

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KENNETH P. ORTEGA and DEPARTMENT OF AGRICULTURE,
FOREST SERVICE, Taos, N.M.

*Docket No. 96-1647; Submitted on the Record;
Issued June 11, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's wage-earning capacity was represented by the position of sales clerk.

In the present case, the Office accepted that appellant sustained tendinitis of the right wrist causally related to his federal employment. In a letter dated December 26, 1995, the Office advised appellant that it proposed to reduce his compensation based on his capacity to earn wages in the constructed position of sales clerk. With regard to appellant's medical restrictions, the Office indicated that Dr. Herbert Rachelson, an attending orthopedic surgeon, had provided work restrictions in a January 21, 1993 form report (OWCP-5) and a July 9, 1992 form report (CA-17). By decision dated January 29, 1996, the Office determined that appellant's wage-earning capacity was represented by the selected position of sales clerk, and therefore he had no continuing loss of wage-earning capacity.

The Board has reviewed the record and finds that the wage-earning capacity determination in this case was improper.

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 in such benefits.¹

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

¹ *Carla Letcher*, 46 ECAB 452 (1995).

availability of suitable employment, and other factors and circumstances which may affect his wage-earning capacity in his disabled condition.²

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.³ 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.⁴

The initial question presented is whether the selected position of sales clerk was determined with due regard to the nature of appellant's employment injury and the degree of physical impairment. In this regard it is well established that under the Act a wage-earning capacity determination must be based on current medical evidence. For example, in *Ellen G. Trimmer*, the Board found that the Office had improperly relied on a work tolerance limitation report that was almost two years old at the time of the wage-earning capacity determination, noting that the "passage of time had lessened the relevance" of the physician's report.⁵ In *Samuel J. Russo*, a wage-earning capacity determination was made in December 1972, with the most recent medical reports regarding appellant's physical limitations for work being made two years earlier in 1970.⁶ The Board remanded the case for a current medical evaluation of appellant's physical limitations and an opinion as to whether he was physically capable of performing the duties of the selected position. In *Keith Hanselman*, the Board found that a July 1987 work restriction evaluation that was over a year old, not fully completed, and not accompanied by any indication of a concurrent physical examination, was insufficient to provide a basis for a wage-earning capacity determination.⁷

In the present case, the Office relies on a work restriction evaluation dated January 21, 1993, which was three years old at the time of the wage-earning capacity determination. The medical evidence submitted after the January 21, 1993 report consisted of brief treatment notes from Dr. Rachelson which were of little probative value on the issue presented. It is evident that at the time of the wage-earning capacity determination in this case, the record did not contain a detailed current description of the employee's work restrictions.⁸ Nor was there any indication

² See *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); see also 5 U.S.C. § 8115(a).

³ See *Dennis D. Owen*, 44 ECAB 475 (1993).

⁴ 5 ECAB 376 (1953); see also 20 C.F.R. § 10.303.

⁵ 32 ECAB 1878, 1882 (1981).

⁶ 28 ECAB 43 (1976).

⁷ 42 ECAB 680 (1991); see also *Anthony Pestana*, 39 ECAB 980 (1988).

⁸ Federal Employees' Compensation Act Program Memorandum No. 77, as amended May 9, 1983, provides in

that a physician reviewed the job duties and offered an opinion that appellant could perform the duties of the selected position.⁹

The Board finds that the January 21, 1993 form report is not sufficient to establish appellant's work restrictions in this case, since it was completed three years prior to the wage-earning capacity determination and did not appear to be accompanied by a concurrent physical examination. The record does not contain a detailed current description of appellant's work restrictions, and therefore 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 in this case.

The decision of the Office of Workers' Compensation Programs dated January 29, 1996 is reversed.

Dated, Washington, D.C.
June 11, 1998

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

pertinent part that in determining an employee's loss of wage-earning capacity, the Office must "ensure that the record contains a detailed description of the employee's ability to perform work in a disabled condition, including capacity to lift, stand, walk, etc."

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.8(d) (December 1995) ("If the medical evidence is not clear and unequivocal, the CE [claims examiner] will seek medical advice from the DMA [District medical adviser], treating physician, or second opinion specialist as appropriate.")