

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RALPH A. NETTLES and DEPARTMENT OF THE NAVY,
PUGET SOUND NAVAL SHIPYARD, Bremerton, WA

*Docket No. 02-1386; Submitted on the Record;
Issued March 3, 2003*

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs properly reduced appellant's compensation benefits effective May 20, 2001 based on his ability to perform the selected position of software engineer; and (2) whether the Office abused its discretion under section 8128 of the Federal Employees' Compensation Act by refusing to reopen his case for a merit review.

The Office accepted that, on October 22, 1993, appellant, then a 46-year-old marine machinery mechanic, sustained a lumbar strain and lumbar radiculopathy in the performance of duty, requiring left L5-S1 facetectomy, posterior L5-S1 interbody fusion, partial L5-S1 lateral fusion, insertion of rods and plates at L5-S1 and a bone graft to correct a collapsed L5-S1 disc space with significant foraminal stenosis performed on November 5, 1995.¹ He received appropriate benefits on the periodic rolls through May 2001.

In a March 25, 1996 report, Dr. David A. Hanscom, an attending Board-certified orthopedic surgeon, recommended starting a rehabilitation program. Appellant participated in physical therapy from March to September 1996 (and a work hardening program from October 1996 through June 1997. Dr. Hanscom diagnosed appellant with lumbar disc degeneration on June 6, 1997 but found him capable of light-duty work.

After the employing establishment stated in May 1997 that it could not reemploy appellant, the Office placed him in "Plan Development" status. On August 27, 1997 the Office approved appellant's enrollment in an 18-month associates degree program in computer network operations at Olympic Community College.

¹ The Office previously accepted a February 1981 lumbosacral strain/sprain, August 25, 1982 left cervical and hip strains, a June 21, 1983 herniated L5-S1 disc requiring L5-S1 disc excision on August 9, 1983, a December 2, 1985 lumbar subluxation and left elbow contusion, an August 10, 1986 low back strain, a January 22, 1992 left shoulder and trapezius strain and an April 29, 1993 lumbosacral strain and subsequent lumbar myelogram.

Kimberly Shaffer, a vocational rehabilitation counselor, assigned by the Office, submitted reports from April 1997 through May 1999.²

In an August 1999 report, Ms. Shaffer noted that appellant's "employment goal ha[d] been changed to Software Engineer/UNIX [Uniplexed Information and Computing System] Administrator" or an entry level "Information Service Technician."

Ms. Shaffer enclosed the results of a labor market survey performed on July 12, 1999. She identified six positions under Department of Labor's *Dictionary of Occupational Titles*, (DOT) 032.262-010 "Technical Support, all with salaries of \$20,000.00 to \$35,000.00 a year, with duties of "troubleshooting" computer program and hardware applications, maintaining the LAN, answering questions, learning new products and applications and installing upgrades. The positions required keyboarding skills, between six months and one year relevant work experience or education, with one employer preferring "a BS/BA Degree in Computer Science or Electrical Engineering," knowledge of "SQL [Structured Query Language] Server, Visual Basic, C++ [C object-oriented programming language], MS Networking, Windows NT and operating systems." Ms. Shaffer noted that appellant's training would suffice for the six months of experience as it provided the appropriate training in software and operating systems."

Ms. Shaffer also identified 5 positions under DOT 030.062-010, "Software Engineer," with salaries from \$30,000.00 to \$100,000.00. These positions involved designing, developing and implementing software products for web sites, servers and streaming multimedia engines, developing device drivers and "low level" software. Minimum requirements included "[s]trong development experience in C\C++, object oriented design," experience with either Win32 or UNIX, with networking and multimedia API experience preferred and a strong programming background. Two employers required HTML (hyper-text markup language) or JAVA (a high-level, object oriented cross-platform programming language).

On September 10, 1999 appellant enrolled in the final semester of coursework for the LAN program, consisting of "DOS for technicians," "SQL and C++, Accounting/PC Hardware Basics," with the occupation after rehabilitation of "Support Tech[nician] 032.262-010" or "Software Engineer 030.062-010.

In a December 1999 report, Ms. Shaffer stated that appellant was resistant to seeking employment outside of Kitsap County, as he did not want to commute as far as Seattle as it aggravated his back pain.

