# United States Department of Labor
# Employees' Compensation Appeals Board

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| **EDWARD L. McCABE, Appellant** | ) | |
| **and** | ) | **Docket No. 05-239** |
| | ) | **Issued: January 4, 2006** |
| **DEPARTMENT OF STATE, ART SHOPS, Washington, DC, Employer** | ) | |

*Appearances:*
*Jonathan K. Miller, Esq.*, for the appellant
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

### *JURISDICTION*

On November 3, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' August 16, 2004 merit decision which upheld the reduction of his compensation effective June 13, 2003. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

### *ISSUE*

The issue is whether the Office properly reduced appellant's compensation effective June 13, 2003, based on his capacity to work as a legal assistant/paralegal.

### *FACTUAL HISTORY*

On October 9, 1981 appellant, then a 44-year-old graphic artist and chief of audio-visual services, filed an occupational disease claim alleging that he sustained allergic and respiratory conditions due to exposure to graphic arts chemicals and other substances at work. The Office

accepted that he sustained employment-related bronchiolitis and aggravation of pharanigitis, asthma and pneumonitis. The Office paid appropriate compensation for periods of disability.[1]

Appellant received treatment for his condition from several physicians, including Dr. Thomas P. Kennedy, an attending physician Board-certified in internal medicine and pulmonary diseases. In a report dated November 8, 1983, Dr. Kennedy noted that appellant had a serious interstitial process in his lungs with abnormally low arterial oxygen levels and stated that he was 100 percent disabled.

Appellant also received treatment from Dr. Rebecca Bascom, an attending physician Board-certified in internal medicine and pulmonary diseases. In a report dated November 1, 1985, she indicated that appellant's arterial oxygen level was abnormal for a nonsmoking man of his age. Dr. Bascom diagnosed allergic bronchiolitis and stated that he could not be exposed to "dust, fumes, gases or chemicals in graphic arts processing, including office copiers." In a report dated March 10, 1988, she indicated that appellant could work eight hours per day if he was not exposed to graphic arts chemicals or toxins. In a report dated September 16, 1996, Dr. Bascom stated that his persistent airways hyper-reactivity and asthma rendered him permanently disabled from his work as a graphic artist, but posited that appellant could "work at full capacity in a job that does not expose him to respiratory irritants or sensitizers."

In reports dated October 25, 1999, Dr. Melissa McDiarmid, an attending physician Board-certified in internal and occupational medicine, stated that appellant typically reported experiencing chest tightness, shortness of breath and coughing after being exposed to airborne irritants. She indicated that diagnostic testing showed a pulmonary obstruction and diagnosed asthma. Dr. McDiarmid stated that appellant could not work as a graphic artist, but that he could work eight hours per day as long as he was not exposed to graphic arts chemicals, inks, dusts, fumes or gases.

In December 1999, appellant began to participate in a vocational rehabilitation program. In August 2000, his vocational rehabilitation counselor determined that he was physically capable of working as a legal assistant/paralegal or a clergy member, but noted that appellant needed additional computer skills to work as a legal assistant/paralegal.[2] The Office approved appellant's participation in computer skills courses at Howard Community College beginning in September 2000 and he successfully completed several courses by October 2000. He participated in more advanced computer skills courses in mid 2001. These courses included instruction in operating programs for tracking billing and using the internet to conduct legal research.

In a report dated January 5, 2001, Dr. McDiarmid stated that appellant had asthma and noted that exposure to airborne particulate matter generated from laser printers and possibly some copy machines might be detrimental to his respiratory health. She stated, "At this point, I

[1] Appellant last worked on November 2, 1983 and retired from the employing establishment in November 1984.

[2] The vocational rehabilitation counsel noted that appellant received a Juris Doctor degree from the University of Baltimore School of Law in the 1960s, but that he did not pass the bar examination and did not ever pursue employment as an attorney.

would hope that we could find an office environment where there is not a congregation of these machines in one area and that [appellant] will, hopefully, be able to tolerate occasional exposure to the usual (hopefully, small) number of such machines."

In a form report dated April 16, 2003, Dr. McDiarmid stated that appellant could lift up to 20 pounds. She indicated that reference should be made to her January 5, 2001 report and noted that he "may not be exposed to graphic arts chemicals or fumes or particulate material from office machinery (laser printers, [x]erox machines)."

Appellant's vocational rehabilitation counselor determined that he was physically and vocationally capable of working as a legal assistant/paralegal. According to the Department of Labor's *Dictionary of Occupational Titles*, the position of legal assistant/paralegal involves researching and analyzing law sources such as statutes, judicial decisions, legal articles, treaties, constitutions and legal codes in order to prepare legal documents, such as briefs, pleadings and appeals. The position also involves the filing of pleadings with court clerks and investigating the facts of cases in order to determine causes of action and to help prepare cases. The job description indicates that a legal assistant/paralegal would engage in light physical activities, including lifting up to 20 pounds. In April 2003, appellant's vocational rehabilitation counselor conducted a labor market survey which showed that legal assistant/paralegal positions were reasonably available in appellant's commuting area.

