

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of RICHARD M. PAVLAK and U.S. POSTAL SERVICE,  
POST OFFICE, Royal Oak, Mich.

*Docket No. 96-2005; Submitted on the Record;  
Issued September 28, 1998*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation benefits to reflect his wage-earning capacity as a telephone operator.

The Board has duly reviewed the case record and finds that the Office did meet its burden of proof in this case.

In the present case, the Office accepted that appellant, a mail processor, sustained a number of back injuries during his federal employment. The Office has accepted that appellant sustained a lumbar sprain on October 17, 1989; with recurrences of disability causally related to the October 17, 1989 injury on January 31 and June 2, 1990. The Office has accepted that on December 13, 1990 appellant sustained a lumbar radiculopathy with herniated disc, requiring a subsequent microlumbar discectomy at L4-5. Finally, the Office has also accepted that appellant sustained a traumatic injury on October 1, 1992 which caused lumbar radiculopathy and which required a post lumbar myelogram/laminectomy.

On March 3, 1993 appellant's treating physician, Dr. Robert Ho, a Board-certified neurosurgeon, completed an attending physician's work restriction form wherein he indicated that appellant had reached maximum medical improvement and could return to part-time modified postal work. Appellant's other treating physician, Dr. Mark Brennan, Board certified in physical medicine, continued to report that appellant was disabled for work. In June 1993 Dr. Ho reported that appellant was again disabled, pending further diagnostic studies. The Office then referred appellant to Dr. Grant Hyatt, an orthopedic surgeon, for a second opinion examination. In a report dated September 21, 1993, Dr. Hyatt opined that appellant could return to work with restrictions of no lifting/carrying over 20 pounds, no repetitive bending, twisting, stooping and overhead work, and with the ability to alternatively sit/stand. The Office determined that a conflict existed in the medical opinion evidence regarding appellant's ability to return to work.

The Office then referred appellant to Dr. Stephan Friedman, a Board-certified orthopedic surgeon, for an impartial medical evaluation. In a report dated October 12, 1994, Dr. Friedman opined that appellant did have current medical residuals from his work injury and that they were part of the reason that appellant could not return to full and unrestricted duty. Dr. Friedman stated, however, that appellant was medically able to return to sedentary type work, with no lifting over 10 pounds, and with a sit/stand option.

By decision dated April 11, 1995, the Office reduced appellant's compensation on the grounds that the position of telephone operator represented his wage-earning capacity. The Office denied modification of the prior decision on April 10, 1996.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.<sup>1</sup> If the claimant is no longer totally disabled, but has residual partial disability, the Federal Employees' Compensation Act provides that disability monthly monetary compensation shall be paid equal to 66 2/3 percent of the difference between monthly pay and monthly wage-earning capacity.<sup>2</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>3</sup>

Pursuant to section 8115(a) of the Act,<sup>4</sup> 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 if the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, his degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect his wage-earning capacity in his disabled condition.

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an Office wage-earning capacity specialist for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open labor market, that fits the employee's capabilities with regard to his or her 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. Finally,

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<sup>1</sup> *Wilson Clow, Jr.*, 44 ECAB 157 (1992).

<sup>2</sup> 5 U.S.C. § 8106(a).

<sup>3</sup> *See generally*, 5 U.S.C. § 8115(a).

<sup>4</sup> 5 U.S.C. § 8115(a).

application of the principles set forth in the *Shadrick* decision<sup>5</sup> shall determine the percentage of the employee's loss of wage-earning capacity.<sup>6</sup>

The Office obtained a well-rationalized report from the impartial medical specialist, Dr. Friedman indicating that appellant could return to sedentary work. Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.<sup>7</sup>

On February 27, 1995 an Office rehabilitation specialist completed a form CA-66 (Job Classification Form) for the position of telephone operator. On the form CA-66 for the telephone operator position, the specialist, utilizing a job description provided by the Department of Labor's *Dictionary of Occupational Titles*, noted that the position was sedentary in nature, requiring lifting up to ten pounds occasionally, with sitting most of the time and walking or standing for brief periods of time. The rehabilitation specialist noted that one to three months of vocational preparation would be required for the position. The rehabilitation specialist also indicated that there were a number of listings for telephone operators and telemarketers in the classified advertisements of the Detroit newspaper, such that the job was being performed in sufficient numbers so as to make it reasonably available to appellant within his commuting area. Finally, he noted that \$270.50 to \$350.75 was an average entry level weekly wage for this position.

The Board finds that the Office did properly follow its proscribed procedures in determining appellant's wage-earning capacity as a telephone operator with average weekly earnings of \$270.50. The specialist selected the position of telephone operator from the Department of Labor's *Dictionary of Occupational Titles* to fit appellant's capacity for work, determined the position's prevailing wage rate and indicated that the position was within appellant's geographic locality and existed in sufficient numbers within the local and regional economy to render it suitable for placement consideration. Furthermore, the Office claims examiner properly determined that the physical requirements of the selected position did not exceed the sedentary work tolerance restrictions for appellant as set forth by Dr. Friedman. While appellant's attorney alleged that appellant would not be allowed to exercise a sit/stand option in a telephone operator position, no evidence was presented in support of this allegation.

Appellant submitted additional reports from Dr. Brennan after the reduction of his compensation benefits, which indicated that appellant had fallen down stairs at his home on October 30, 1995 and had increased back pain and numbness of the legs, Dr. Brennan indicated that no further diagnostic tests had been performed. Dr. Brennan's additional reports did not

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<sup>5</sup> *Albert C. Shadrick*, 5 ECAB 376 (1953).

<sup>6</sup> *Dennis D. Owen*, 44 ECAB 475 (1993).

<sup>7</sup> *Harrison Combs, Jr.*, 45 ECAB 716 (1994).

substantiate that appellant's accepted condition had materially worsened such that he could no longer perform sedentary work.<sup>8</sup>

As the evidence of record substantiates that appellant had the wage-earning capacity of a telephone operator, the Office properly reduced appellant's compensation benefits.

The decision of the Office of Workers' Compensation Programs dated April 10, 1996 is hereby affirmed.

Dated, Washington, D.C.  
September 28, 1998

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>8</sup> *Odessa C. Moore*, 46 ECAB 681 (1995). Once loss of wage-earning capacity is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been trained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous. The burden of proof is on the party attempting to show modification of the award.