

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

M.R., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
San Diego, CA, Employer**

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**Docket No. 09-1811
Issued: April 12, 2010**

Appearances:

*Alan J. Shaprio, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 9, 2009 appellant filed a timely appeal from the Office of Workers' Compensation Programs' March 12, 2009 merit decision concerning his wage-earning capacity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

ISSUE

The issue is whether the Office properly reduced appellant's compensation effective May 11, 2008 based on his capacity to earn wages as a unit clerk.

FACTUAL HISTORY

On May 21, 2004 appellant, then a 55-year-old distribution clerk, filed an occupational disease claim alleging that he sustained a cervical condition as a result of his federal employment activities. The Office accepted his claim for cervical radiculopathy and cervalgia; aggravation of

cervical degenerative disc disease; cervical spondylosis and cervical spinal stenosis.¹ Appellant returned to light-duty work in June 2005. On March 29, 2006 the Office accepted his recurrence claim and placed him on the periodic rolls, when the employing establishment withdrew his light-duty job. Appellant was referred for vocational rehabilitation.

Appellant was treated by Dr. Frederic Butler, a Board-certified internist. In a report dated December 20, 2005, Dr. Butler provided a history of appellant's injury and treatment. On examination, he found atrophy involving the deltoid muscle. Appellant had posterior neck pain with cervical extension. Axial rotation was 30 degrees bilaterally; however, it elicited pain that radiated into appellant's upper extremities bilaterally. Axial rotation of the cervical spine produced complaints of paresthesias. Dr. Butler diagnosed bilateral cervical radiculopathy involving the C5-C6 dermatomal distribution; limited paresthesias of the bilateral hands; and status post anterior cervical discectomy with fusion of C5-C6 and C6-C7. He stated that appellant had significant permanent upper extremity impairment as a result of his accepted employment injury. Dr. Butler opined that appellant was able to work with maximum lifting, pushing and pulling restrictions of 20 pounds.

On July 25, 2007 the Office asked Dr. Butler to provide an opinion as to whether appellant's current condition and work restrictions had changed since his December 20, 2005 report. In a September 5, 2007 report, Dr. Butler diagnosed: cervical radiculopathy; bilateral paresthesias in the hands; brachial neuritis and cervical spondylosis. He opined that appellant could return to work with restrictions, which included: no lifting greater than 20 pounds continuously or intermittently for a maximum of four hours per day; no pushing greater than 20 pounds per day and no reaching above his shoulders greater than 5 pounds. Appellant was permitted to sit a maximum of four hours per day; stand four hours per day intermittently; walk intermittently up to eight hours per day; bend and stoop four hours per day; twist continuously up to eight hours per day; and perform simple grasping tasks and fine manipulation eight hours per day.

Appellant participated in vocational rehabilitation efforts. His vocational rehabilitation counselor determined that he was vocationally and medically able to work as a health unit clerk (Dictionary of Occupational Titles (DOT) 245.362-014). A labor market survey showed that the position was reasonably available in appellant's commuting area and that it paid an average weekly wage of \$400.00. The position involved preparing and compiling records in the nursing unit of a hospital or medical facility; recording patient information; copying medical information from nurses' records onto patient's medical records; preparing patient discharge notices; requisitioning supplies; answers telephone calls; distributing mail, newspapers, and flowers to patients and transporting patients in wheelchairs or conveyances to locations within the facility. The physical activity level pursuant to DOT was classified as "light," which was defined by a 20-pound lifting/pushing/pulling tolerance. The counselor stated that the position was in compliance with Dr. Butler's restrictions. In her November 15, 2007 closure report, the rehabilitation counselor stated that appellant had not obtained a position as a unit clerk, despite a significant level of assistance over a 90-day period.

¹ Appellant's October 27, 1999 traumatic injury claim (No. xxxxxx866) was accepted for cervical strain. The Office consolidated File No. xxxxxx850 with File No. xxxxxx866, which became the master file.

