

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of RICHARD J. CUTHRELL and DEPARTMENT OF THE ARMY,  
DUGWAY PROVING GROUND, Dugway, Utah

*Docket No. 97-681; Submitted on the Record;  
Issued January 5, 1999*

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DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,  
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined appellant's wage-earning capacity based on his ability to work as an Assembler, Small Products II; and (2) whether the Office properly denied modification of its wage-earning capacity decision.

On December 13, 1984 appellant filed a claim for a traumatic injury occurring on that date when he slipped and fell on ice. The Office accepted appellant's claim for a sprained right ankle and a rupture of the right ankle tibiofibular syndesmosis. The Office authorized a February 1985 surgery on the ankle and further accepted that appellant sustained a right knee medial meniscus tear. The Office identified the following conditions as preexisting appellant's employment injury: morbid obesity; sleep apnea, psychiatric problems, lumbar spine pain, hearing loss, asthma, Bell's palsy, hypertension and a complete tear of the radial collateral ligament to the right thumb.

Following his employment injury, appellant returned to limited-duty employment on April 30, 1985. The employing establishment, however, terminated appellant effective April 19, 1986 due to his inability to perform his duties. The Office placed appellant on the periodic rolls.<sup>1</sup>

By decision dated January 4, 1996, the Office adjusted appellant's compensation effective January 7, 1996 to reflect his capacity to earn wages as a small products assembler. By decision dated November 1, 1996, the Office denied modification of its January 4, 1996 decision.

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<sup>1</sup> By decision dated October 14, 1986, the Office granted appellant a schedule award for a 27 percent permanent impairment of his right leg.

The Board has duly reviewed the case record and finds that the Office improperly determined appellant's wage-earning capacity based on his ability to work as an Assembler, Small Products II.

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>2</sup> Under section 8115(a) of the Federal Employees' Compensation Act,<sup>3</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 the employee has no actual earnings, his wage-earning capacity is determined with due regard to 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>4</sup>

After the Office makes a medical determination of partial disability and of special 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 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 through contact with the state employment services or other applicable services. Finally, application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.<sup>5</sup>

In the present case, the Office received a work restriction evaluation dated May 4, 1992, from Dr. P. Lyn Thompson, a Board-certified orthopedic surgeon, who found that appellant had a partial capacity to perform work subject to specified work restrictions. On August 7, 1992 the Office referred appellant to a rehabilitation counselor for vocational rehabilitation.

In a vocational rehabilitation report dated May 20, 1993, the rehabilitation counselor identified the positions of Assembler, Small Products I and II and Electric Motor Assembler as within appellant's capabilities. The rehabilitation counselor recommended case closure.

In a report dated October 16, 1995, an Office rehabilitation specialist determined that the position of small products assembler was reasonably available within appellant's geographical area.

The Office properly relied upon the opinions of the rehabilitation counselor and Office rehabilitation specialist in finding that the position of small products assembler was vocationally

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<sup>2</sup> *David W. Green*, 43 ECAB 883 (1992); *Harold S. McGough*, 36 ECAB 332 (1984).

<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> *Samuel J. Chavez*, 44 ECAB 431 (1993).

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

suitable for appellant and geographically available. The Office, however, further has the responsibility to determine whether the medical evidence establishes that appellant has the ability to perform the selected position. In determining a loss of wage-earning capacity where the residuals of an injury prevent an employee from performing his regular duties, the impairments which preexisted the injury, in addition to the injury-related impairments, must be taken into consideration in the selection of a job within his work tolerance. It is only subsequently acquired impairments unrelated to the injury, which are excluded from consideration in the determination of the employee's work capabilities.<sup>6</sup> In the instant case, the medical evidence is insufficient to show that appellant had the physical capacity to perform the position around the time his compensation was adjusted in January 1996.

In a work restriction evaluation accompanying an office visit note dated April 27, 1994, Dr. Thomas P. Bauman, a Board-certified orthopedic surgeon and appellant's attending physician, found that appellant was unable to work due to age, obesity and arthritis. He opined that appellant had untreatable morbid obesity and arthritis of the knee and ankle.

In a report dated March 11, 1995, Dr. David Curtis, a Board-certified orthopedic surgeon, to whom the Office referred appellant for a second opinion evaluation, identified appellant's current complaints and findings on examination. He found that, regarding appellant's employment-related knee and ankle conditions, continued subjective complaints would prevent him from performing his regular employment but that he could perform sedentary work including the position of small products assembler. Dr. Curtis stated:

“[Appellant] complains of several other medical conditions, including a back problem, which he claims would not allow him to sit and perform sedentary work. The noted other medical conditions, and specifically the back complaint are not job[-]related injuries. From the standpoint of his previous right ankle and knee injuries, I believe that he is fully capable of performing sedentary work.”

Dr. Curtis specifically indicated that he considered only appellant's employment-related conditions and not any preexisting medical problems in finding that he could perform the position of small products assembler. The Office thus issued its wage-earning capacity decision without determining whether any of the appellant's identified preexisting conditions prevented him from performing the duties of the selected position. The Office, therefore, improperly determined appellant's wage-earning capacity based on his ability to work as an Assembler, Small Products II.<sup>7</sup>

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<sup>6</sup> *William Ray Fowler*, 31 ECAB 1817, 1822 (1980).

<sup>7</sup> In view of the Board's disposition of the first issue, the issue of whether the Office properly denied appellant's request for modification of its wage-earning capacity decision is moot.

The decisions of the Office of Workers' Compensation Programs dated November 1 and January 4, 1996 are hereby reversed.

Dated, Washington, D.C.  
January 5, 1999

George E. Rivers  
Member

David S. Gerson  
Member

Michael E. Groom  
Alternate Member