

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JOE HUSTED and DEPARTMENT OF JUSTICE,  
BUREAU OF PRISONS, Lewisburg, PA

*Docket No. 99-2070; Submitted on the Record;  
Issued October 25, 2000*

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DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,  
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation benefits effective July 20, 1997, based on his capacity to perform the duties of residence counselor.

The Office accepted that appellant, then a 32-year-old corrections officer, sustained employment-related injuries on April 29, 1985 which resulted in a displaced lateral tibial plateau, fracture of the right tibia and tear of the right knee lateral meniscus.<sup>1</sup> He stopped work that day, but returned on September 29, 1985 with restrictions, until his position with the employing establishment was eliminated in February 1996. Appellant was placed on the periodic rolls and received compensation benefits for total disability.

In a work restriction evaluation (Form OWCP-5) dated July 25, 1996, Dr. Jonathan Hahn, a Board-certified orthopedist and appellant's attending physician, stated that appellant was only capable of performing medium work within certain physical restrictions. Dr. Hahn opined that appellant was unable to run, walk and climb while at work. He specifically noted that appellant had been able to work in his light-duty assignment of tower duty and requested that he continue such sedentary duty.

By letter dated August 22, 1996, the Office referred appellant for rehabilitation services. Appellant participated minimally with vocational rehabilitation, indicating that he was more disabled than had been reported by his physician. His vocational rehabilitation file was later closed in May 1997. In a May 7, 1997 report, the vocational counselor set forth to the Office the

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<sup>1</sup> The Board notes that the Office subsequently accepted that appellant sustained a cervical strain and bilateral knee sprain at work on August 9, 1995. Appellant previously filed a claim for compensation for an injury on June 13, 1993 that was later denied by the Office. On September 30, 1997 he claimed a recurrence of the August 9, 1995 injury, which the Office denied on March 19, 1998 on the grounds that it was not causally related to the accepted injury.

three positions that were within appellant's physical capabilities and vocational skills, and found these positions performed in sufficient numbers in appellant's geographic area so as to be deemed reasonably available to appellant. The Office selected the position of residence counselor as being representative of appellant's wage-earning capacity.

On May 9, 1997 the Office provided appellant with notice of a proposed reduction of compensation, based on his ability to perform the duties of a residence counselor. The Office advised appellant that if he disagreed with the proposed action, he could submit additional factual or medical evidence relevant to his capacity to earn wages.

In a letter dated June 5, 1997, appellant provided a narrative statement, in which he disagreed with the proposed decision. He indicated that residence counselor position was approximately three hours from his residence and therefore not a reasonable employment opportunity for him.

By decision dated June 24, 1997, the Office reduced appellant's compensation, effective July 20, 1997, based on an earning capacity of \$487.31 per week in the selected position.

In a July 11, 1997 letter, appellant requested an oral hearing before an Office hearing representative.

A hearing was held on November 17, 1998 to determine whether the position of residence counselor represented appellant's wage-earning capacity and whether the Office properly reduced appellant's compensation. Appellant testified that pain in his right leg and his upper and lower back had bothered him and that he took pain medication on a regular basis and used a cane approximately 60 percent of the time due to his right leg injury. He testified that he was not capable of performing the duties of a residence counselor, which he indicated was not a sedentary position, because he was still in pain most of the time. Appellant testified further that he had not worked since February 1996 in any capacity and was on disability retirement.<sup>2</sup>

By decision dated January 14, 1999, the hearing representative affirmed the Office's June 24, 1997 decision on the grounds that the evidence of record established that the position of residence counselor was medically and vocationally suited for appellant.

The Board finds that the Office properly reduced appellant's compensation benefits effective July 20, 1997 based on his capacity to perform the duties of residence counselor.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.<sup>3</sup> If an employee's disability is no longer total, but the employee remains partially disabled, the Office may reduce compensation benefits by determining the employee's wage-earning capacity.<sup>4</sup> Wage-earning capacity is a measure of the employee's

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<sup>2</sup> On May 2, 1998 appellant requested that his compensation benefits be terminated effective May 1, 1998 as he had elected to receive retirement benefits from the Office of Personnel Management effective July 19, 1997.

<sup>3</sup> *Bettye F. Wade*, 37 ECAB 556 (1986).

<sup>4</sup> 5 U.S.C. § 8115(a); *see also* 20 C.F.R. § 10.303(a).

