

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of BERNARD T. CASPER and DEPARTMENT OF THE NAVY,  
NAVAL SEA SYSTEMS COMMAND, NAVAL SHIPYARD,  
Philadelphia, PA

*Docket No. 98-547; Submitted on the Record;  
Issued December 1, 1999*

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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 reduced appellant's compensation benefits effective March 30, 1997 on the grounds that the position of surveillance system monitor represented appellant's wage-earning capacity in his partially disabled condition.

On November 10, 1988 appellant, then a 55-year-old ship tank tester, injured his left knee in the performance of duty. The Office accepted appellant's condition for acute left knee synovitis and it authorized arthroscopic surgery. Appellant began to receive compensation benefits for temporary total disability beginning November 18, 1988. On April 23, 1992 the Office granted appellant a schedule award for a 20 percent permanent impairment of his left lower extremity. Appellant worked in a light-duty position beginning June 9, 1989 until October 1, 1992 when he was terminated due to lack of availability.

In a work restriction evaluation dated April 23, 1993, Dr. Andrew J. Collier, a Board-certified orthopedic surgeon, indicated that appellant could work 8 hours per day with intermittent sitting for 8 hours per day, intermittent walking for 4 to 5 hours per day, intermittent bending and lifting of up to 20 pounds for 8 hours per day and intermittent standing for 4 to 5 hours per day. Dr. Collier recommended that appellant undergo vocational rehabilitation services to return to work.

On September 20, 1994 an Office rehabilitation specialist had authorized a private rehabilitation counselor to provide appellant with vocational rehabilitation services directed toward returning him to work.

In work restriction evaluations dated September 29, 1994 and May 23, 1995, Dr. Walter W. Dearolf, III, a Board-certified orthopedic surgeon and appellant's attending physician, noted that appellant had reached maximum medical improvement "years ago," and

indicated that appellant could work 8 hours per day light duty, with no more than 8 hours continuous sitting, with intermittent walking for 2 hours per day, intermittent standing and bending for 1 hour per day and with intermittent lifting of no more than 20 pounds for 1 hour per day. On December 13, 1995 Dr. Dearolf stated that appellant could “only do a light[-]duty sedentary position. Any job that involve[s] lifting or prolonged walking, he cannot perform.”

On January 31, 1996 a functional capacity evaluation was performed on appellant by Dr. Barry Schnall, a Board-certified physical medicine and rehabilitation specialist, which indicated that appellant’s residual physical capacity was measured at a sedentary level.

After a variety of rehabilitation efforts, the vocational rehabilitation services were terminated when job placement did not prove successful, and the rehabilitation counselor completed a job availability report documenting suitable positions for which appellant was qualified. The rehabilitation counselor identified the positions of security guard and driver/chauffeur as suitable positions for appellant in his partially disabled capacity, which were two positions for which he had interviewed during the rehabilitation process. After receiving Drs. Dearolf’s and Schnall’s most recent reports the rehabilitation specialist requested that the rehabilitation counselor provide several sedentary positions for a constructed loss of wage-earning capacity determination. By reports dated August 7, 1996, the rehabilitation counselor identified the sedentary positions of identification clerk/security clerk, surveillance system monitor, and telephone solicitor/telemarketer as being appropriate to appellant’s partially disabled capabilities. The rehabilitation counselor indicated that the position of “surveillance system monitor,” Department of Labor’s *Dictionary of Occupational Titles* No. 379:367-010, required the ability to talk, hear and see, required a short demonstration as vocational preparation, was reasonably available within appellant’s commuting area at a weekly wage of \$235.60 and was consistent with his sedentary work restrictions.

The Office then determined that the position of a surveillance system monitor most closely matched appellant’s job qualifications and restrictions, and, after ascertaining the current pay rate for appellant’s job and step when injured, calculated his loss of wage-earning capacity using the *Shadrick*<sup>1</sup> formula, and determined that he had a 35 percent wage-earning capacity, or a 65 percent loss of wage-earning capacity.

On January 15, 1997 the Office issued a notice of proposed reduction of compensation advising appellant that it intended to reduce his compensation on the basis that he was no longer totally disabled and that he was able to earn wages as a surveillance system monitor. The Office allotted appellant 30 days within which to submit any contrary evidence. This notice was accompanied by a December 17, 1996 memorandum in which the Office concluded that the evidence of record established that appellant’s wage-earning capacity was fairly and reasonably represented by the position of surveillance system monitor, and a complete description of the position from the *Dictionary of Occupational Titles* was provided.

In response appellant submitted a February 14, 1997 report from Dr. Marc C. Cohen, a chiropractor, which indicated that he was writing on behalf of Dr. Schnall, that appellant’s

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<sup>1</sup> *Albert C. Shadrick*, 5 ECAB 376 (1953).

condition had been worsening, and that he was not fit to perform the job offered. Dr. Cohen stated: “[S]ince Dr. Schnall and I have not authorized this patient to return to any specific job duties he remains fully disabled at this time.” The record, however, also contains a January 21, 1997 form report from Dr. Schnall in which he indicated that appellant had a sedentary work capability. In a February 4, 1997 report, Dr. Schnall indicated that appellant was evaluated on January 29, 1997 and noted that he was “recently ordered a job, but i[s] not sure of what it entails. I requested him to obtain a job description for my review.” Dr. Schnall recommended that appellant return to Dr. Dearolf for reevaluation.

