

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT R. MURRAY, JR. and DEPARTMENT OF THE ARMY,
ARMY DEPOT, New Cumberland, PA

*Docket No. 97-2772; Submitted on the Record;
Issued September 20, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation effective December 1, 1996 based on his capacity to earn wages as a dispatcher.

The Board finds that the Office properly reduced appellant's compensation effective December 1, 1996 based on his capacity to earn wages as a dispatcher.

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.¹ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.²

Under section 8115(a) of the Federal Employees' Compensation Act, 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.³ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment

¹ *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

² *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

³ *See Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C § 8115(a).

conditions.⁴ The job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives.⁵

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 or 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 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 the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.⁶

In the present case, the Office accepted that appellant sustained a lumbosacral strain and herniated nucleus pulposus at L4-5 on June 6, 1990; the Office paid compensation for periods of disability.⁷ By decision dated October 30, 1996, the Office reduced appellant's compensation effective December 1, 1996 based on his capacity to earn wages as a dispatcher. The Office determined that appellant's wage-earning capacity was represented by the selected position of dispatcher.⁸ By decision dated and finalized July 11, 1997, an Office hearing representative affirmed the Office's October 30, 1996 decision.

The Office received information from Dr. Bruce Goodman, a Board-certified orthopedic surgeon to whom it referred appellant, who found that appellant was not totally disabled for work. The Office referred appellant to Dr. Goodman in early 1996 because appellant had not regularly visited an attending physician in more than a year. In a report dated March 26, 1996, Dr. Goodman noted that appellant had degenerative disc disease and indicated that he was capable of performing limited-duty work with avoidance of repetitive bending, stooping, crawling, climbing or lifting more than 35 pounds; Dr. Goodman recommended that appellant undergo a work capacity assessment. Appellant underwent a work capacity assessment and, in a report dated June 24, 1996, Dr. Goodman indicated that the results of the assessment showed symptom magnification on appellant's part. Dr. Goodman noted that his recommendation of work restrictions was based on appellant's degenerative disc disease and deconditioning. In a report dated July 24, 1996, Dr. Goodman indicated that appellant should not engage in lifting more than 20 pounds, prolonged standing or extensive bending, stooping or crawling. He stated

⁴ *Albert L. Poe*, 37 ECAB 684, 690 (1986), *David Smith*, 34 ECAB 409, 411 (1982).

⁵ *Id.*

⁶ See *Dennis D. Owen*, 44 ECAB 475, 479-80 (1993); *Wilson L. Clow, Jr.*, 44 ECAB 157, 171-75 (1992); *Albert C. Shadrick*, 5 ECAB 376 (1953); see also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8 (December 1993).

⁷ Appellant stopped work on July 2, 1990 and did not return.

⁸ The Office adjusted appellant's compensation for 4 hours per workday for the week beginning December 1, 1996 and then adjusted appellant's compensation for 8 hours per workday thereafter.

that appellant was capable of performing the dispatcher position which had been selected by his vocational rehabilitation counselor. Due to his deconditioning, Dr. Goodman indicated that appellant was capable of working 4 hours per day for the first week and then 8 hours per day thereafter. The dispatcher position was an essentially sedentary position which involved receiving complaints from the public and broadcasting orders and instructions to remote units. The position did not require lifting more than 10 pounds.

Appellant's vocational rehabilitation counselor had determined that appellant was able to perform the position of dispatcher and that state employment services showed the position was available in sufficient numbers so as to make it reasonably available within appellant's commuting area. The Office properly relied on the opinion of the rehabilitation counselor that appellant was vocationally capable of performing the dispatcher position and a review of the medical evidence, including the opinion of Dr. Goodman, reveals that appellant is physically capable of performing the position. The Board notes that the fact that an employee has been unsuccessful in obtaining work in the selected position does not establish that the work is not reasonably available in his commuting area.⁹

Appellant submitted a January 23, 1997 report in which Dr. James R. Hamsher, an attending Board-certified orthopedic surgeon, indicated that he had chronic low back pain syndrome and was temporarily disabled due to low back pain. Dr. Hamsher did not, however, specify the extent of appellant's disability or otherwise clearly indicate that appellant could not perform the dispatcher position. Nor did he explain how appellant's findings on examination and diagnostic testing warranted a disability determination. In report dated April 4, 1997, Dr. Stuart A. Hartman, an attending osteopath, indicated that appellant reported low back pain with left radicular symptoms; he indicated that appellant was not capable of "performing any gainful employment." In a report dated May 20, 1997, Dr. Hartman indicated that appellant's condition had improved. Dr. Hartman's reports do not show that appellant could not perform the dispatcher position effective December 1, 1996. His reports are of limited probative value in that he did not adequately explain how objective findings, rather than subjective symptoms, showed that appellant could not perform any degree of work. This report, however, is of limited probative value on the relevant issue of the present case in that it does not contain adequate medical rationale in support of its opinion on causal relationship.¹⁰

The Office considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment, age and employment qualifications, in determining that the position of dispatcher represented appellant's wage-earning capacity effective December 1, 1996.¹¹ The weight of the evidence of record establishes that, at the time his compensation was adjusted effective December 1, 1996, appellant had the requisite physical ability, skill and experience to perform the position of dispatcher and that such a position was

⁹ See *Leo A. Chartier*, 32 ECAB 652, 657 (1981).

¹⁰ See *George Randolph Taylor*, 6 ECAB 986, 988 (1954) (finding that a medical opinion not fortified by medical rationale is of little probative value). It does not appear that Dr. Hamsher or Dr. Hartman reviewed the requirements of the dispatcher position.

¹¹ See *Clayton Varner*, 37 ECAB 248, 256 (1985).

reasonably available within the general labor market of appellant's commuting area. Therefore, the Office properly based appellant's wage-earning capacity effective December 1, 1996 on the position of dispatcher.¹²

The decisions of the Office of Workers' Compensation Programs dated and finalized July 11, 1997 and dated October 30, 1996 are affirmed.

Dated, Washington, D.C.
September 20, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

¹² Based on Dr. Goodman's assessment of appellant's initial need to overcome deconditioning, the Office properly adjusted appellant's compensation for 4 hours per workday for the week beginning December 1, 1996 and then adjusted appellant's compensation for 8 hours per workday thereafter.