In an April 4, 2008 letter, the Office advised appellant that it proposed to reduce his compensation based on its determination that he had the capacity to earn wages as a unit clerk. It indicated that appellant's vocational rehabilitation counselor had determined that he was vocationally able to work as a unit clerk and that the position was reasonably available in his commuting area. The Office noted that the weight of the medical evidence regarding appellant's ability to work rested with the opinion of, Dr. Butler, his treating physician, and stated that his work restrictions would not prevent appellant from performing the position.

Appellant submitted an April 1, 2008 report from Dr. Butler, which reiterated his work restrictions precluding pushing, pulling or lifting more than 20 pounds.

In a May 5, 2008 decision, the Office reduced appellant's compensation effective May 11, 2008 based on his capacity to earn wages as a unit clerk. It indicated that it relied on Dr. Butler's work restrictions in determining his ability to perform the duties of the position.

Appellant requested a telephonic hearing. At the August 7, 2008 hearing, he testified that he was unable to perform the duties of a unit clerk, noting that his 20-pound lifting, pulling and pushing restriction would prevent him from pushing patients in wheelchairs, as required by the position. Appellant's counsel contended that the duties required of the unit clerk position, specifically the requirement of pushing patients in wheelchairs and on gurneys, violated appellant's work restrictions.

In a March 12, 2009 decision, the Office hearing representative affirmed the Office's May 5, 2008 decision. He found that the position of unit clerk met appellant's vocational and physical limitations, and fairly and reasonably represented his wage-earning capacity.

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.² Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.³

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.⁴ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment

² *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

³ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁴ *See Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

conditions.⁵ 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.⁶

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 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 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.⁷

ANALYSIS

The Board finds that the Office did not properly reduce appellant's compensation based on his ability to earn wages as a unit clerk. The medical evidence from Dr. Butler, appellant's attending physician, established that he was no longer totally disabled; thus, the Office properly referred him for vocational rehabilitation. The rehabilitation counselor found that appellant had the physical and vocational capacity to perform the duties of a unit clerk. On appeal, appellant argues that he is unable to work as a unit clerk because the position requires him to push patients in wheelchairs and gurneys, a requirement that exceeds his 20-pound restriction.

The medical evidence is insufficient to support a finding that the position of unit clerk was within appellant's physical limitations. The issue of whether an employee has the physical ability to perform a selected position is primarily a medical question that must be resolved by the medical evidence.⁸ On July 25, 2007 Dr. Butler provided a history of appellant's injury and treatment and examination findings. He diagnosed bilateral cervical radiculopathy involving the C5-C6 dermatomal distribution; limited paresthesias of the bilateral hands; and status post anterior cervical discectomy with fusion of C5-C6 and C6-C7. Noting that appellant had significant permanent upper extremity impairment as a result of his accepted employment injury, he opined that appellant was able to work with maximum lifting, pushing and pulling restrictions of 20 pounds.

The position of unit clerk is classified as "light," with a 20-pound lifting/pushing/pulling limitation, which would fall within the restrictions set forth by appellant's attending physician. However, the position also requires the employee to transport patients in wheelchairs or other

⁵ *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

⁶ *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).

⁷ 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).

⁸ See *Maurissa Mack*, 50 ECAB 498 (1999); *Robert Dickinson*, 46 ECAB 1002 (1995).

conveyances to locations within the hospital. There is no factual evidence addressing how pushing a heavy patient in a wheelchair correlates with pushing or pulling a stationary object. There is also no medical evidence addressing whether appellant is capable, given his cervical and upper extremity impairments, of pushing or pulling a wheelchair or bed, which might also contain a patient or equipment on occasion. The Office has the burden of proof to justify termination or modification of compensation benefits, and when a position is selected to represent wage-earning capacity, the Office must show that a claimant has the physical ability to perform the position.⁹ Although appellant's treating physician noted his work restrictions, the Office did not ask the physician to review the position description to determine whether appellant could perform all the duties. As it is unclear whether appellant has the capacity to work as a unit clerk, the Office has not met its burden of proof to reduce his compensation benefits based on the selected position of unit clerk.

CONCLUSION

The Board finds that the Office improperly reduced appellant's compensation effective May 11, 2008 based on his capacity to earn wages as a unit clerk.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs March 12, 2009 decision is reversed.

Issued: April 12, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

⁹ See *supra* notes 2 through 4 and accompanying text.