

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of LAWRENCE KING and DEPARTMENT OF THE NAVY,  
NAVAL SHIPYARD, Philadelphia, PA

*Docket No. 98-2033; Submitted on the Record;  
Issued April 20, 2000*

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DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation to reflect his wage-earning capacity in the selected position of surveillance systems monitor.

The Board has duly reviewed the case on appeal and finds that the Office properly reduced appellant's compensation to reflect his wage-earning capacity in the selected position of surveillance systems monitor.

Appellant, a sandblaster, filed a claim alleging that, on November 9, 1987, he injured his low back in the performance of duty. The Office accepted his claim for a lumbosacral strain/sprain and herniated disc L4-5. Appellant filed a second claim alleging that, on August 26, 1991, he injured his back and legs sweeping and removing trash. The Office accepted this claim for a lumbosacral strain/sprain. He completed a claim for recurrence of disability on November 6, 1992 noting that the employing establishment no longer had light duty available. The Office entered appellant on the periodic rolls on October 6, 1993. The Office proposed to reduce appellant's compensation benefits on December 2, 1996. By decision dated February 3, 1997, the Office determined appellant's wage-earning capacity based on the selected position of surveillance systems monitor. He requested an oral hearing. By decision dated March 10, 1998, the hearing representative affirmed the Office's February 3, 1997 decision.

Section 8115 of the Federal Employees' Compensation Act<sup>1</sup> provides that 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 the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, the degree of physical impairment, his usual employment, his age, his qualifications for other employment, the

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<sup>1</sup> 5 U.S.C. §§ 8101-8193, 8115.

availability of suitable employment and other factors or circumstances which may affect his wage-earning capacity in his disabled condition.<sup>2</sup>

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by the Office 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 that employee's capabilities with regard to his physical limitations, education, age and prior experience. Once this selection is made, 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. Finally, application of the principles set forth in *Albert C. Shadrick*<sup>3</sup> will result in the percentage of the employee's loss of wage-earning capacity. The basis range of compensation paid under the Act is 66 2/3 percent of the injured employee's monthly pay.<sup>4</sup>

In this case, the Office referred appellant for a second opinion evaluation with Dr. Roy T. Lefkoe, a Board-certified orthopedic surgeon. In a report dated August 5, 1996, he noted appellant's history of injury including a postemployment cerebrovascular accident in 1992. Dr. Lefkoe diagnosed herniated disc L4-5 with mild spinal stenosis. He stated that appellant sustained an aggravation of his preexisting back condition as a result of the 1991 employment injury and that he was permanently disabled from his date-of-injury position. He stated:

"If the cerebrovascular accident, however, had not occurred I believe that [appellant] could have continued in his light[-]duty position at the [employing establishment] and I would have given him lifting and carrying restrictions of 10 pounds, with no repetitive bending or twisting. At this time, I do not feel that [appellant] can stand for more than 30 minutes or sit more than 30 minutes without a change of position."

Dr. Lefkoe determined that appellant was only partially disabled due to his accepted employment injuries. The rehabilitation specialist then determined that the position of surveillance systems monitor was within appellant's physical limitations and was available in suitable numbers to make it reasonably available to appellant within his commuting area. The Office medical adviser reviewed the position description and appellant's limitations as provided by Dr. Lefkoe and determined that based on the employment injury alone appellant could perform the duties of the position. The Board notes that the Office is not required to consider medical conditions arising subsequent to the work-related injury or disease in determining whether a position constitutes an employee's wage-earning capacity.<sup>5</sup> Therefore, the record establishes that appellant is physically capable to perform the work of a surveillance systems monitor and that the position is reasonably available. Moreover, the Office properly calculated appellant's wage-earning capacity based on the difference between his weekly wages at the time

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<sup>2</sup> *Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

<sup>3</sup> 5 ECAB 376 (1953).

<sup>4</sup> *Karen L. Lonon-Jones*, 50 ECAB \_\_\_\_ (Docket No. 97-155, issued March 18, 1999).

<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(b) (December 1995).

of the recurrence of disability, \$532.00 and the weekly wage of a surveillance systems monitor, \$280.00, using the *Shadrick* formula.<sup>6</sup>

Appellant alleged that he was unable to perform the duties of the selected position as he could not sit continuously. He also submitted a report dated February 7, 1997 from Dr. Marc S. Zimmerman, a Board-certified orthopedic surgeon. He noted appellant's history of injury and medical treatment. Dr. Zimmerman stated that appellant still suffered from the residuals of his work injury of August 26, 1991. He stated, "In my opinion, [appellant] is unable to return to work at this time. As a final comment, the cerebrovascular accident that [he] has suffered has further aggravated [appellant's] back complaints."

The Board finds that Dr. Zimmerman's report does not provide specific work restrictions indicating that appellant cannot perform the duties of the selected position due to his accepted employment injuries. Furthermore, the selected position of surveillance systems monitor does not specifically require that appellant either sit or stand in order to perform the duties of the position. Therefore, the Office met its burden of proof in reducing appellant's compensation based on his wage-earning capacity as a surveillance systems monitor.

The March 10, 1998 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, D.C.  
April 20, 2000

David S. Gerson  
Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>6</sup> See *Albert C. Shadrick*, *supra* note 3.