

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CLARENCE C. PARKER, JR. and DEPARTMENT OF HEALTH &
HUMAN SERVICES, NATIONAL INSTITUTES OF HEALTH, Bethesda, MD

*Docket No. 99-495; Submitted on the Record;
Issued November 28, 2000*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's monetary compensation on the grounds that he had the capacity to earn wages as a protective signal operator.

The Board has duly reviewed the evidence of record and finds that the Office improperly reduced appellant's monetary compensation.

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.¹ The Office has not met its burden of proof in this case.

In its September 23, 1998 decision, the Office adjusted appellant's monetary compensation because the medical evidence showed that he was no longer totally disabled for work due to the effects of his employment injury. The Office found that the weight of the medical evidence rested with the June 14, 1996 report of Dr. James R. Kunec, a Board-certified orthopedic surgeon and Office referral physician. He reported that appellant was equipped only to perform sedentary duties that did not require the use of his left arm. Based on this evidence, the Office found that the position of protective signal operator was medically and vocationally suitable in accordance with the factors set forth in 5 U.S.C. § 8115(a).

The Office must base its wage-earning capacity determination on a reasonably current medical evaluation.²

¹ *Harold S. McGough*, 36 ECAB 332 (1984).

² *Carl C. Green, Jr.*, 47 ECAB 737, 746 (1996).

In *Anthony Pestana*³ the Office made its wage-earning capacity determination almost five years after the claimant's most recent thorough physical examination and evaluation. The Board found that the Office failed to meet its burden of proof to justify a reduction in the claimant's compensation benefits by failing to demonstrate that the selected position fairly and reasonably represented his wage-earning capacity consistent with his current work tolerance limitations. In *Ellen G. Trimmer*⁴ the Board found that the Office did not meet its burden of justifying the reduction of the employee's temporary total disability compensation. The Office had based its determination on an August 4, 1975 work tolerance limitations report by the employee's attending physician. By the time the Office determined in July 1977 that the employee was no longer disabled, this report was almost two years old and the passage of time had lessened the relevance of the work tolerance limitations report.

In the present case, the Office reduced appellant's compensation on September 23, 1998 based on Dr. Kunec's report of June 14, 1996, which the Office found represented the weight of the medical evidence. As this report was over two years old when the Office made its wage-earning capacity determination, the Board finds that the Office has failed to demonstrate that the selected position represents appellant's wage-earning capacity consistent with his current work tolerance limitations.

Moreover, the record in this case indicates that appellant had actual earnings in several jobs prior to his examination by Dr. Kunec in 1996. Generally, wages actually earned are the best measure of a wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.⁵ Before the Office attempts to use a constructed or selected position to determine an employee's wage-earning capacity, it must be established that actual earnings do not fairly and reasonably represent wage-earning capacity.⁶ The Office's September 23, 1998 wage-earning capacity determination made no showing that appellant's actual earnings did not fairly and reasonably represent his wage-earning capacity.

³ 39 ECAB 980, 987 (1988).

⁴ 32 ECAB 1878, 1882 (1981).

⁵ *Dennis E. Maddy*, 47 ECAB 259 (1995).

⁶ *Radames Delgado-Serrano*, 47 ECAB 650 (1996).

The September 23, 1998 decision of the Office of Workers' Compensation Programs is reversed.

Dated, Washington, DC
November 28, 2000

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member