

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JAMES W. HARRISON and DEPARTMENT OF THE NAVY,  
PHILADELPHIA NAVAL SHIPYARD, Philadelphia, PA

*Docket No. 98-2549; Submitted on the Record;  
Issued October 5, 2000*

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DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,  
VALERIE D. EVANS-HARRELL

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

In a decision dated June 25, 1997, the Office reduced appellant's monetary compensation effective July 20, 1997 because the medical evidence showed that he was no longer totally disabled for work due to the effects of his accepted employment injury. The Office found that appellant was able to perform the duties and physical requirements of the position of dispatcher eight hours per day with restrictions.

Appellant requested a hearing before an Office hearing representative. In a decision dated May 22, 1998, the Office hearing representative affirmed the reduction of appellant's monetary compensation. The hearing representative found that the November 8, 1993 report of Dr. Paul L. Liebert, a Board-certified orthopedic surgeon and impartial medical specialist, represented the weight of the medical evidence and established that appellant was capable of working eight hours a day with restrictions. The hearing representative further found that the Office properly based its determination regarding appellant's wage-earning capacity on the work restrictions provided by Dr. Liebert on November 8, 1993.

The Board finds that the Office has not met its burden of proof to justify the reduction of appellant's monetary compensation.

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.<sup>1</sup> In this case, the Office reduced appellant's monetary compensation on the grounds that he has the capacity to earn wages as a dispatcher.

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<sup>1</sup> *Harold S. McGough*, 36 ECAB 332 (1984).

Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions given 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>2</sup>

In determining appellant's wage-earning capacity, the Office relied on the November 8, 1993 evaluation of the impartial medical specialist, Dr. Liebert. The Board has held, however, that a wage-earning capacity determination must be made on a reasonably current medical evaluation.<sup>3</sup>

In the case of *Keith Hanselman*,<sup>4</sup> the relevant medical report was almost two years old when the Office issued its decision modifying the claimant's compensation. The relevant work restriction evaluation form was over one year old, was not fully completed, listed no current findings and was unaccompanied by evidence that it was made with the benefit of a concurrent physical examination. The Board held that these reports could not form a valid basis for a loss of wage-earning capacity determination.

In the case of *Ellen G. Trimmer*,<sup>5</sup> the Board found that the Office did not meet its burden of justifying the reduction of the employee's monetary compensation because of fatal defects in its determination of wage-earning capacity. The Office had based its decision on a work-tolerance limitations report by the employee's attending physician, but by the time the Office determined that the employee was no longer disabled, this report was almost two years old and the passage of time had lessened its relevance.

When, in the present case, the Office made its wage-earning capacity determination on June 25, 1997, Dr. Liebert's November 8, 1993 evaluation was over three and a half years old. Because the Office based its wage-earning capacity determination on a medical evaluation that was not reasonably current, the Board finds that the Office did not meet its burden of proof to justify the reduction of appellant's monetary compensation.

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<sup>2</sup> 5 U.S.C. § 8115(a). See generally 2 A. Larson, *The Law of Workers' Compensation* § 57.22 (1989).

<sup>3</sup> *Carl C. Green, Jr.*, 47 ECAB 737 (1996); *Anthony Pestana*, 39 ECAB 980 (1988); see also, FECA Program Memorandum No. 77, as amended May 9, 1983, states that in determining the employees' loss of wage-earning capacity the Office must ensure that the record contains a detailed current description of the employee's ability to perform work in a disabled condition.

<sup>4</sup> 42 ECAB 680 (1991).

<sup>5</sup> 32 ECAB 1878 (1981).

The May 22, 1998 decision of the Office of Workers' Compensation Programs is reversed.

Dated, Washington, DC  
October 5, 2000

David S. Gerson  
Member

Michael E. Groom  
Alternate Member

Valerie D. Evans-Harrell  
Alternate Member