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>5</sup>

After the Office makes a medical determination of partial disability and of special work restrictions, it may refer the employee's case 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 market, that fits the employee's capabilities with regard to his or her 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 services or other applicable services. 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.<sup>6</sup>

In this case, the Office selected the sedentary position of residence counselor for appellant (*Dictionary of Occupational Titles* No. 045.107-038). The residence counselor position is described by the *Dictionary of Occupational Titles* as sedentary, which includes lifting up to 10 pounds with 75 percent of the work performed inside. The position requires two to four years of vocational preparation. The job description indicates that the person will:

“[P]rovide individual and group guidance services relative to problems of scholastic, educational, and personal-social nature to residents. Suggests remedial or corrective actions to assist residents in making better adjustments and in planning intelligent life goals. Plans and directs programs to students and assists in the integration into residential facility. Investigates reports of misconduct and attempts to resolve or eliminate causes of conflict.”

The rehabilitation counselor, in recommending the position to the Office, found that appellant's transferable skills and education qualified him vocationally for the position. The rehabilitation counselor relied on Dr. Hahn's evaluation form dated July 25, 1996, which outlined appellant's medical restrictions. Dr. Hahn indicated that appellant was medically capable of working 8 to 10 hours per day with restrictions of no running and no standing, walking or climbing stairs more than 1/3 of the workday. Appellant was also restricted from kneeling, squatting, crawling and lifting, or carrying more than 50 pounds.

In a CA-66 form updated on May 7, 1996, the rehabilitation counselor determined that appellant was both physically and vocationally able to perform the duties of the residence counselor position. He also determined that the position was reasonably available in appellant's

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<sup>5</sup> *Samuel J. Chavez*, 44 ECAB 431 (1993).

<sup>6</sup> *Albert C. Shadrick*, 5 ECAB 376 (1953). This case developed the formula for determining loss of wage-earning capacity based on actual earnings, which was codified by regulation at 20 C.F.R. § 10.303(b) of this regulation, provides that wage-earning capacity in terms of percentage is obtained by dividing the employee's earnings by the current pay rate, which means current salary or pay rate for the job held at the time of injury; *see also Robin Bogue*, 46 ECAB 488 (1995).

commuting area and listed the reported weekly wage for the position. Thereafter, the Office correctly applied the principles set out in *Shadrick*<sup>7</sup> and reduced appellant's continuing compensation to reflect his employment-related loss of wage-earning capacity.

Appellant contends that the residence counselor position is not sedentary in nature and that he can not perform the physical duties of the position. There is no indication, however, that the selected position is outside the physical restrictions imposed by Dr. Hahn. The residence counselor position does not require physical activity beyond the stated limitations. Although appellant argued that the position could result in some altercations and that he could not perform the duties outlined in the description, the medical evidence on file including updated reports from Dr. Hahn on April 7 and July 21, 1997, indicates that appellant is capable of working full time with restrictions that have been taken into account in the chosen position. Moreover, in finding the selected position to be vocationally suitable, the Office gave due regard to the enumerated factors under 5 U.S.C. § 8115(a) in determining that the selected position represented appellant's wage-earning capacity.

Appellant also contends that he was unable to locate such a position in his geographic area and that the position located by the counselor was unreasonably distant from his residence. However, this does not establish that the work is not reasonably available in the area.<sup>8</sup> The position must be performed in sufficient numbers within the commuting area to be considered reasonably available. Further, the rehabilitation specialist determined that the selected position was reasonably available in appellant's commuting area at the time the Office rendered its decision.

The Board has held that because the rehabilitation specialist is an expert in the field of vocational rehabilitation, the claims examiner may rely on his or her opinion as to whether the job is reasonably available and vocationally suitable. The rehabilitation specialist properly concluded that selected position was performed in such numbers within appellant's commuting area as to be considered reasonably available. The rehabilitation specialist documented in his report that he contacted an employer to determine that the selected position was reasonably available. The evidence of record therefore, contains probative evidence regarding reasonable availability.<sup>9</sup>

The Office properly evaluated appellant's ability to return to the labor market as a residence counselor based on his physical capabilities and transferable law enforcement skills and education. Furthermore, the Office properly utilized the wage rate for a residence counselor in determining appellant's wage-earning capacity. It considered the average salary for this position and that appellant held a GS-7 step 1 on his date of injury, including a law enforcement differential in addition to the general locality differential and determined the rate of \$442.31 per week as the appropriate wage rate.

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<sup>7</sup> *Albert C. Shadrick*, *supra* note 6.

<sup>8</sup> *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

<sup>9</sup> *See Carla Letcher*, 46 ECAB 452 (1995).

In view of the foregoing, the Board finds that the Office properly found that appellant was no longer totally disabled but rather partially disabled as a result of his April 29, 1985 work injury and properly determined that the position of residence counselor represented appellant's wage-earning capacity.

The decision of the Office of Workers' Compensation Programs dated January 14, 1999 is hereby affirmed.

Dated, Washington, DC  
October 25, 2000

David S. Gerson  
Member

Michael E. Groom  
Alternate Member

Priscilla Anne Schwab  
Alternate Member