

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANTHONY DURANTE and DEPARTMENT OF TRANSPORTATION,
U.S. COAST GUARD, Curtis Bay, MD

*Docket No. 03-65; Submitted on the Record;
Issued March 24, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly reduced appellant's compensation based on its determination that the selected position of estimator represented appellant's wage-earning capacity; and (2) whether appellant has more than a 10 percent impairment of the left upper extremity.

On June 4, 1998 appellant, then a 44-year-old pipefitter, filed a claim alleging that he injured his left elbow when tightening a bolt. The Office accepted his claim for mononeuritis of the left upper arm and authorized an ulnar nerve release and transposition, which he underwent on February 9, 1999. Appellant stopped work on June 19, 1998 and was in receipt of compensation payments for temporary total disability. Effective March 2, 1999, his term appointment as a pipefitter ended with the employing establishment.

In August 1999, the Office authorized appellant to undergo vocational rehabilitation services. Following an initial vocational interview, testing and evaluation, the rehabilitation counselor recommended a plan of job placement. In an October 24, 2000 report, the vocational rehabilitation counselor identified the position of estimator as being available within appellant's commuting area although appellant had unsuccessfully attempted to obtain positions in this field.

In a November 6, 2000 notice, the Office advised appellant that it proposed to reduce his compensation because the factual and medical evidence of record established that he was partially disabled and the duties of an estimator reasonably represented his wage-earning capacity. The Office further advised him to submit additional evidence or argument within 30 days if he disagreed with the proposed action.

By decision dated January 5, 2001, the Office reduced appellant's compensation to zero based on his capacity to earn wages as an estimator.

Appellant disagreed with the decision and requested a hearing which was held on June 29, 2001. Medical reports from Dr. A. Lee Osterman, a Board-certified orthopedic surgeon, were received along with the description of the estimator position.¹ In a November 20, 2000 report, Dr. Osterman stated that, based on appellant's injury, appellant has a permanent partial impairment and he is not capable of returning to unrestricted pipefitter work. Clearly, he is capable of less vigorous and demanding arm activities. In a January 25, 2001 report, Dr. Osterman wrote: "As described by him, the estimator job involves climbing ladders, crawling beneath bulkheads, fitting in small compartments and working with hand tools, some of which are vibratory. These components of that job are not medically acceptable based on my examination of May 5, 2000."

By decision dated October 3, 2001, an Office hearing representative found that the Office had properly determined appellant's wage-earning capacity and affirmed the previous decision of January 5, 2001.

The Board notes that the issue of whether appellant had more than a 10 percent permanent impairment of the left upper extremity was previously before the Board. In its decision dated April 11, 2002, the Board remanded the case to the Office for additional development of the medical evidence.² The facts and procedural history of the case are hereby incorporated by reference.

Pursuant to the Board's instructions, the Office undertook further development of the schedule award issue by requesting the Office medical adviser to provide a further explanation and rationalization of his December 4, 2000 report. In its April 11, 2002 decision, the Board noted that, while the Office medical adviser in his report of December 4, 2000 found a 10 percent ratable impairment due to residuals of ulnar nerve entrapment of the elbow, it was not clear to what extent he considered the medical evidence of record in reaching his opinion. In a June 21, 2002 report, the Office medical adviser stated that, using the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) in evaluating entrapment neuropathy, impairment may be derived from measuring such factors as motion and sensory deficits or the alternative method of Table 16, p. 57. He noted the A.M.A., *Guides* specifically stated, on p. 56, that both methods should not be used. The Office medical adviser stated that he used Table 16, p. 57 and emphasized that, when using Table 16, p. 57 of the fourth edition, the rating is not combined or used in conjunction with findings on physical examination to include weakness or grip strength.

By decision dated August 30, 2002, the Office found that appellant was not entitled to any additional schedule impairment beyond the 10 percent to the left arm previously awarded. The Office found that the weight of the medical opinion evidence rested with the Office medical adviser's report of June 21, 2002 as he presented sound rationale for the use of the particular method chosen.

¹ Although the record contains additional evidence, it does not relate to the issue at hand.

² Docket No. 01-1410 (issued April 11, 2002).

The Board has duly reviewed the record and finds that the Office improperly reduced appellant's compensation.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.³ Pursuant to section 8115(a) of the Federal Employees' Compensation Act,⁴ 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 wage-earning capacity or if the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, his or her usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect wage-earning capacity in his or her 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 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 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 labor market should be made through contact with the state employment service or other applicable service.⁶ Finally, application of the principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.⁷

In this case, the Office determined that appellant could work in the selected position of estimator based on the June 30, 1999 report from Dr. Osterman, who opined that, although appellant no longer had the physical capacity for reemployment in his previous occupation as a pipefitter, he was able to be employed in a light to medium work capacity. The physical requirements of the selected position of estimator were sedentary and required, *inter alia*, no climbing, balancing, stooping, kneeling, crouching and crawling. It required frequent reaching and handling with occasional fingering, talking and hearing.

There is no indication that the selected position is outside of appellant's physical limitations. Although Dr. Osterman opined in his report of January 25, 2001 that the components of the estimator job, as described by appellant, were not medically acceptable based on his examination of May 25, 2000, the duties which appellant described (climbing ladders, crawling, fitting in small compartments and working with hand tools) is not within the physical requirements of the selected position of estimator. Accordingly, Dr. Osterman's report is insufficient to establish that appellant is unable to perform the duties of an estimator.