On February 9, 2000 the Office approved appellant's participation in employment placement, with the occupational goal of "Support Technician 032.262-010" earning \$20,000.00 a year or "Software Engineer 030.062.010" earning \$38,000.00 a year.

In a February 25, 2000 letter, Ms. Shaffer, informed the Office that appellant had completed training and had an earning capacity of \$18.20 an hour or \$28,000.00 a year as a

² In a March 16, 1998 letter, Dr. Hanscom recommended that appellant use an ergonomic chair during all classes and computer labs, as he continued to experience "soft tissue pain in the right side of his back." As appellant weighed 320 pounds and is 6 feet 4 inches tall, the Office complied. Appellant required additional physical therapy in September 1998 and developed depression in November 1998.

Software Engineer/UNIX Administrator.” She noted that appellant’s wage at injury was \$38,437.00 a year.

On March 17, 2000 appellant earned an associate of technical arts degree in LAN (local area network) administration and support. Appellant completed the following courses: Composition; Fundamentals of Speech; Principles of Accounting I; Introduction to Business Statistics; College Arithmetic; Elementary Algebra; Intermediate Algebra; PC Hardware Basics; Survey of Microcomputing; Information Systems Concepts; Introduction to Operating Systems; Programming Concepts; Introduction to Using the Internet; Web Page Development; Concepts; Operating Systems/UNIX; UNIX Administration; Use Windows NT Workstation; Support/Windows NT Server; DOS for Technicians; LAN Administrative Netware 4.1; Data Communication/Network; Structured Analysis and Design; Introduction to C Language; Advanced C Language; Introduction to Visual Basic.

In an April 4, 2000 closure report, Ms. Shaffer again noted that appellant would “not travel out of Kitsap County for employment,” was “very overweight” and needed to improve his grooming. Referring to the job descriptions in the *Dictionary of Occupational Titles*, Ms. Shaffer stated that appellant was qualified as a “User Support Analyst (Technical Support),” DOT 032.262-010, installing and troubleshooting computers and software, answering client inquiries, using diagnostic software, talking with programmers to explain software errors or to recommend changes to programs and training others on how to use computer equipment and programs. Ms. Shaffer assumed there were positions reasonably available, based on a July 12, 1999 labor market survey.

Ms. Shaffer also found appellant qualified as a Software Engineer, DOT 030.062-010, developing, researching and designing computer software and hardware products, including consulting “with hardware engineers and other engineering staff to evaluate interface between hardware and software and operational and performance requirements of overall system, formulating and designing software systems “using scientific analysis and mathematical models to predict and measure outcome and consequences of design.” Ms. Shaffer indicated that, according to the *Dictionary of Occupational Titles*, the Software Engineer position required 4 to 10 years of “specific Vocational Preparation,” but that appellant’s associates degree in LAN Administration would suffice for an entry-level position in “the software engineering field.” Ms. Shaffer noted that the position remained reasonably available in appellant’s commuting area, which included Tacoma, Seattle and Bremerton.

In an April 20, 2000 report, Mr. Standen, the Office rehabilitation specialist, closed appellant’s rehabilitation effort. He stated that appellant had “the background” to work as a Software Engineer/UNIX Administrator, DOT 030.061-010 earning \$917.00 a week or a Network Support Technician, DOT 032.262-010 earning \$534.00 a week. Both positions were sedentary, within appellant’s medical restrictions and found to be reasonably available within his commuting area.

In a May 5, 2000 letter, appellant contended that he was not qualified as a software engineer. He explained that he had an associate’s degree in LAN management “and could possibly work as a network technician. Appellant also alleged that Ms. Shaffer’s assertion that he would not seek work outside Kitsap County was untrue, as he attended three job fairs, including one in Seattle and one in Bellevue, placed his resume on five national recruiting web

sites and sent or delivered approximately 30 resumes “to prospective employers within driving distance in the Puget Sound region.” Appellant also described his on-line and telephonic efforts to locate employment.

In a May 22, 2000 letter, Mr. Standen responded that appellant’s coursework qualified him as a “Software Engineer/UNIX Administrator.” Mr. Standen noted that the December 22, 1999 job placement plan agreement included both the Support Engineer and Software Engineer positions.

