

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

I.M., Appellant

and

DEPARTMENT OF THE NAVY, LONG
BEACH NAVAL SHIPYARD, Long Beach, CA,
Employer

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**Docket No. 08-501
Issued: July 24, 2008**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 28, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated October 9, 2007, reducing appellant's compensation pursuant to 5 U.S.C. § 8115. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly reduced appellant's compensation effective October 9, 2007 on the grounds that his wage-earning capacity was represented by the selected position of counter parts sales clerk at \$400.00 per week.

FACTUAL HISTORY

The Office that accepted appellant, then a 57-year-old shipwright, sustained facial contusions, concussion and postconcussion syndrome as a result of a July 25, 1994 employment

incident when he was struck by a falling pipe. He retired from federal employment in November 1999 and received compensation for temporary total disability.

Appellant was referred for a second opinion evaluation by Dr. Robert Moore, a neurologist. In a report dated November 14, 2005, Dr. Moore provided a history and results on examination. He indicated that appellant had some post-traumatic vertigo as a residual of the employment injury, but otherwise the neurological examination was normal. Dr. Moore stated that appellant could work with no climbing or work at unprotected heights.

The Office referred appellant for vocational rehabilitation services. The rehabilitation counselor indicated that appellant had difficulty reading and comprehending English. A vocational rehabilitation report submitted on October 19, 2006 indicated that the position of counter sales and courier appeared to be within appellant's aptitude and abilities. The report stated a labor market survey of the counter sales position revealed a salary range from \$7.50 to \$10.00 per hour.

A labor market survey dated July 30, 2007 was performed by a vocation rehabilitation counselor for the positions of counter parts sales clerk Department of Labor, *Dictionary of Occupational Titles* (DOT) No. 279.357.062 and sales clerk (No. 290.477.014). For the position of counter sales clerk there were 10 employers contacted with a salary range from \$7.50 to \$15.00 per hour, for the sales clerk the employers reported a range of \$8.00 to \$9.00 per hour. In discussing both positions, the rehabilitation counselor reported the general salary range was \$8.00 to \$9.00 per hour and the results indicated a positive labor market. The rehabilitation counselor completed a Form CA-66 (job classification) for both positions. The physical demands of the position indicated they required occasional lifting of up to 20 pounds and no climbing, and the rehabilitation counselor opined the positions were medically suitable and reasonably available in appellant's area. The weekly wage was reported as \$440.00 for the counter parts sales clerk and \$340.00 for the sales clerk.

By letter dated August 29, 2007, the Office advised appellant that it proposed to reduce his compensation because he had the capacity to earn wages as a counter parts sales clerk at the rate of \$400.00 per week. It found the physical demands were within appellant's abilities and the entry level wage was \$400.00 per week. In a letter dated September 22, 2007, appellant stated that he was "submitting extension notice of proposed wage reduction," noting he was scheduled for eye surgery and had additional medical appointments with his physicians, including his cardiologist.

In a decision dated October 9, 2007, the Office finalized the proposed reduction of compensation. It found that appellant was capable of earning \$400.00 a week, resulting in a 38 percent wage-earning capacity compared to the current pay rate for his date-of-injury position.

LEGAL PRECEDENT

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 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, DOT 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

ANALYSIS

In this case, the Office selected the position of counter parts sales clerk (DOT No. 279.357.062) as representing appellant's wage-earning capacity. 5 U.S.C. § 8115 requires that the Office take into account relevant vocational and medical evidence in determining wage-earning capacity when there are no actual earnings. The rehabilitation counselor was aware of appellant's age and his educational and vocational background. She opined that the selected position was appropriate for appellant. This is within the area of a rehabilitation counselor's expertise and there is no probative evidence establishing the selected position was not vocationally appropriate. As to medical restrictions, the medical evidence from Dr. Moore dated November 14, 2005 indicated that appellant could work in a job with no climbing or work from unprotected heights, as appellant had residual vertigo. The selected position was a light strength job with no climbing. There is no indication that the selected position was outside appellant's work restrictions.

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

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. § 10.403.

The evidence of record, therefore, does support that the Office took into account relevant factors affecting wage-earning capacity in selecting the counter parts sales clerk position. The job was found to be reasonably available in appellant's commuting area.

As to the wage rate, however, the Office stated, without further explanation, the entry level was \$400.00 per week, or \$10.00 per hour. The evidence of record does not confirm the Office's finding. There is no indication that the rehabilitation counselor or other vocational specialist opined that appellant was capable of earning \$400.00 per week in the selected position. The initial reference to wages for the position was a report submitted in October 2006 with an entry level wage of \$7.50 per hour. The rehabilitation counselor then submitted a July 30, 2007 labor market survey involving both the selected position and a general sales clerk position. While there were two employers reporting a wage rate of \$10.00 per hour, there was a range of responses commencing at \$7.50 per hour. In summarizing both positions, the rehabilitation counselor reported a wage rate of \$8.00 to \$9.00 per hour. On the other hand, the Form CA-66's reported significantly different wage rates for the two jobs, with \$440.00 reported for the counter sales clerk and \$340.00 for the sales clerk. It is not clear whether the counselor intended to report \$340.00 (or \$8.50 per hour) for both the positions, which would be consistent with her summary of the labor market survey, or whether she was relying on other data to find a wage rate of \$11.00 per hour for the counter parts sales clerk position.

In any case, the Office should have requested clarification from the rehabilitation counselor or other vocational specialist regarding the entry level wage for an individual with appellant's background. The evidence of record is not sufficient to properly establish the wage rate and the subsequent calculations as to appellant's loss of wage-earning capacity pursuant to *Shadrick* and 20 C.F.R. § 10.403. It is the Office's burden of proof, and the Office did not meet its burden of proof in this regard.

CONCLUSION

The evidence supported a finding that the selected position was medically and vocationally suitable, but the evidence was not sufficient to establish the appropriate wage rate for the position and therefore the loss of wage-earning capacity was not properly determined.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 9, 2007 is reversed.

Issued: July 24, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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