

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ARLINGTON HENDERSON and DEPARTMENT OF THE NAVY,
PHILADELPHIA NAVAL SHIPYARD, Philadelphia, Pa.

*Docket No. 97-2083; Submitted on the Record;
Issued May 6, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation effective May 25, 1997 based on his capacity to earn wages as a telephone solicitor.

The Office accepted that appellant's December 5, 1975 employment injury, in which he hit his right knee on a pipe and fell against a railing, resulted in a torn medial meniscus and degenerative arthritis of the right knee, and in a chronic low back strain. Appellant last worked at the employing establishment on March 23, 1977 and the Office began paying him compensation for temporary total disability on March 24, 1977. By decision dated May 16, 1997, the Office reduced appellant's compensation effective May 25, 1997 based on his capacity to earn wages as a telephone solicitor.

Section 8115 of the Federal Employees' Compensation Act,¹ titled "Determination of Wage-Earning Capacity" states in pertinent part:

"In determining compensation for partial disability, ... if the actual earnings of the employee do not fairly and reasonably represent his wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity as appears reasonable under the circumstances is determined with due regard to --

- (1) the nature of his injury;
- (2) the degree of physical impairment;
- (3) his usual employment;

¹ 5 U.S.C. § 8115.

- (4) his age;
- (5) his qualifications for other employment;
- (6) the availability of suitable employment; and
- (7) other factors or circumstances which may affect his wage-earning capacity in his disabled condition.”

In the present case, appellant has had no actual earnings since his employment with the employing establishment ended, and the Office thus proceeded to determine appellant’s wage-earning capacity under 5 U.S.C. § 8115. The Office selected the position of telephone solicitor from the Department of Labor’s *Dictionary of Occupational Titles*.² Through contact with the state employment service, the Office ascertained that this position was reasonably available in appellant’s commuting area. The duties of this position are sedentary, with maximum lifting of 10 pounds. The case record, however, did not contain a current medical report showing appellant’s work restrictions, as required by the Office’s procedure manual.³ At the time of the Office’s May 16, 1997 determination of appellant’s wage-earning capacity, the most recent medical report setting forth appellant’s work tolerance limitations was a September 18, 1995 report from an Office referral physician. As this report was almost two years old, the passage of time had lessened its relevance.⁴ This is especially important in the present case, where appellant’s attending physician stated in a September 13, 1993 report that appellant’s employment-related condition “has continued to get progressively worse.”

Because of the absence of a medical report of appellant’s work tolerance limitations relatively contemporaneous with the issuance of the Office’s determination of appellant’s wage-earning capacity, the Office has not met its burden of proof.⁵ In addition, there is no indication that the Office considered appellant’s age of 69 years in determining his wage-earning capacity, as required by 5 U.S.C. § 8115.⁶

² Code No. 299.357.014.

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8, Exhibit 4 (December 1995).

⁴ *Ellen G. Trimmer*, 32 ECAB 1878 (1981); *Samuel J. Russo*, 28 ECAB 43 (1976).

⁵ Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment. *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

⁶ See *Fred N. Nelson*, 6 ECAB 455 (1954).

The decision of the Office of Workers' Compensation Programs dated May 16, 1977 is reversed.

Dated, Washington, D.C.
May 6, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member