By notice dated April 20, 2001, the Office advised appellant that it proposed to reduce his compensation benefits on the grounds that he was able to perform the selected position of software engineer. The Office noted that the April 20, 2000 vocational rehabilitation closure report “identified the positions of Software Engineer/UNIX Administrator (DOT 030.062-010) and Network Support Technician (DOT 032.262-010). Both of these jobs fall within the sedentary to light categories and within [appellant’s] work restrictions.” The Office then found that “[o]f the two jobs identified ... the job of Software Engineer (DOT 030.062-010 with a salary of \$917.00 a week is considered the most suitable and ... best represents [appellant’s] wage-earning capacity.... His prior training shows that he is capable of performing this job both vocationally and medically.” The Office noted that appellant’s current pay rate for the date of injury position was \$934.70 a week.³ The Office determined that appellant, therefore, had a two percent loss of wage-earning capacity, with compensation every four weeks in the amount of \$46.00. Appellant was given 30 days in which to provide additional evidence regarding his ability to earn wages as a software engineer. The file indicates that appellant did not submit additional evidence prior to the issuance of the May 23, 2001 decision.

By decision dated May 23, 2001, the Office reduced appellant’s compensation effective May 20, 2001 on the grounds that he was able to perform the selected position of software engineer, with an earning capacity of \$917.00 a week. The Office determined that the position of software engineer fairly and reasonably represented his wage-earning capacity. The Office recalculated appellant’s compensation rate, finding that he was entitled to an additional 50 cents a week, resulting in a total of \$48.00 in compensation every four weeks.

Appellant disagreed with this decision and, in a February 20, 2002 letter, requested reconsideration. He explained that he was not qualified as a software engineer, but was qualified and willing to work in his degreed field of LAN management. Appellant noted that a “computer software engineering degree” required four years of study at the college level. He asserted that it was unfair for Ms. Shaffer to repeatedly claim that he was unwilling to work outside of Kitsap County when he was actually working in Seattle in October 2001. Appellant noted that, during the past two years, he had applied for several hundred positions, but received “nearly two hundred rejection notices stating [he] was ‘qualified but not considered’” in LAN and computer technical support positions.

³ In a May 24, 2000 memorandum, the Office determined that, on October 22, 1993, the date of injury, appellant was a WG 10, Step 5, with a current pay rate of \$21.37 an hour. In an April 16, 2001 file note, the Office stated that there was “no wage data available that is more recent than the labor market survey of March 3, 1999 ... the weekly wage of \$917.00 a week for Software Engineers remains accurate.”

In support of his contentions, appellant attached his course program from Olympic Community College, entitled “Local Area Network Administration and Support,” which qualified its graduates “to obtain employment as a network administrator or support technician” planning, implementing and maintaining local area networks. He also submitted excerpts from the Department of Labor’s Occupational Outlook Handbook, indicating that software engineers or computer programmers required an advanced knowledge of and certification in programming languages, with the usual training being a four-year degree. Appellant also provided course descriptions from two universities showing that a software engineer required four years of college level training, including several advanced courses in programming languages and design, calculus, physics and aspects of engineering. He also submitted job announcements for software engineers, showing that minimum requirements included strong proficiencies in four to five programming languages and a knowledge of their interactions.

By decision dated April 11, 2002, the Office denied reconsideration on the grounds that the evidence submitted was “argumentative and immaterial.” The Office noted conducting a “limited review of the evidence used by the Office to determine that the position of software engineer reasonably represented [appellant’s] ability to earn wages.” The Office determined that it had “followed proper procedures” in selecting the constructed position of Software Engineer as representing appellant’s wage-earning capacity.

The Board finds that the Office improperly reduced appellant’s compensation benefits effective May 20, 2001 on the basis of his ability to perform the selected position of software engineer.

Section 8115 of the Act⁴ provides that wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity or the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, the degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect his wage-earning capacity in his disabled condition.⁵

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 for selection of a position, listed in the Department of Labor’s *Dictionary of Occupational Titles* or otherwise available in the open 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 *Albert C. Shadrick*⁶ will result in the percentage

⁴ 5 U.S.C. §§ 8101-8193, 8115.

