

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HAROLD E. SCAIFE, JR. and U.S. POSTAL SERVICE,
POST OFFICE, Cleveland, OH

*Docket No. 02-365; Submitted on the Record;
Issued March 11, 2003*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly adjusted appellant's wage-earning capacity based on his ability to work as a customer service clerk.

On December 14, 1984 appellant, then a 33-year-old letter carrier, sustained a contusion, sprained medial collateral ligament and torn medial meniscus of his left knee due to a fall at work. On April 28, 1987 appellant sustained a right knee contusion and aggravation of chondromalacia symptoms when his right knee was struck by a mail case. The Office also accepted that appellant sustained an employment-related torn medial cartilage of his right knee, precipitation of osteoarthritis, and permanent aggravation of chondromalacia. It authorized arthroscopic surgical procedures of both knees which were performed in July and October 1987, including left knee chondroplasty, removal of a shelf tear of the left posterior horn medial cartilage and bilateral medial cartilage repair.

Appellant stopped worked for various periods and worked in limited-duty positions for the employing establishment.¹ On January 18, 1988 he returned to full-time work for the employing establishment as a modified distribution clerk.² On February 12, 1989 appellant sustained a right knee contusion and a left ankle sprain due to a fall at work.³ He stopped work on that date but later returned to work in his modified distribution clerk position. In May 1989 appellant was terminated from the employing establishment for falsifying documentation pertaining to his medical condition.⁴

¹ He received schedule awards for a 58 percent permanent impairment of his left leg and a 56 percent permanent impairment of his right leg.

² The position involved sorting mail and required standing, walking and lifting up to 20 pounds on a regular basis.

³ Appellant also has preexisting nonwork-related conditions including chronic venous insufficiency of both lower extremities, post-traumatic stress disorder, obesity, and a right knee arthroscopy due to a 1977 mine accident.

⁴ In 1991 appellant worked for a period for a private employer.

By decision dated December 20, 1999, the Office terminated appellant's compensation based on the opinion of Dr. Mahendra R. Patel, a Board-certified orthopedic surgeon selected as an impartial medical specialist who determined that appellant no longer had employment-related disability.⁵ However, by decision dated and finalized May 3, 2000, an Office hearing representative reversed the Office's December 20, 1999 decision on the grounds that the opinion of Dr. Patel was not sufficiently rationalized to justify termination of appellant's compensation.

In July 2000 appellant began to participate in a vocational rehabilitation program. In order to resolve the existing conflict in the medical evidence regarding appellant's ability to work, the Office referred appellant to Dr. Alan H. Wilde, a Board-certified orthopedic surgeon, for an impartial medical examination. Appellant's vocational rehabilitation counselor determined that appellant was vocationally capable of working as a customer service clerk and that such positions were reasonably available in his commuting area.⁶

By decision dated December 15, 2000, the Office adjusted appellant's compensation based on its determination that he was capable of working as a customer service clerk. The Office found that appellant was physically capable of performing the duties of the position on the opinion of the impartial medical examiner, Dr. Wilde. By decision dated and finalized September 19, 2001, an Office hearing representative reversed the Office's December 15, 2000 decision, but adjusted appellant's compensation based on her finding that he was capable of working as a modified distribution clerk. The Office hearing representative found that the opinion of Dr. Wilde established that appellant was physically capable of performing the more demanding position of modified distribution clerk.

The Board finds that the Office improperly adjusted appellant's wage-earning capacity based on his ability to work as a modified distribution clerk, but that it did meet its burden of proof to establish effective December 15, 2000 that his wage-earning capacity was represented by his ability to work as a customer service clerk.

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.⁷ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁸

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

⁵ The Office had determined that there was a conflict in the medical evidence regarding appellant's employment-related disability between Dr. Tim Rice, an attending Board-certified orthopedic surgeon, and Dr. Moses Leeb, a Board-certified orthopedic surgeon, who served as an Office referral physician.

⁶ The customer service clerk position involved providing for the needs of customers through such actions as exchanging merchandise, approving checks, taking orders for goods, and responding to customer inquiries. The position, which was essentially sedentary in nature, fell under the light-work classification and did not require lifting more than 20 pounds or engaging in climbing, stooping or kneeling.

⁷ *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

⁸ *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.⁹ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.¹⁰ 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.¹¹

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.¹²

In the present case, an Office hearing representative decided, in a September 19, 2001 decision, that the Office's December 15, 2000 decision should be reversed with respect to its determination that appellant's wage-earning capacity was represented by the constructed position of customer service clerk. In its December 15, 2000 decision, the Office adjusted appellant's compensation effective that day based on its determination that he was capable of working as a customer service clerk. The Office based its determination that appellant was physically capable of performing the position on the opinion of Dr. Wilde, a Board-certified orthopedic surgeon, who served as an impartial medical specialist. However, the Office hearing representative found that the opinion of Dr. Wilde established that appellant was physically capable of performing the more demanding position of modified distribution clerk.

