

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of EDWARD L. JENKINS and NATIONAL SECURITY ADMINISTRATION,  
Fort Meade, Md.

*Docket No. 96-469; Submitted on the Record;  
Issued May 6, 1998*

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DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant had a 32 percent loss of wage-earning capacity.

On May 23, 1990 appellant, then a 45-year-old carpenter, developed back pain while helping to move a slate board on to an elevator. He complained of constant pain in his lower back. He stopped working on July 23, 1990. A July 16, 1990 computerized tomography (CT) scan showed a mild bulge of the L4-5 disc. In a November 23, 1990 report, Dr. Andrew Yang, a Board-certified family practitioner, indicated that a magnetic resonance imaging (MRI) scan showed appellant had evidence of posterior spondylytic changes at L4-5 with mild bilateral facet degeneration and a small disc protrusion. He noted that at L5-S1 appellant had a small bulging annulus with minimal posterior spondylytic changes. Dr. Yang reported no definite nerve root compression was seen at either level. In a December 7, 1990 report Dr. Charles P. Adamo, a Board-certified family practitioner, stated that the CT and MRI scans showed a small herniated disc at L4-5. The Office accepted appellant's claim for low back strain and a herniated L4-5 disc. Appellant received continuation of pay for the period July 23 through September 8, 1990 and received temporary total disability compensation for the period October 8 through November 2, 1990. He returned to light-duty work but the employing establishment ended his light-duty assignment on September 21, 1991. The Office recommenced payment of temporary total disability compensation effective September 22, 1991.

In an October 18, 1995 decision, the Office found that appellant was no longer totally disabled for work due to the effects of the employment injury. The Office determined that appellant could perform the duties of an estimator and therefore had a 32 percent loss of wage-earning capacity. The Office reduced appellant's compensation effective November 12, 1995.

The Board finds that the Office properly determined that appellant had only a 32 percent loss of wage-earning capacity.

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 compensation benefits. Once the medical evidence suggests that a claimant is no longer totally disabled but rather is partially disabled, the issue of wage-earning capacity arises.<sup>1</sup> Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions given the nature of the employee's injuries and the degree of physical impairment, his or her usual employment, the employee's age and vocational qualifications, and the availability of suitable employment.<sup>2</sup> Accordingly, the evidence must establish that appellant can perform the duties of the job selected by the Office and that jobs in the position selected for determining wage-earning capacity are reasonably available in the general labor market in the commuting area in which the employee lives. In determining an employee's wage-earning capacity, the Office may not select a makeshift or odd lot position or one not reasonably available on the open labor market.<sup>3</sup>

The Office determined that appellant could perform the duties of an estimator<sup>4</sup> which included the duties of analyzing blueprints, specifications, proposals and other documentation, preparing time cost and labor estimates for products, projects or services, computing cost factors and preparing estimates used for management purposes. Testing of appellant showed that his arithmetic ability was at the fifth grade level and his reading ability was at the fourth grade level. Appellant, however, indicated that he had worked as a building estimator for a private employer from 1977 to 1982. His employment history therefore indicates that appellant had the vocational ability and preparation to perform the duties of an estimator. The position was described as sedentary, requiring the ability to lift up to 10 pounds. In a January 12, 1994 report, Dr. Patricia Tom, a Board-certified family practitioner, indicated that appellant had persistent back pain and recommended that he be retrained in a position that would allow him to change positions frequently and avoid lifting more than 20 pounds, bending and twisting. The position of estimator, therefore, is within appellant's physical limitations. A representative of the state employment service indicated that the job was performed in sufficient numbers within appellant's commuting area to be considered reasonably available. The Office, therefore, properly determined that appellant had the physical and vocational ability to perform the position of an estimator and that the job was reasonably available to appellant.<sup>5</sup> The Office met its burden of proof in reducing appellant's compensation to reflect a 32 percent loss of wage-earning capacity.

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<sup>1</sup> *Garry Don Young*, 45 ECAB 621 (1994).

<sup>2</sup> *See generally*, 5 U.S.C. § 8115(a); A. Larson, *The Law of Workmen's Compensation* § 57.22 (1989).

<sup>3</sup> *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

<sup>4</sup> Department of Labor, *Dictionary of Occupational Titles*, DOT No. 169.267.038 (4th ed. 1977).

<sup>5</sup> The fact that a claimant has been unsuccessful in obtaining a job in the selected position does not establish that the job is not reasonably available in the commuting area. *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

The decision of the Office of Workers' Compensation Programs, dated October 18, 1995, is hereby affirmed.

Dated, Washington, D.C.  
May 6, 1998

David S. Gerson  
Member

Bradley T. Knott  
Alternate Member

A. Peter Kanjorski  
Alternate Member