

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ROBERT A. FLINT and DEPARTMENT OF THE INTERIOR,  
NATIONAL PARK SERVICE, Crater Lake, OR

*Docket No. 03-1148; Submitted on the Record;  
Issued October 14, 2003*

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DECISION and ORDER

Before ALEC J. KOROMILAS, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation benefits based on his ability to perform the selected position of hotel clerk.

On July 14, 1999 appellant, then a 48-year-old seasonal maintenance worker, filed a traumatic injury claim alleging that he tripped that day on a loose board on the bottom step leading up to a compactor and hit his head and right elbow on the cement. The Office accepted appellant's claim for right eyebrow laceration and nondisplaced coronoid process fracture of the right elbow. The Office further approved a debridement surgery on May 1, 2000 and post-traumatic arthritis related to the work injury. The Office began payment of temporary total disability compensation following the expiration of continuation of pay.

Dr. Michael Casey, attending orthopedist, provided work restrictions on July 12, 2000 which outlined that appellant could work for 8 hours per day but that he was restricted from pushing, pulling and lifting more than 35 pounds for no more than 2 hours per day. In an attending physician's report dated September 6, 2000, Dr. Casey advised that appellant had permanent weakness and was limited with arm extension and pronation and would require a lighter form of work with no heavy lifting for long periods. He advised that appellant was limited in shoulder reaching and right elbow repetitive movements and should not do repetitive lifting of the right arm.

The Office thereafter referred appellant for vocational rehabilitation. The vocational rehabilitation counselor consulted with Dr. Casey about appellant's interest in training in the field of computer-aided drafting; however, it was later determined that a two-year training program was not appropriate for appellant given his date-of-injury position. On May 24, 2001 the Office rehabilitation counselor recommended that, because appellant was injured in a seasonal position, that appellant be directly placed in an entry-level job in his date-of-injury commuting area. The rehabilitation counselor thereafter completed a labor market survey and determined that the positions of security guard, general clerk and hotel clerk were semi-skilled

positions that fit appellant's capabilities. The Office rehabilitation counselor noted, however, that placement efforts had proved difficult because appellant moved around during the training program and his whereabouts were often difficult to determine. On October 26, 2001 the Office rehabilitation counselor determined that given the circumstances in appellant's case it was appropriate to close the case.

On February 19, 2002 the Office advised appellant that it proposed to reduce his compensation on the grounds that the medical evidence no longer established that appellant was totally disabled. The Office further determined that the position of hotel clerk and the corresponding wages represented appellant's wage-earning capacity and found that the position was available in his commuting area. The Office advised appellant that, if he disagreed with its proposed action, he should submit contrary evidence or argument within 30 days.

In a letter dated March 7, 2002, appellant disagreed with the proposed reduction in compensation and stated that the position of hotel clerk did not fairly and reasonably represent his wage-earning capacity. Appellant alleged that the position was incompatible with his interests and personality characteristics and would not allow his aptitudes to be expressed.

By decision dated April 3, 2002, the Office found that, based on the residuals of appellant's injury and considering pertinent nonmedical factors, it was found that appellant could perform the duties of hotel clerk. The Office outlined the duties of the chosen position as follows:

"Greet, registers, assigns rooms to guests, issues room keys and provide instructions to bellhop, date stamps, sorts and racks incoming mail and messages, transmits and receives messages using telephones or telephone switchboard, answers inquiries pertaining to hotel services, keeps records of room availability and guests' accounts, manually or using computer computes bill, collects payment and makes change for guests."<sup>1</sup>

The Office then outlined the physical requirements of the position as follows: "Light duty with lifting no greater than 20 pounds occasionally and 10 pounds frequently, occasional reaching and frequent fingering." The Office finalized the reduction of appellant's compensation to zero effective April 7, 2002, based on his capacity to earn wages as a sales hotel clerk.

On September 28, 2002 appellant requested reconsideration and submitted additional evidence.

In a letter dated December 9, 2002, the Office requested that Dr. Casey review the physical duties of the job description for the hotel clerk position and requested that he explain whether appellant, who is right handed, was capable of performing the physical duties of the position in light of his September 6, 2000 work restrictions that appellant not do repetitive lifting with the right arm. The Office did not receive a response from Dr. Casey.