By notice dated May 2, 2003, the Office advised appellant that it proposed to reduce his compensation based on his capacity to work as a legal assistant/paralegal. In several statements, he argued that his medical condition prevented him from working as a legal assistant/paralegal. Appellant alleged that legal assistant/paralegal positions would require him to be in close proximity to laser printers and copy machines and indicated that his physicians had restricted him from working near these machines. He also claimed that he was not vocationally qualified to perform the positions.

By decision dated June 6, 2003, the Office reduced appellant's compensation effective June 15, 2003 based on his capacity to work as a legal assistant/paralegal.

Appellant requested a hearing before an Office hearing representative which was held on April 26, 2004. He contended to argue that he was not physically or vocationally capable of working as a legal assistant/paralegal. By decision dated and finalized August 16, 2004, the Office hearing representative affirmed the Office's June 6, 2003 decision.

## ***LEGAL PRECEDENT***

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.[3] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[4]

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

[4] *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

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 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.[5] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[6] 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.[7]

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.[8]

## ***ANALYSIS***

The Office accepted that appellant sustained employment-related bronchiolitis and aggravation of pharanigitis, asthma and pneumonitis and he last worked for the employing establishment in November 1983. By decision dated June 6, 2003, the Office reduced appellant's compensation effective June 15, 2003, based on his capacity to work as a legal assistant/paralegal and, by decision dated August 16, 2004, the Office affirmed its prior decision.

In early 2003, appellant's vocational rehabilitation counselor determined that he was vocationally able to perform the position of legal assistant/paralegal and that state employment services showed the position was available in sufficient numbers so as to make it reasonably available within his commuting area. He had received a Juris Doctor degree from the University of Baltimore School of Law and participated in advanced computer skills courses which included instruction in operating programs for tracking billing and using the internet to conduct legal research. The Office properly relied on the opinion of the rehabilitation counselor to meet its

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

[6] *Albert L. Poe*, 37 ECAB 684, 690 (1986), *David Smith*, 34 ECAB 409, 411 (1982).

[7] *Id.* The commuting area is to be determined by the employee's ability to get to and from the work site. *See Glen L. Sinclair*, 36 ECAB 664, 669 (1985).

[8] *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).

burden of proof to show that appellant was vocationally capable of performing the legal assistant/paralegal position and that it was reasonably available within his commuting area.

A review of the evidence reveals that the Office met its burden of proof to show that appellant was physically capable of working as a legal assistant/paralegal. In determining that he was physically capable of performing this constructed position, the Office properly relied on the opinion of Dr. McDiarmid, an attending physician Board-certified in internal and occupational medicine. In a report dated April 16, 2003, Dr. McDiarmid indicated that appellant was capable of lifting up to 20 pounds. The legal assistant/paralegal position primarily involved the performance of clerical duties and required only light physical activities, including the ability to lift up to 20 pounds. There is no indication in the medical record that appellant would not be able to perform these limited physical duties.

Dr. McDiarmid addressed the matter of appellant's ability to be exposed to irritants in the work place. In her April 16, 2003 report, Dr. McDiarmid stated that appellant "may not be exposed to graphic arts chemicals or fumes or particulate material from office machinery (laser printers, xerox machines)." However, Dr. McDiarmid clarified this statement by explaining that he could have limited exposure to a number of photocopier and printer machines, but that he should not be subjected to a concentration of such machines in one area which emitted significant noxious fumes. The Board notes that there is no indication that the constructed position of legal assistant/paralegal position would require appellant to work next to a concentration of photocopier or printer machines or would require him to be exposed to machines that emitted significant noxious fumes. Therefore, the reports of Dr. McDiarmid show that his respiratory condition would not prevent him from performing the selected position of legal assistant/paralegal.

The Office considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment, age and employment qualifications, in determining that the position of legal assistant/paralegal represented appellant's wage-earning capacity.[9] The weight of the evidence of record establishes that he had the requisite physical ability, skill and experience to perform the position of legal assistant/paralegal and that such a position was reasonably available within the general labor market of his commuting area. Therefore, the Office properly reduced appellant's compensation effective June 15, 2003, based on his capacity to earn wages as a legal assistant/paralegal.

## ***CONCLUSION***

The Board finds that the Office properly reduced appellant's compensation effective June 15, 2003, based on his capacity to work as a legal assistant/paralegal.

[9] *See Clayton Varner*, 37 ECAB 248, 256 (1985).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' August 16, 2004 decision is affirmed.

Issued: January 4, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board