The Board finds, however, that the Office hearing representative did not properly determine that appellant's compensation should be adjusted based on the position of modified distribution clerk. Appellant had not worked in the modified distribution clerk position referenced by the Office hearing representative since he was terminated from the employing establishment in May 1989. Office procedure provides that a federal or other civil service position in which the claimant is not actually employed may not be used to make a loss of wage-

⁹ See *Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

¹⁰ *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

¹¹ *Id.*

¹² 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).

earning determination based on a constructed position.¹³ Therefore, it was inappropriate for the Office hearing representative to base appellant's wage-earning capacity on the modified distribution clerk position.

The Board finds, however, that the Office met its burden of proof to establish effective December 15, 2000 that appellant's wage-earning capacity was represented by his ability to work as a customer service clerk.

The opinion of Dr. Wilde shows that appellant was physically capable of performing the customer service clerk position.¹⁴ The Office properly referred appellant to Dr. Wilde in order to resolve a conflict in the medical opinion regarding his ability to work.¹⁵ The well-rationalized opinion of Dr. Wilde resolved this conflict and therefore showed that appellant could perform the service clerk position.¹⁶

In his June 7, 2000 report, Dr. Wilde provided a detailed discussion of appellant's factual and medical history. He reported the results of his examination, indicating that appellant had some medial instability of his right knee. Dr. Wilde noted that appellant was not suffering from such employment-related conditions as left knee contusion, sprained medial collateral ligament of his left knee, torn medial meniscus of his left knee, right knee contusion, torn medial cartilage of his right knee and left ankle sprain. He indicated that appellant had progressive osteoarthritis in both knees which had been present since at least 1987 and posited that it could have been the result of his torn medial meniscus. Dr. Wilde also stated that appellant had chondromalacia of his right knee which could have been aggravated by his employment.¹⁷ He indicated that appellant was not capable of returning to his regular work as a letter carrier, but that he was capable of returning to his former limited-duty work as a modified distribution clerk. Dr. Wilde stated, "I do not believe that he is disabled for this work as a result of nonwork-related conditions such as the severe chronic venous insufficiency in both lower extremities, as obesity, the arthroscopy of his right knee or the gunshot wound of the right upper thigh." In a form report dated June 26, 2000, Dr. Wilde indicated that appellant could work 8 hours per day, lift 40

¹³ See *Ann Rich*, 34 ECAB 277; *Rudy Solovic*, 28 ECAB 105 (1976); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2-814.8 (December 1993).

¹⁴ The customer service clerk position, which was essentially sedentary in nature, fell under the light-work classification and did not require lifting more than 20 pounds or engaging in climbing, stooping or kneeling.

¹⁵ Section 8123(a) of the Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." 5 U.S.C. § 8123(a).

¹⁶ When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence. *William C. Bush*, 40 ECAB 1064, 1975 (1989).

¹⁷ In a supplemental report dated June 26, 2000, Dr. Wilde clarified his earlier report by stating his opinion that appellant's osteoarthritis was precipitated by the torn medial meniscus of his left knee and that appellant had a permanent employment-related aggravation of his chondromalacia.

pounds, sit for 1 hour at a time and 3 hours total per day, and walk for 1 hour at a time and 3 hours total per day.¹⁸

Dr. Wilde provided work limitations in his reports which were well within those necessitated by the duties of the constructed position of customer service clerk. He explained that appellant had some residuals of his employment-related condition which prevented him from performing the heavy duties of his original letter carrier position, but that the nature of his condition was not so severe that it prevented him from performing less demanding work. Dr. Wilde also explained that he had reviewed the statement of accepted facts and considered the effect of all employment-related and preexisting conditions on appellant's ability to work.¹⁹

In addition, the opinion of appellant's rehabilitation counselor shows that appellant was vocationally capable of performing the customer service clerk position. Moreover, the evidence of record shows that the position was reasonably available in appellant's commuting area. For these reasons, the Office met its burden of proof to establish effective December 15, 2000 that appellant's wage-earning capacity was represented by his ability to work as a customer service clerk.

The September 19, 2001 decision of the Office of Workers' Compensation Programs is affirmed, as modified.

Dated, Washington, DC
March 11, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

¹⁸ Dr. Wilde indicated that video surveillance had shown appellant walking without a cane and carrying a baby, a can of paint and a piece of plywood. Appellant suggested that it was inappropriate for Dr. Wilde to consider this evidence, but he did not adequately articulate the basis for this argument.

¹⁹ In determining wage-earning capacity based on a constructed position, consideration is given to the residuals of the employment injury and the effects of conditions which preexisted the employment injury; *see Jess D. Todd*, 34 ECAB 798, 804 (1983). With particular respect to appellant's preexisting post-traumatic stress syndrome, there is no medical evidence of record that this condition would prevent appellant from performing the customer service clerk position.