

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARTIN S. SANCHEZ and DEPARTMENT OF THE INTERIOR, BUREAU OF RECLAMATION, MIDDLE RIO GRANDE PROJECT, Albuquerque, NM

*Docket No. 00-1847; Submitted on the Record;
Issued February 26, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS,
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation based on his capacity to earn wages as a street sweeper operator.

On October 30, 1973 appellant, then a 40-year-old crane operator, was injured in the performance of duty when he jumped clear of a machine that was about to tilt over and struck his right knee on drain bank. The Office accepted the claim for a back sprain and internal derangement of the right knee. Appellant was paid appropriate compensation and eventually returned to regular duty.

On November 24, 1978 appellant was again injured in the performance of duty when he was climbing onto a tractor and fell three feet onto his left side on some rocks. The Office accepted the claim for a torn collateral ligament of the left knee. Appellant received compensation for intermittent periods of wage loss and a schedule award for 10 percent permanent impairment of the left extremity. He stopped work entirely on January 12, 1982 and began receiving compensation on the periodic rolls for disability.

On October 22, 1991 appellant underwent a right knee replacement, followed by a left knee total replacement on September 4, 1996. He has been under the care of Dr. Richard A. Rock, a Board-certified orthopedic surgeon. In a report dated November 17, 1998, Dr. Rock stated that appellant was doing well with minimal pain. He therefore released appellant to light duty with lifting limited to 20 pounds maximum. Dr. Rock also recommended that appellant not be engaged in work that required a great deal of walking or stair climbing.

In a December 2, 1998 report, Dr. Rock revised appellant's lifting restriction to 10 pounds on an occasional basis. He also stated that appellant could work eight hours per day.

Based on Dr. Rock's evaluation of appellant's work capacity, the Office referred him for vocational rehabilitation in an effort to return him to appropriate work. In a report dated April 27, 1999, a rehabilitation counselor assigned to appellant's case reported that he had the

necessary job skills to perform the duties of a street sweeper operator based on the results of a functional capacity evaluation (FCE).¹ The position of street sweeper operator was listed as involving light work and was said to require 30 days to 3 months of specific vocational preparation. The rehabilitation counselor noted that the position of street sweeper operator was reasonably available in appellant's commuting area and paid a wage of \$256.00 per week.

The position of street sweeper operator in the *Dictionary of Occupational Titles* 195.227-010 is described as follows:

“Drives sweeping machine that cleans the street of trash and other accumulations. Fills water tank of machine from hydrant. Drives sweeper along street near curb. Moves controls to activate rotary brushes and water spray so that machine automatically picks up dust and trash from paved street and deposits it in dirt trap at rear of machine. Pulls lever to dump refuse in piles at curb for removal. May be employed by industrial plant, shopping center, or other establishment to drive modified sweeper through parking lots, factory aisles, or along paved roads and be designated power-sweeper operator (any industry). May drive machine that sucks leaves into vacuum chamber and be designated leaf-sucker operator (government ser[vice]). May drive vehicle equipped with rotating brushes to remove and litter from newly constructed highways and be designated sweeper operator, highways (construction).”

In an addendum to the FCE dated August 18, 1999, Daniel Pena, a physical therapist, advised that appellant had told him that he was to be reemployed as a street sweeper. Mr. Pena stated that based on the FCE, appellant would “not be suitable for this new job secondary to having restricted bilateral lower extremity range of motion and loss of balance as well as cardiovascular endurance”

By letter dated November 18, 1999, the Office forwarded a copy of the rehabilitation counselor's report to Dr. Rock and asked for his opinion as to whether appellant had the physical capacity to perform the job of a street sweeper operator.

In a November 19, 1999 treatment note, Dr. Rock indicated that appellant had a functional capacity evaluation performed in August with a physical therapist. He also noted that he had received the job classification from the Office and stated that he would probably let appellant try either one of the occupations listed.²

The computation of gross compensation for loss of wage-earning capacity was determined to be \$256.00 per week for a street sweeper operator and was shown on an attached Form CA-816.

¹ The record contains a copy of a functional capacity evaluation dated August 18, 1999.

² The rehabilitation counselor had also identified the position of a road-oiling truck driver but that position required a longer period of vocational preparation, five to six months, compared to the street sweeper operator position.

