

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of NARVIE RAY TOLBERT and DEPARTMENT OF THE ARMY,  
Fort Benning, GA

*Docket No. 97-2474; Submitted on the Record;  
Issued November 5, 1999*

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DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,  
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to reduce appellant's compensation benefits based on his capacity to earn wages as a gate guard.

The Board has duly reviewed the case on appeal and finds that the Office failed to meet its burden of proof to reduce appellant's compensation benefits based on his capacity to earn wages as a gate guard.

On June 23, 1982 appellant, then a 35-year-old sheet metal mechanic, alleged that he injured his back in the performance of duty on June 18, 1982. The Office accepted appellant's claim for lumbosacral strain and permanent aggravation of postlumbar laminectomy. The Office entered appellant on the periodic rolls on September 19, 1993. The Office reduced appellant's compensation benefits based on his capacity to earn wages as a gate guard by decision dated December 17, 1993. By decision dated March 23, 1994, the Office's Branch of Hearings and Review set aside the December 17, 1993 decision finding that the Office had not submitted sufficient evidence of the reasonable availability of the position in appellant's area. The Office proposed to reduce appellant's compensation benefits by letter dated June 13, 1994 finding that he had the capacity to earn wages as a gate guard. By decision dated October 23, 1995, the Office found that appellant had the wage-earning capacity of a gate guard and reduced his benefits. Appellant requested an oral hearing and, by decision dated April 25, 1997 and finalized April 28, 1997, the hearing representative affirmed the Office's October 23, 1995 decision and

further found that appellant had not submitted sufficient new medical evidence to warrant modification of his wage-earning capacity determination.<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>

In its October 23, 1995 decision, the Office informed appellant that it was adjusting his wage-loss compensation as he was no longer totally disabled and was capable of performing the position of gate guard.

Section 8115 of the Federal Employees' Compensation Act<sup>3</sup> 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.

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by the Office 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 that employee's capabilities with regard to his 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 service or other applicable service. Finally, application of the principles set forth in *Albert C. Shadrick*<sup>4</sup> will result in the percentage of the employee's loss of wage-earning capacity. The basic rate of compensation paid under the Act is 66 2/3 percent of the injured employee's monthly pay.<sup>5</sup>

The Board finds that there is insufficient medical evidence to establish that appellant was capable of performing the constructed position. Appellant's attending physician, Dr. Robert L. White, a Board-certified neurosurgeon, recommended a functional capacity evaluation on July 6, 1994. In a note dated July 11, 1994, Dr. White indicated that appellant could lift up to 25

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<sup>1</sup> Following the Office's April 28, 1997 decision, appellant submitted additional new evidence. As the Office did not review this evidence in reaching a final decision, the Board may not consider it for the first time on appeal. 20 C.F.R. § 501.2(c).

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

<sup>3</sup> 5 U.S.C. §§ 8101-8193, 8115.

<sup>4</sup> 5 ECAB 376 (1953).

<sup>5</sup> *Karen L. Lonon-Jones*, 50 ECAB \_\_\_\_ (Docket No. 97-155, issued March 18, 1999).

pounds. Appellant underwent a functional capacity evaluation on July 15, 1994. This evaluation was conducted by a physical therapist and, indicated that appellant could lift up to 20 pounds and provided further restrictions on walking and standing. Neither Dr. White nor appellant's other attending physicians submitted any further evidence regarding appellant's work restrictions nor did any physician review and adopt the functional capacity evaluation. As a physical therapist is not a physician for the purposes of the Act,<sup>6</sup> this report does not constitute medical evidence and is insufficient to establish appellant's work restrictions. The record is devoid of medical evidence describing appellant's work restrictions from July 11, 1994 until after the Office's October 23, 1995 decision reducing his compensation benefits. Due to this lack of contemporaneous medical evidence, the Board finds that the Office failed to meet its burden of proof to reduce appellant's compensation benefits based on his capacity to earn wages as a gate guard.

The decision of the Office of Workers' Compensation Programs dated April 25, 1997 and finalized April 28, 1997 is hereby reversed.

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

David S. Gerson  
Member

Michael E. Groom  
Alternate Member

Bradley T. Knott  
Alternate Member

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<sup>6</sup> *Jane A. White*, 34 ECAB 515 (1983).