

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT K. BRYSON and DEPARTMENT OF DEFENSE,
DEFENSE CONSTRUCTION SUPPLY CENTER, Columbus, OH

*Docket No. 98-1981; Submitted on the Record;
Issued May 11, 2000*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the position of surveillance system monitor properly represents appellant's wage-earning capacity.

On April 22, 1992 appellant, then a 35-year-old temporary forklift operator,¹ filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that on January 8, 1992 he first realized his back pain was due to his federal employment. The Office of Workers' Compensation Programs accepted the claim for central extruded disc at L4-5 and approved his laminectomy surgery performed on April 29, 1992 and authorized spinal fusion surgery. Appellant stopped work on April 29, 1992 and received appropriate compensation.

In a report dated October 11, 1993, Dr. Alan L. Longert, a Board-certified orthopedic surgeon, concluded that appellant was reaching maximum medical improvement and that he was totally disabled from his position of forklift driver. Physical examination by Dr. Longert revealed normal straight leg lifting, no evidence of radiculopathy "and no gross neuromuscular deficit." Dr. Longert stated that he had "no explanation" for appellant's failure to respond to rehabilitation. He indicated that appellant was capable of working and recommended that he receive retraining for light work, which would require no bending or heavy lifting. Dr. Longert continued submitting reports indicating that appellant's symptoms remained essentially unchanged.

On November 11, 1993 the Office referred appellant to Dr. James H. Rutherford, a Board-certified orthopedic surgeon, who concluded, in a December 1, 1993 report, that appellant was only partially disabled due to his centrally extended disc at L4-5. Dr. Rutherford opined that appellant was totally disabled from his position as a forklift driver. He completed a work restriction evaluation (OWCP 5), which indicated that appellant would reach maximum medical

¹ The Office noted that on the date-of-injury, appellant was working 24 hours per week due to a decreased work load, but that prior to January 5, 1992 he had been employed as a temporary employee working 40 hours per week.

improvement on February 4, 1994 and could perform sedentary work with restrictions including one hour of intermittent walking, up to four hours of standing and no heavy lifting, bending, squatting, climbing and kneeling.

The Office referred appellant for vocational rehabilitation services on March 31, 1994. In the referral letter, it was noted that the employing establishment did not have light duty available for appellant.

In progress reports dated April 4 and August 31, 1996, the rehabilitation counselor identified two positions, which were within appellant's physical limitations, order clerk, food and beverage and surveillance system monitor, which were reasonably available within appellant's commuting area. He noted that the weekly wage for a surveillance system monitor was between \$4.25 per hour and \$6.00 per hour and that the position was unskilled requiring a short demonstration period of training.

In a treatment note dated September 17, 1996, Dr. Longert noted that appellant's condition remained unchanged, there was no evidence of radiculopathy and that he had reached maximum medical improvement.

In a status report dated September 20, 1996, the rehabilitation specialist noted that appellant had been provided with training services, which were unsuccessful due to appellant's "inability to handle college level math." Based upon appellant's skills and work limitations, the positions of order clerk, food and beverage and surveillance system monitor were identified as suitable jobs based upon their availability and work requirements.

The position description of surveillance system monitor indicated that the position entailed monitoring "premises of public transportation terminals to detect crimes or disturbances, using closer circuit television monitors," notifying authorities of the need for corrective action by telephone, observing television screens, which transmit views of the facility sites, pushing hold buttons to maintain surveillance of locations where an incident developed, adjusting monitor controls to improve reception and calling repair services when the equipment malfunctions. The physical requirements of the position were sedentary. The position required up to 30 days of vocational preparation.

By letter dated October 10, 1996, the Office issued a notice of proposed deduction of compensation and stated that it proposed to reduce appellant's compensation as he was no longer totally disabled and had the capacity to earn wages as a surveillance system monitor at \$240.00 per week. The Office allowed appellant 30 days to submit evidence if he disagreed.

By decision dated November 14, 1996, the Office reduced appellant's compensation finding that the position of surveillance system monitor fairly and reasonably reflected appellant's wage-earning capacity.

Appellant, through counsel, requested an oral hearing in a letter dated November 27, 1996.

In a decision dated May 6, 1997, an Office hearing representative vacated the November 16, 1996 decision finding that the Office erred in its computation of the reduction of appellant's compensation as it was based on an incorrect pay rate.