On February 16, 2000 the Office issued a notice of proposed reduction of compensation. Appellant was given 30 days to submit evidence if he disagree with the proposed notice.

In response appellant resubmitted evidence that was previously of record.

Appellant also submitted a letter from Daniel PeLia, a physical therapist, dated March 22, 2000 that stated as follows:

“This letter is in regards to [appellant’s] ability to perform work as a street sweeper operator. My concerns come from my observation of a street sweeper in the past which required a step up to the cabin as well as climbing [in and out of] the street sweeper to fill the water tank. Also noted were frequent to constant sitting. This may present some problems to [appellant] due to his current knee conditions. This would be lack of range of motion to bilateral lower extremities as well as poor endurance. As per your letter stating that Dr. Rock has agreed to let [appellant] try this new position, I agree with his decision.”

In a decision dated March 31, 2000, the Office reduced appellant’s compensation based on a finding that the position of street sweeper operator is suitable.

The Board finds that the Office properly reduced appellant’s compensation based on his capacity to earn wages as a street sweeper operator.

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.³

Under section 8115(a) of the Federal Employee’s Compensation Act,⁴ wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, age, qualifications for other employment, that availability of suitable employment and other factors and circumstances which may affect wage-earning capacity in the employee’s disabled condition.⁵ Wage-earning capacity is a measure of your ability to earn wages in the open labor market under normal employment conditions.⁶ Where vocational rehabilitation is unsuccessful, the rehabilitation counselor will prepare a final report which lists two or three jobs which are medically and vocationally suitable for the employee and proceed

³ *James B. Christenson*, 47 ECAB 775 (1996); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

⁴ 5 U.S.C. § 8115(a).

⁵ See *Richard Alexander*, 48 ECAB 432 (1997); *Pope D. Cox*, 39 ECAB 143 (1988).

⁶ *Id.*

with information from a labor market survey to determine the availability and wage rate of the position.⁷

The Office procedures pertaining to vocational rehabilitation services emphasize returning partially disabled employees to suitable employment.⁸ If the employment injury prevents the injured worker from returning to the job held at the time of injury, vocational rehabilitation services are provided to assist the employee in placement with the previous employer in a modified job or, if not feasible, developing an alternative plan based on vocational testing which may include medical rehabilitation, training and/or placement services.⁹ When rehabilitation services prove unsuccessful, the Office's procedures instruct the rehabilitation counselor to submit a closure report to the Office, with relevant information regarding the suitability and availability of selected positions.¹⁰ 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.¹¹

In this case, appellant's rehabilitation counselor determined that he was able to perform the job of a street sweeper operator, that the position was available in sufficient numbers so as to make it reasonably available within his commuting area and that the salary range for the position was \$256.00 per week. Appellant's treating physician and his physical therapist agreed that the position was within appellant's work capacity.¹²

The Board finds that 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 street sweeper operator represented appellant's wage-earning capacity. The weight of the evidence establishes that appellant can perform this position. The rehabilitation counselor followed appropriate guidelines for finding that the position was reasonably available within the general labor market to appellant's commuting area. Therefore, the Office properly reduced appellant's compensation based on a finding that the position of a street sweeper operator reflected appellant's wage-earning capacity.

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.814.8 (December 1993); *see also Sylvia Bridcut*, 48 ECAB 162 (1996).

⁸ *Id.*

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.6(b) (December 1993); *see Sylvia Bridcut*, *supra* note 7; *Clayton Varner*, 37 ECAB 248 (1985).

¹⁰ *Philip S. Deering*, 47 ECAB 692 (1996).

¹¹ *Richard Alexander*, *supra* note 5.

¹² Although the physical therapist originally stated that appellant could not perform this position, he later deferred to the opinion of appellant's treating physician. The Board notes that a physical therapist is not considered a physician under the Act so the Office properly relied on Dr. Rock's opinion; *see* 5 U.S.C. § 8102(2).

The decision of the Office of Workers' Compensation Programs dated March 31, 2000 is hereby affirmed.

Dated, Washington, DC
February 26, 2002

Michael J. Walsh
Chairman

Alec J. Koromilas
Member

David S. Gerson
Alternate Member