

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JEROLD W. PARLIER and DEPARTMENT OF COMMERCE,
NATIONAL OCEANIC ATMOSPHERIC ADMINISTRATION, Phoenix, AZ

*Docket No. 99-1065; Submitted on the Record;
Issued March 6, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation benefits, effective August 17, 1997, based on its determination that the selected position of security guard represented his wage-earning capacity.

The Board has carefully reviewed the record and finds that the Office did not meet its burden of proof in reducing appellant's compensation in this case.

On January 18, 1982 appellant, then a 42-year-old meteorological technician, filed a traumatic injury claim alleging that he injured his lower back on January 13, 1982 while removing a recording rain gage. The Office accepted the claim for lumbar strain and herniated nucleus pulposus, L5-S1 and placed appellant on the periodic rolls effective February 7, 1983.

On January 18, 1995 the Office referred appellant to Dr. John Cortner, a Board-certified orthopedic surgeon, and Dr. Ronald S. David, a Board-certified psychiatrist, to determine the extent and degree of any disability due to appellant's accepted employment injury.

In a February 27, 1995 report, Dr. David, based upon a physical examination and employment injury history, opined that appellant had no psychological problem at that time.

In a February 27, 1995 report, Dr. Cortner, based upon a review of the medical evidence, employment injury history and physical examination, concluded that appellant was disabled from his date-of-injury position, but that he was capable of working 40 hours per week. Dr. Cortner opined that appellant could perform light-duty work "provided he had frequent change of position and did not have to do frequent or repetitive lifting or repetitive bending."

On July 26, 1995 the Office referred appellant for vocational rehabilitation based upon the reports of Drs. Cortner and David.

On June 23, 1997 the Office issued a notice of proposed reduction of compensation based upon appellant's ability to perform the selected position of security guard.

In a decision dated July 28, 1997, the Office finalized its decision to reduce appellant's compensation effective August 14, 1997.

By letter dated August 28, 1997, appellant's counsel requested a hearing which was held on April 29, 1998.

By decision dated November 24, 1998, the Office hearing representative affirmed the Office's reduction of compensation.

Once the Office accepts a claim, it has the burden of proof to establish that the disability has ceased or lessened in order to justify termination or modification of compensation 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 or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent the employee's wage-earning capacity, or if the employee has no actual wages, the wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, the employee's usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect his wage-earning capacity in his or her disabled condition.²

The initial question presented is whether the Office properly determined that the offered position was medically suitable. In this case, the medical evidence on which the Office relies is a narrative report dated February 25, 1995 provided by a second opinion physician, Dr. Cortner. By the time of the suitability decision in this case, the report of Dr. Cortner was well over two years old. This is not considered to be current medical evidence as to appellant's work restrictions.³ Due to this lack of contemporaneous medical evidence, the Board finds that the Office failed to meet its burden of proof to reduce appellant's compensation based on his capacity to earn wages as security guard.

¹ *Philip S. Deering*, 47 ECAB 692 (1996).

² 5 U.S.C. § 8115.

³ See *Keith Hanselman*, 42 ECAB 680, 687 (1991) (where the most recent medical evidence was over a year old and was found not to be a sufficient basis for a wage-earning capacity determination).

The decision of the Office of Workers' Compensation Programs dated November 24, 1998 is hereby reversed.

Dated, Washington, DC
March 6, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member