

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of [REDACTED] and DEPARTMENT OF THE ARMY,
WHITE SANDS MISSILE RANGE, White Sands, N.M.

*Docket No. 96-112; Submitted on the Record;
Issued December 3, 1997*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's monetary compensation on the grounds that he has the capacity to earn wages as a cashier.

The Board has duly reviewed the record on appeal and finds that the Office improperly reduced appellant's monetary compensation.

Once the Office has made a determination that an employee is totally disabled as a result of an employment injury, it has the burden of justifying a subsequent reduction in compensation benefits.¹

An injured employee who is unable to return to the position held at the time of injury (or to earn equivalent wages) but who is not totally disabled for all gainful employment is entitled to compensation computed on loss of wage-earning capacity. In determining compensation for partial disability, an employee's wage-earning capacity is determined with due regard to: (1) the nature of his injury, (2) the degree of physical impairment, (3) his usual employment, (4) his age, (5) his qualifications for other employment, (6) the availability of suitable employment, and (7) other factors or circumstances that may affect his wage-earning capacity in his disabled condition.²

The evidence of record indicates that appellant is a twice-convicted felon, once for burglary and again for assault and battery. Appellant asserts that he informed the rehabilitation counselor of these convictions but was told something to the effect that they were not important and would not be considered. A review of the rehabilitation counselor's reports supports that no

¹ *Edward L. Havener*, 35 ECAB 268 (1983).

² 5 U.S.C. § 8115(a); 20 C.F.R. § 10.303(a).

apparent consideration was given these convictions in determining the suitability of the selected position of Cashier II. The Office has noted in its September 19, 1995 decision that the job description for Cashier II does not require the employee to be bonded and that there was no evidence that appellant's convictions would necessarily prevent him from working as a Cashier II. Although these observations may be technically correct, the Board finds that they do not give "due regard" to the impact that this significant other factor or circumstance may have on appellant's capacity to earn wages in the selected position. Without further consideration and explanation, appellant's capacity to earn wages as a cashier, given his history of felony convictions, does not appear outwardly reasonable under the circumstances.³

Because the Office failed to give due regard to appellant's prior felony conviction the Board finds that the Office failed to justify the reduction of appellant's monetary compensation.

As a moreover to appellant's argument on appeal, the Board notes that the availability of the employment is usually evaluated with respect to the area where the injured employee resides at the time the determination is made, rather than the area of residence at the time of injury. However, when the employee voluntarily moves to an isolated locality with few job opportunities, the question of availability should be applied to the area of residence at the time of the injury.⁴ In this case, the rehabilitation counselor made the determination of availability on August 24, 1994. It appears that appellant was at that time residing with his wife in the city of Socorro. Appellant telephoned the rehabilitation counselor five days later, on August 29, 1994, to advise that as of that date he was living in the isolated locality of Carrizozo, which happened to be the place he lived when he was injured. The record therefore supports that the availability of the selected position was properly evaluated with respect to the city of Socorro, the area where appellant resided at the time the determination was made.

³ See *James R. Verhine*, 47 ECAB ____ (Docket No. 94-86, issued March 14, 1996), in which the Board found the position of pawnbroker was not shown to be a reasonable position for the employee in light of the terms of his probation.

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(c) (December 1993).

The September 19 and May 30, 1995 decisions of the Office of Workers' Compensation Programs are reversed and the case remanded for reinstatement of monetary compensation retroactive to the effective date of reduction.

Dated, Washington, D.C.
December 3, 1997

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member