

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DOUGLAS W. LENTON and DEPARTMENT OF THE NAVY,  
MARE ISLAND NAVAL SHIPYARD, Vallejo, CA

*Docket No. 99-899; Submitted on the Record;  
Issued December 15, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,  
VALERIE D. EVANS-HARRELL

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to establish that the position of hotel clerk represented appellant's wage-earning capacity effective November 8, 1998; and (2) whether the Office properly denied merit review of the claim on December 28, 1998.

This is the second appeal of this case. In the first appeal,<sup>1</sup> on June 21, 1995 the Board reversed the Office's finding that the position of sales clerk represented appellant's wage-earning capacity effective August 19, 1993. The facts of the case are fully set forth in the Board's prior decision and are hereby incorporated by reference.

On December 6, 1975 appellant, then a 29-year-old pneumatic tool operator, filed a traumatic injury claim alleging that he had sustained shoulder and back injuries in the performance of duty on that day. Appellant stopped work on December 6, 1975 and did not return. The Office accepted appellant's claim for myositis, right shoulder sprain, bilateral thoracic outlet syndrome and codeine addiction. Appellant underwent surgical procedures for his accepted conditions on April 13, 1976 and January 13, 1978.

By decision dated October 16, 1998, the Office found that the position of hotel clerk represented appellant's wage-earning capacity and reduced appellant's compensation payments effective November 8, 1998 to reflect his wage-earning capacity in this position. The Office denied appellant's application for merit review on December 28, 1998.

The Board has duly reviewed the case record and finds that the Office did not meet its burden of proof to reduce appellant's compensation benefits effective November 8, 1998.

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<sup>1</sup> Docket No. 94-30 (issued June 21, 1995).

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.<sup>2</sup>

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 a loss of wage-earning capacity. 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 or if the employee has no actual earnings, his wage-earning capacity as appears reasonable under the circumstances 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 availability of suitable employment and other factors or circumstances which may affect his wage-earning capacity in his disabled condition.<sup>3</sup>

Where reemployment with the employing establishment is not possible, the vocational rehabilitation counselor assists in either additional job training or in job placement efforts. Where vocational rehabilitation efforts are unsuccessful, Office procedures instruct the vocational rehabilitation counselor to identify three positions from the Department of Labor's *Directory of Occupational Titles* and obtain information from the state employment service with respect to the availability and wage rate of the position.<sup>4</sup> The Office is required to select one of the positions in view of such factors as appellant's skills, aptitude, mental alertness, personality factors, *etc.* and to determine the medical suitability taking into consideration medical conditions due to the accepted work-related injury and any preexisting medical condition. Medical conditions arising subsequent to the work-related injury or disease are specifically excluded from consideration. Finally, application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.<sup>5</sup>

Vocational rehabilitation efforts were not successful in this case. Therefore, the Office proceeded to determine appellant's wage-earning capacity in a selected position. In the prior appeal, the Board found that the reports of Dr. John C. Goldner, a Board-certified neurologist acting as an impartial medical specialist, dated October 8, 1991 and September 9, 1992 were not sufficient to establish that appellant was medically able to perform a sales clerk position. The Board noted that Dr. Goldner had indicated that appellant could not reach or work above shoulder level, that the position description required stocking shelves and counters, and that therefore Dr. Goldner's opinion that appellant could perform a sales clerk position was not based upon sufficient facts.

On October 16, 1998 the Office again modified appellant's compensation benefits, effective November 8, 1998, granting the weight of the medical evidence to Dr. Goldner's 1991 and 1992 reports. The Office also noted that an October 5, 1995 work restriction evaluation

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<sup>2</sup> *James B. Christenson*, 47 ECAB 775, 778 (1996).

<sup>3</sup> *See* 5 U.S.C. § 8115.

<sup>4</sup> *See James R. Verhine*, 47 ECAB 460 (1996).

<sup>5</sup> *Id.*

from Dr. Daniel A. Hogan, a family practitioner, supported the physical limitations and work restrictions found by Dr. Goldner, whose report upon which the Office relied to modify appellant's compensation benefits effective November 1998 were over six years old at the time of the Office's 1998 determination. Dr. Hogan's October 5, 1995 work restriction evaluation was over three years old. The Board has held that the Office cannot modify compensation benefits without first obtaining a detailed current description of the claimant's disability and ability to perform work.<sup>6</sup> Dr. Goldner's 1991 and 1992 reports which were more than six years old therefore were of limited probative value in determining appellant's wage-earning capacity as of November 8, 1998. Similarly Dr. Hogan's report dated October 3, 1995 was three years old at the time of the 1998 loss of wage-earning capacity determination and was therefore of limited probative value.

On September 16, 1998 appellant's attorney submitted recent medical evidence to the record from appellant's treating physician, Dr. Joan Harding, a family practitioner. In a report dated April 15, 1997, Dr. Harding stated that appellant had chronic neck and shoulder pain, tingling and other symptoms and that his physical examination was consistent with chronic pain and "problems" in these areas. She opined that there was no work that appellant could do as he was unable to do anything that would require bending over at the neck or changing neck positions; that he was unable to lift his arms above his head; and that even very light work using his arms consistently would be deleterious to his condition. Dr. Harding explained that appellant had arm movement from 0 to 45 degrees and that his musculature was consistent with decreased musculature in the upper shoulders and that he was also developing stooped posture, which might be from chronic shoulder and neck pain. In a narrative report dated September 14, 1998, she stated that she had examined appellant on that day and had found that he now had slight scoliosis, significant kyphosis, very little neck movement, relatively little strength in his hands or shoulders. Dr. Harding opined that any repetitive movement using his hands and elbows would exacerbate his symptoms and that she anticipated he would remain disabled for the rest of his life. She also explained that his current condition was causally related to the accepted employment injury. On September 14, 1998 Dr. Harding also completed a work restriction evaluation in which she noted appellant's physical restrictions in use of the arms and shoulders, and opined that appellant could not return to work.

Dr. Harding's reports indicate that appellant remains disabled from work activities due to his employment-related injuries. The Office therefore did not meet its burden of proof to establish that the position of hotel clerk represented appellant's wage-earning capacity, as of November 8, 1998.<sup>7</sup>

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<sup>6</sup> *Keith Hanselman*, 42 ECAB 680 (1991).

<sup>7</sup> Given the disposition of the first issue, the second issue is moot.

The decisions of the Office of Workers' Compensation Programs dated December 28 and October 16, 1998 are hereby reversed.

Dated, Washington, DC  
December 15, 2000

Michael J. Walsh  
Chairman

Michael E. Groom  
Alternate Member

Valerie D. Evans-Harrell  
Alternate Member