⁵ *Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

⁶ *Albert C. Shadrick*, 5 ECAB 376 (1953).

of the employee's loss of wage-earning capacity. The basic range of compensation paid under the Act is 66 2/3 percent of the injured employee's monthly pay.⁷

The medical record establishes that appellant is physically capable of performing the software engineer position. The issue is whether appellant has the appropriate knowledge, training and background to perform the selected position of software engineer.

On August 27, 1997 appellant enrolled in an approved associate degree program in computer network operations, with the occupational goal of computer network operator, DOT 033.167-010. He continued his coursework in the computer network operations program through the end of the spring semester in 1999. Then, in August 1999, Ms. Shaffer, the rehabilitation counselor, changed appellant's employment goal to software engineer/UNIX administrator or information service technician, both under DOT 030.062-010. As appellant did not change his program enrollment or field of study, there is no clear indication as to why Ms. Shaffer so fundamentally changed the nature of appellant's target occupation. Ms. Shaffer stated in her August 1999 report that a network support technician could earn \$20,000.00 to \$30,000.00 a year while a software engineer could earn from \$30,000.00 to \$100,000.00.

The two different occupational goals along appear in Ms. Shaffer's reports through February 2000. In an April 4, 2000 closure report, Ms. Shaffer stated that appellant had obtained his associate degree and was, therefore, qualified as a support technician, troubleshooting software and hardware systems and answering client questions. However, she also found that appellant was qualified as a software engineer, which, according to the *Dictionary of Occupational Titles*, required "specific [v]ocational [p]reparation" of "4 to 10 years" and the ability to formulate and design software systems "using scientific analysis and mathematical models." In support of this occupational goal, Ms. Shaffer stated that appellant had "completed enough classes" in the two-year LAN program to "qualify for Software Engineering positions" at the entry level. However, Ms. Shaffer did not fully address why appellant's two-year technical degree in LAN operations was the equivalent in course content or experience to the four to ten years preparation specified in the *Dictionary of Occupational Titles* for software engineer.

The software engineering positions requires "[s]trong development experience in C\C++, object oriented design," experience with either Win32 or UNIX, with networking and multimedia API experience preferred and a strong programming background. Two employers required HTML or JAVA. While appellant took one course in C and another in C++, two UNIX classes and one introductory course in programming, the record does not establish that he had the development or advanced programming experience or education as required. The Board finds appellant's vocational preparation is not sufficient to enable him to work as a software engineer. Appellant does not have the coursework or experience as specified by the *Dictionary of Occupational Titles* to meet the minimum requirements of the identified software engineer positions.

The Board notes, however, that appellant did complete sufficient coursework to qualify as a LAN administrator or support technician, the other vocational goal identified by Ms. Shaffer. Appellant took classes in LAN net ware 4.1, UNIX operating systems and

⁷ Karen L. Lonon-Jones, 50 ECAB 293 (1999).

administration, Windows NT, network and data communication and DOS for Technicians. These courses closely approximate the technical support positions Ms. Shaffer identified in the July 1999 labor market survey, which required six months experience or equivalent training in these areas.

It appears, therefore, that the Office selected the software engineer position not because it was vocationally appropriate, but because it would have resulted in a greater reduction of appellant's compensation benefits. This course of action is contrary to the goals and purpose of vocational rehabilitation. The Office's procedures define vocational training as "any organized form of instruction that provides the knowledge and skills needed to perform the tasks involved in an occupation."⁸ Thus, vocational training should provide the injured worker with the knowledge and skills needed to perform the occupation selected by the rehabilitation counselor. In this case, appellant did not receive sufficient vocational training to work in the selected position of software engineer.

The Board, therefore, finds that the Office improperly reduced appellant's compensation benefits based on his ability to earn wages in the selected position of software engineer.

The Board notes that this disposition regarding appellant's wage-earning capacity moots the reconsideration issue.

The decisions of the Office of Workers' Compensation Programs dated April 11, 2002 and May 23, 2001 are hereby set aside and the case remanded for further action consistent with this decision and order.

Dated, Washington, DC
March 3, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

⁸ Federal (FECA) Procedure Manual, Part -- *Rehabilitation*, Chapter 3.0200-6.b(2) "Training -- Types of Training -- Vocational Training" (FECA Tr. 98-02, Dec. 1997).