By decision dated February 24, 1997, the Office finalized the proposed reduction in compensation by determining appellant’s loss of wage-earning capacity, based upon his ability to perform the sedentary duties of a surveillance system monitor, and informed him that his benefits would be reduced effective March 30, 1997. The Office found that the chiropractic evidence appellant had submitted in response to the January 15, 1997 notice was of no probative value as the accepted condition for which he was receiving compensation was left knee synovitis and not a spinal subluxation, such that a chiropractor was not considered to be a physician under the Federal Employees’ Compensation Act with regard to that condition. The Office further found that Dr. Schnall stated on January 21, 1997 that appellant could perform sedentary work, which the position of surveillance system monitor entailed, and that, although Dr. Schnall stated on February 4, 1997 that he was not certain what the position entailed, appellant had been given a clear copy of the position’s physical requirements in the December 17, 1996 job description which he should have shared with Dr. Schnall had there been any substantive question, such that Dr. Schnall’s statement that appellant was not sure what it entailed was without basis. Further, the Office found that Dr. Schnall did not state that appellant could not perform the sedentary duties of the position of surveillance system monitor as detailed in the December 17, 1996 memorandum. Therefore, the Office found that appellant was capable of performing the position of surveillance system monitor, which was being performed in sufficient numbers within appellant’s commuting area, such that it represented his wage-earning capacity, and it reduced appellant’s monetary compensation accordingly. On September 4, 1997 the Office reissued the final loss of wage-earning capacity determination decision.<sup>2</sup>

The Board finds that the Office properly reduced appellant’s compensation benefits on the grounds that the position of surveillance system monitor represented appellant’s wage-earning capacity in his partially disabled condition.

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>3</sup>

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<sup>2</sup> The Office noted that appellant’s representative had not received a copy of the February 24, 1997 decision and it reissued the decision to preserve appellant’s appeal rights. In the interim the Office received further medical evidence dated June 25, 1997 from Dr. Schnall which reiterated that appellant could work eight hours per day at a sedentary job.

<sup>3</sup> *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

The Office properly found in its proposed reduction of compensation, which was finalized on February 24, 1997, that appellant was no longer totally disabled for work due to the effects of his November 10, 1988 left knee synovitis injury. Appellant was actually working light duty from June 1989 to October 1992, and Dr. Collier, a Board-certified orthopedic surgeon, reported as early as April 1993 that appellant could work a 40-hour week of light work with limitations on lifting. Dr. Dearolf reported in 1994 and 1995 that appellant could work eight hours per day light duty and in late 1995 changed that to working eight hours per day sedentary duty, noting that appellant had reached maximum medical improvement “long ago.” In addition, Dr. Schnall, a physical medicine and rehabilitation specialist concurred that appellant was rated at sedentary activity.

The rehabilitation counselor assigned to assist appellant identified three positions listed in the *Dictionary of Occupational Titles* which were appropriate for appellant’s qualifications and which had physical restrictions of sedentary activity with intermittent change of position at will. The rehabilitation counselor indicated that these positions were consistent with the current physical restrictions placed upon appellant by his physicians. The Office has stated that in some situations extensive rehabilitation efforts will not succeed. In such circumstances the Office procedures instruct the rehabilitation officer to submit a final report summarizing that placement efforts were not successful and submitting relevant information to the Office.<sup>4</sup>

In this case, the rehabilitation counselor properly submitted reports dated July 7, 1995 and August 7, 1996 indicating that placement efforts had been unsuccessful. The rehabilitation counselor provided required information concerning the position description, the availability of the positions within appellant’s commuting area and the pay ranges within the geographical area as confirmed by State officials. The Office then properly followed established procedures for determining appellant’s employment-related loss of wage-earning capacity.

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

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<sup>4</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814 (8)(b) (October 1993).

vocational qualifications, and the availability of suitable employment.<sup>5</sup> Accordingly, the evidence must establish 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>6</sup>

The Office identified a position of the three listed by the rehabilitation counselor which was the most consistent with appellant's background and, using the information provided by the rehabilitation counselor regarding the prevailing wage rate in the area for a surveillance system monitor, calculated appellant's loss of wage-earning capacity based upon his ability to earn wages as a surveillance system monitor. The Board, therefore, finds that the Office has met its burden of justifying a reduction in appellant's compensation for total disability.

Accordingly, the decision of the Office of Workers' Compensation Programs dated September 4, 1997 is hereby affirmed.

Dated, Washington, D.C.

December 1, 1999

David S. Gerson  
Member

Bradley T. Knott  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>5</sup> See generally, 5 U.S.C. § 8115(a); A. Larson *The Law of Workers' Compensation* § 57.22 (1989); see also *Betty F. Wade*, 37 ECAB 556 (1986). Section 8115(a) of the Act, which provides:

"Wage-earning capacity of an employee is determined by his earnings if his actual earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings of the employees do not fairly and reasonably represent his wage-earning capacity or if the employee has no actual earnings, his earning capacity as appears reasonable under the circumstances is determined with due regard to: (1) the nature of his injury; (2) the degree of physical impairment; (3) his usual employment; (4) his age; (5) his qualifications for other employment; (6) the availability of suitable employment; and (7) other factors or circumstances which may affect his wage-capacity in his disabled condition."

<sup>6</sup> *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).