respect to appellant's work status, Dr. Lane stated that appellant may perform lifting up to 15 pounds intermittently. He also stated that appellant should avoid prolonged standing, walking, bending and stooping activities.

As a sales clerk appellant would be expected, among other things, to obtain and receive merchandise or food items, stock shelves, total bills, accept payments, wrap or bag merchandise, and make change for customers. The designated strength level of the position is "light," with occasional lifting of 20 pounds or less and frequent lifting of 10 pounds or less. The sales clerk position also requires frequent reaching, handling and fingering. Additionally, appellant would be required to stoop and crouch occasionally. The position description, however, does not identify the amount of standing, bending or walking required.

The Board finds that the Office failed to establish that the selected position of sales clerk is medically suitable. Dr. Lane stated that appellant could perform lifting up to 15 pounds intermittently, the sales clerk position identified by the Office requires occasional lifting up to 20 pounds. Additionally, Dr. Lane recommended that appellant avoid prolonged standing, walking, bending and stooping activities. The sales clerk position requires occasional stooping, which is not consistent with Dr. Lane's advice to avoid prolonged stooping. Moreover, the position description does not indicate the amount of standing, bending or walking required of a sales clerk. As the sales clerk position requires occasional lifting up to 20 pounds, it is incompatible with the 15-pound lifting limitation imposed by Dr. Lane. Furthermore, the medical suitability of the selected position is questionable in that the record is unclear as to whether the position requires prolonged standing, bending or walking.

⁸ *Albert C. Shadrick*, 5 ECAB 376 (1953).

⁹ The Office attempted to obtain a more recent report from Dr. Lane on September 21, 2000. However, there is no indication from the record that Dr. Lane responded to the Office's request. The record also indicates that the Office referred appellant for a second opinion orthopedic evaluation on May 4, 2001. Appellant attended the examination scheduled for May 29, 2001; however, Dr. Lane's report was not received by the Office prior to the issuance of its May 30, 2001 decision. The Board's review is limited to the evidence in the case record which was before the Office at the time of its final decision. 20 C.F.R. § 501.2.

As the record fails to establish that the selected position of sales clerk is medically suitable, the Board finds that the Office failed to meet its burden of proof to justify modification of appellant's wage-loss compensation.¹⁰

The May 30, 2001 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, DC
June 27, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁰ *James B. Christenson, supra* note 3.