³ *Patricia A. Keller*, 45 ECAB 278 (1993).

⁴ 5 U.S.C. § 8115(a).

⁵ *See Dorothy Lams*, 47 ECAB 584 (1996).

⁶ *See Dennis D. Owen*, 44 ECAB 475 (1993).

⁷ 5 ECAB 376 (1953).

The record, however, is devoid of affirmative evidence that the selected position is within appellant's vocational capabilities.

The duties of the selected position of estimator requires: analysis of blueprints, specifications, proposals and other documentation to prepare time, cost and labor estimates for products, projects or services and applying knowledge of specialized methodologies, techniques, principles or processes. Reviewing data to determine material and labor requirements and preparing of itemized lists. Computing cost factors and preparing estimates used for management purposes, such as planning, organizing and scheduling work, preparing bids, selecting vendors or subcontractors and determining cost effectiveness. Conducting specialized studies to develop and establish standard hour and related cost data or effect cost reductions. Consulting with clients, vendors and other individuals to discuss and formulate estimates and formulate estimates and resolve issues. May specialize according to particular service performed, type of product manufactured or phase of work involved, such as tool and fixture costs, production costs, construction costs or material costs. The position requires two to four years of experience.

In this case, the rehabilitation counselor noted that appellant had owned and operated his own contract business for two years and his duties included bidding and estimating jobs. The Office concluded that appellant's employment history indicated that he has the vocational ability and preparation to perform the job of an estimator. Appellant's testimony and vocational interview with the rehabilitation counselor, however, reflect that appellant neither has the experience nor the training to fully execute the stated duties of an estimator. In his June 29, 2001 testimony before the Office hearing representative, appellant responded "not at all" to the question of whether he ever had to apply his knowledge of specified methodologies, techniques, principals or processes in determining what was needed. He stated that, although he reviewed data to determine material requirements for piping, he never reviewed data to determine labor requirements nor ever prepared itemized listing for anything other than the materials needed. He never computed cost factors and prepared estimates for management purposes nor conducted special studies to develop and establish standard hour and related cost data or effect cost reductions. Appellant stated that he was never concerned with costs and never consulted with clients, vendors or other individuals to discuss and formulate estimates and resolve issues. The record reflects that, although appellant would review blueprints periodically in his pipefitter's position, it was not in the business of estimating work. Moreover, although the vocational rehabilitation counselor noted, in his January 19, 2000 report, that appellant had been self-employed and, while operating a cleaning business, performed activities such as estimating projects and bidding for jobs, there is no evidence in the record, such as appellant's resume, to verify such information to establish that appellant had the necessary skills or experience which were transferable into the selected position to meet the selected position's education/experience requirement.

As there is no affirmative evidence in the record to contradict or refute appellant's testimony that he does not have the training or experience necessary to effectively perform the selected position of estimator, the Board finds that the Office has failed to meet its burden in satisfying the education/experience requirement of the selected position. Accordingly, the Office's decision of October 3, 2001 is set aside and the case is remanded for further

development concerning loss of wage-earning capacity. Appellant's compensation is also reinstated as of January 5, 2001, the date compensation benefits were terminated.

The Board further finds that appellant does not have more than a 10 percent impairment of the left upper extremity, which was previously awarded.

As noted earlier, this issue was previously before the Board. In its April 11, 2002 decision, the Board found that, while the Office medical adviser had noted in his report of December 4, 2000 that appellant had a 10 percent ratable impairment due to residuals of ulnar nerve entrapment of the elbow, he did not refer to the May 25, 2000 findings of Dr. Osterman with regard to flexion and extension losses, which could allow for an additional impairment rating. Office procedures provide that "[w]here more than one method of calculation may be used, the [district] [medical] [adviser] should use the same one as the examining physician" assuming that the examining physician correctly correlated his or her findings with the A.M.A., *Guides*.⁸

In his report of June 21, 2002, the Office medical adviser explained that, in evaluating entrapment, the A.M.A., *Guides* allowed for two alternative methods and he had utilized the entrapment neuropathy method. He emphasized that when evaluating upper extremity impairment due to entrapment neuropathy additional impairment values are not given for weakness or grip strength.⁹ The A.M.A., *Guides* provide for alternative impairment determination methods of evaluating impairment of the upper extremities due to peripheral nerve disorders and the Office medical adviser choose the entrapment neuropathy method as appellant's impairment developed from a traumatic nerve lesion and traumatic nerve entrapment.¹⁰ As the Office medical adviser properly applied the entrapment neuropathy method and presented a sound rationale as to why this method was chosen, the Office properly accorded determinative weight to the Office medical adviser's reports of December 4, 2000 and June 21, 2002. Thus, appellant is not entitled to any additional scheduled impairment beyond the 10 percent previously awarded for the left arm.

⁸ See Table 16, page 57 (4th ed. 1993) (A.M.A., *Guides*); see also pages 480-94 (5th ed. 2001) (A.M.A., *Guides*).

⁹ *Id.*

¹⁰ See *Michael D. Nielsen*, 49 ECAB 453 (1998).

The decision of the Office of Workers' Compensation Programs dated August 30, 2002 is hereby affirmed. The decision of the Office dated October 3, 2001 is hereby set aside and the case is remanded for further development in accordance with this decision of the Board.

Dated, Washington, DC
March 24, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member