

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DAVID K. CHESTER and DEPARTMENT OF THE AIR FORCE,  
FAIRCHILD AIR FORCE BASE, Spokane, Wash.

*Docket No. 95-2552; Submitted on the Record;  
Issued February 19, 1998*

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DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly reduced appellant's compensation benefits on February 5, 1995 based on his capacity to perform the duties of a food service manager; and (2) whether the Office abused its discretion by refusing to reopen its January 13, 1995 decision for review of the merits on April 12, 1995.

The Board has duly reviewed the case on appeal and finds that the Office properly reduced appellant's compensation benefits subsequent to February 5, 1995.

Appellant filed a claim alleging on December 9, 1987 he injured his back and buttocks in the performance of duty. The Office accepted that appellant sustained a herniated disc at L5-S1 on July 7, 1988. Appellant filed several claims alleging that he developed hernias due to his federal employment. The Office accepted these claims and authorized compensation benefits. By decision dated January 13, 1995, the Office found that appellant was no longer totally disabled as a result of his injury of December 9, 1987. The Office found that appellant could perform the duties of a food service manager and reduced appellant's compensation to reflect his wage-earning capacity.<sup>1</sup>

Once the Office has determined that an employee is totally disabled as a result of an employment injury, it has the burden of justifying a subsequent reduction of compensation. If the employee's disability is no longer total but is partial, appellant is only entitled to the loss of his wage-earning capacity.<sup>2</sup>

Section 8106 of the Federal Employees' Compensation Act provides that a claimant may be paid 66 percent of the difference between his monthly pay and his monthly wage-earning

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<sup>1</sup> The Office had issued a decision on January 13, 1994 reducing appellant's compensation benefits based on his capacity to earn wages as a food services manager. However, the Office determined that appellant had an additional period of total disability and reentered appellant on the periodic rolls.

<sup>2</sup> *Anthony W. Warden*, 40 ECAB 168, 181-82 (1988).

capacity after the beginning of partial disability.<sup>3</sup> With regard to section 8115(a), this section of the Act 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 availability of suitable employment, and other factors or circumstances which may affect his wage-earning capacity in his disabled condition.<sup>4</sup>

In the instant case, the Office received an investigative memorandum dated July 20, 1992 noting that appellant was working as the manager of a sandwich shop owned by his wife. Appellant's rehabilitation counselor completed a labor market survey for the position of restaurant manager on September 15, 1992, using the title manager food services. He determined that the position was available in sufficient numbers so as to make it reasonably available within appellant's commuting area. The rehabilitation counselor found that appellant met the requirements for the position and provided the wages. The Office referred the physical requirements of the position to appellant's physicians and both responded that appellant was capable of performing the duties entailed.

The Board finds that the Office considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment, age and employment qualifications, in determining that the position of food service manager represented appellant's wage-earning capacity. The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position and that such a position was reasonably available within the general labor market of appellant's commuting area. Therefore the Office properly determined that the position of food service manager reflected appellant's wage-earning capacity effective February 5, 1995.

The Board further finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for review of the merits on April 12, 1995.

Appellant filed a request for reconsideration on February 3, 1995. By decision dated April 12, 1995, the Office denied appellant's request for reconsideration finding that the evidence submitted was not sufficient to require review of its January 13, 1995 decision.<sup>5</sup>

Section 10.138(b)(1) of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the

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<sup>3</sup> 5 U.S.C. § 8106.

<sup>4</sup> *Pope D. Cox*, 39 ECAB 143, 148 (1988).

<sup>5</sup> Following the Office's April 12, 1995 decision appellant submitted additional new evidence. As the Office did not consider this evidence in reaching a final decision, the Board may not review it for the first time on appeal; *see* 20 C.F.R. § 501.2(c).

Office.<sup>6</sup> Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.<sup>7</sup>

In support of his request for reconsideration, appellant submitted additional new medical evidence. In a report dated February 2, 1995, Dr. Michael A. Judd, a Board-certified surgeon, noted appellant's complaints of left leg pain and diagnosed sympathetic dystrophy left lower extremity. He noted that appellant attributed his condition to back surgery in 1990. As Dr. Judd did not attribute appellant's current condition to appellant's accepted employment injuries, his report does not address a change in the nature or extent of appellant's condition necessary for a modification of his wage-earning capacity determination. Therefore, his report is not relevant and is not sufficient to require the Office to reopen appellant's claim for review of the merits.

Dr. E. Patchen Dellinger, a Board-certified surgeon, completed a report on January 9, 1995 and noted appellant had a lump in his right abdominal wall. He noted appellant's history of heavy lifting at work. This report also fails to address the causal relationship between appellant's current condition and his accepted employment injuries and is not relevant to the issue of appellant's wage-earning capacity.

As appellant failed to submit relevant new evidence, the Office properly refused to reopen his claim for review of the merits.

The decisions of the Office of Workers' Compensation Programs dated April 12 and January 13, 1995 are hereby affirmed.

Dated, Washington, D.C.  
February 19, 1998

George E. Rivers  
Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>6</sup> 20 C.F.R. § 10.138(b)(1).

<sup>7</sup> 20 C.F.R. § 10.138(b)(2).