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<sup>1</sup> Department of Labor, *Dictionary of Occupational Titles*, (DOT) No. 2388.367-038.

By merit decision dated January 3, 2003, the Office denied modification of the prior decision.

The Board finds that the Office improperly reduced appellant's compensation benefits based on his ability to perform the selected position of hotel clerk.

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction of benefits.<sup>2</sup> Under section 8115(a) of the Federal Employees' Compensation Act,<sup>3</sup> 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 the employee's injuries and the degree of physical impairment, his or her usual employment, the employee's age and vocational qualifications and the availability of suitable employment.<sup>4</sup>

After the Office makes a medical determination of partial disability and of special 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, DOT 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 open labor market should be made through contact with the state employment services or other applicable services. 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.<sup>5</sup> Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions, based on the nature of the employee's injuries and the degree of physical impairment, employment, age, vocational qualifications and the availability of suitable employment.<sup>6</sup> Accordingly, the evidence must establish that jobs in the position selected for determining wage-earning capacity are reasonably available in the general labor market in the commuting area, in which the employee lives. In determining an employee's wage-earning capacity, the Office may not select a makeshift or odd lot position or one not reasonably available on the open labor market.<sup>7</sup>

In this case, the Office determined that appellant had the requisite physical ability, skill and training to perform the semi-skilled position of hotel clerk and that such a position was reasonably available within the general labor market of appellant's commuting area. Appellant

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<sup>2</sup> *David W. Green*, 43 ECAB 883 (1992); *Harold S. McGough*, 36 ECAB 332 (1984).

<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> *Samuel J. Chavez*, 44 ECAB 431 (1993).

<sup>5</sup> *Albert C. Shadrick*, 5 ECAB 376 (1953).

<sup>6</sup> See generally, 5 U.S.C. § 8115(a); A. Larson, *The Law of Workers' Compensation* § 57.22 (1989).

<sup>7</sup> *Phillip S. Deering*, 47 ECAB 692 (1998).

maintained on reconsideration and the instant appeal that the position did not fairly represent his wage-earning capacity as it did not meet his level of aptitude and skill.

The initial question presented is whether the selected position of hotel clerk was determined with due regard to the nature of appellant's employment injury and the degree of physical impairment. The Office selected the position of hotel clerk as a position within appellant's work limitations after determining that appellant did not qualify for training in his field of interest. The hotel clerk position was described by the rehabilitation counselor and the Office claims examiner as light, requiring the ability to lift up to 20 pounds occasionally and 10 pounds frequently and occasional reaching, handling and frequent fingering. The medical evidence of record, however, does not establish that the duties of hotel clerk were within appellant's medical restrictions.

The record reflects that Dr. Casey had not reviewed the job requirements for hotel clerk position and did not respond to the Office inquiry dated December 9, 2002, as to whether given his restrictions regarding appellant's right hand whether he believed appellant could perform the duties of the chosen position. In reports of record dated July 12 and September 6, 2000, Dr. Casey advised that appellant had permanent weakness in the right arm and was limited with arm extension and pronation. He indicated that appellant could not perform lifting, pushing or pulling of more than 35 pounds for more than 2 hours per day and repetitive shoulder reaching and elbow movements with his right arm. The Board notes that the selected position requires frequent lifting up to 10 pounds. Thus, the medical restrictions, which prohibit repetitive shoulder reaching or extensions involving the right elbow would appear to limit appellant's ability to perform the duties of a hotel clerk, which include frequent lifting up to 10 pounds. As there is no indication in the record that Dr. Casey or any other physician reviewed the job duties of the position and offered an opinion that appellant could perform the duties of the selected position, the Office has failed to establish that it gave due regard to the factors enumerated under section 8115 in determining wage-earning capacity. It is the Office's burden to justify a subsequent reduction in compensation and it has failed to meet its burden of proof in this case.

The Board finds that the position of hotel clerk has not been demonstrated to be suitable to appellant's partially disabled condition. The Office did not meet its burden of proof to reduce appellant's wage-loss compensation entitlement.

The decisions of the Office of Workers' Compensation Programs dated January 3, 2003 and April 3, 2002 are hereby reversed.

Dated, Washington, DC  
October 14, 2003

Alec J. Koromilas  
Chairman

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member