By decision dated July 9, 1997, the Office recalculated appellant's loss of wage-earning capacity, as instructed by the Office hearing representative.² The Office then reduced appellant's compensation finding that the position of surveillance system monitor fairly and reasonably reflected appellant's wage-earning capacity.

On July 28, 1997 appellant requested an oral hearing, which was held on February 28, 1998.

By letter dated March 14, 1998, appellant enclosed a March 9, 1998 treatment note from Dr. Longert. Dr. Longert reported his findings on physical examination, noted appellant's complaints that the pain in his back prevents him from sitting for more than two hours and noted that review of x-ray interpretations showed "no significant changes from his 1996 x-ray." Regarding appellant's work capability, Dr. Longert opined:

"I would agree that he is not capable of sitting eight hours. He is capable, however, of full gainful employment as long as he sits no longer than 2 hours at a time with the ability to stand and walk for 15 to 20 minutes before returning to sitting. He is also restricted from any repeated bending at the waist or lifting of over 15 pounds."

By decision dated April 30, 1998, the hearing representative affirmed the July 9, 1997 decision reducing appellant's compensation benefits. The hearing representative found that the Office properly determined that the physical requirements of a surveillance system monitor were within appellant's restrictions and, thus, the position fairly and reasonably reflected appellant's wage-earning capacity.

The Board finds that the position of surveillance system monitor properly represents appellant's wage-earning capacity.

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 her wage-earning capacity.³

Section 8106 of the Federal Employees' Compensation Act provides that a claimant may be paid 66 percent of the difference between her monthly pay and her monthly wage-earning

² The recalculation increased the amount of compensation appellant received. The pay rate aspects of the Office's determination are not disputed on this appeal.

³ *Sylvia Bridcut*, 48 ECAB 162 (1996); *James B. Christenson*, 47 ECAB 775 (1996); *Carla Letcher*, 46 ECAB 452 (1995).

capacity after the beginning of partial disability.⁴ With regard to section 8115(a), this section of the Act provides that wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent her wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity, or the employee has no actual earnings, her wage-earning capacity is determined with due regard to the nature of her injury, the degree of physical impairment, her usual employment, her age, her qualifications for other employment, the availability of suitable employment and other factors or circumstances, which may effect her wage-earning capacity in her disabled condition.⁵

The Office determined that appellant could perform the duties of a surveillance system monitor, which included notifying authorities for the need for corrective action by telephone, observing television screens, which transmit views of the facility sites, pushing hold buttons to maintain surveillance of locations where an incident developed, adjusting monitor controls to improve reception and calling repair services when the equipment malfunctions. The physical requirements of the position were sedentary with no indication that appellant was required to sit continuously for eight hours. The position required up to 30 days of vocational preparation and was unskilled. Both Dr. Longert and Dr. Rutherford noted physical restrictions requiring a sedentary position with no heavy lifting. The vocational rehabilitation counselor noted that he had performed a labor market survey indicating that surveillance system monitor positions were available in appellant's commuting area. Thus, the Office met its burden of proof in reducing appellant's compensation as there was no medical evidence, at the time of the reduction of compensation, indicating that appellant could not perform the duties of the selected position.

After the Office properly reduced compensation, the burden to modify shifted to appellant.⁶ However, the March 9, 1998 report by Dr. Longert is insufficient to establish that appellant is unable to perform the position of surveillance system monitor. While Dr. Longert noted restrictions on sitting over two hours and recommended walking after sitting and no heavy lifting, the position description for a surveillance system monitor does not indicate that appellant is required to sit continuously for eight hours or that he would be unable to get up and walk around for 15 to 20 minutes before sitting down again, or that there is any lifting requirement. Thus, Dr. Longert's restrictions are not inconsistent with the selected position.

Inasmuch as the evidence of record establishes that appellant could perform sedentary work with no heavy lifting and as the Office followed established procedures for determining vocational suitability and reasonable availability of the position selected, the Board finds that the Office, having given due regard to the factors specified at section 8115(a) of the Act, properly reduced appellant's monetary compensation on the grounds that he has the capacity to earn wages as a surveillance system monitor.

The decisions of the Office of Workers' Compensation Programs dated April 30, 1998 and July 9, 1997 are hereby affirmed.

⁴ 5 U.S.C. § 8106.

⁵ *Pope D. Cox*, 39 ECAB 143 (1987).

⁶ *Sue A. Sedgwick*, 45 ECAB 211, 215-16 (1993)

Dated, Washington, D.C.
May 11, 2000

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member