

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NORMAN A. JOHNSON and DEPARTMENT OF THE INTERIOR,
NATIONAL PARK SERVICE, New York, NY

*Docket No. 00-729; Submitted on the Record;
Issued February 26, 2001*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation to reflect his wage-earning capacity in the selected position of telephone solicitor/market research interviewer.

On October 3, 1994 appellant, then a 47-year-old laborer, filed a traumatic injury claim alleging that he injured his knee in the performance of duty. The Office accepted his claim for contusion of the right knee on December 9, 1994. Appellant stopped work on October 3, 1994 and was subsequently placed on the periodic roll for temporary total disability. Appellant returned to light-duty work on May 2, 1996, but was removed by the employing establishment effective August 30, 1996 due to his inability to perform the position and placed back on the periodic rolls.

This case has been before the Board before. In the prior decision, the Board granted the Director's request to remand the case to further development and set aside the decision dated May 30, 1997, which reduced appellant's benefits to zero pursuant to 20 C.F.R. § 10.124(f).¹

Subsequent to the Board's remand, the Office issued a notice of proposed reduction of compensation dated October 16, 1998. The Office advised appellant, in the October 16, 1998 proposal to reduce compensation benefits, that it found the May 8, 1995 report by Dr. Sanford Wert, a second opinion Board-certified orthopedic surgeon, to represent the weight of the medical evidence that appellant was capable of working in a sedentary position for eight hours per day. Next, the Office determined that the position of telephone solicitor/market research interviewer represented his wage-earning capacity and reduced his compensation benefits accordingly. By decision dated December 16, 1998, the Office finalized the reduction of his compensation benefits effective that date.

¹ Docket No. 98-903 (issued July 27, 1998).

The Board finds that the Office did not properly reduce appellant's compensation to reflect his wage-earning capacity in the selected position of telephone solicitor/market research interviewer.

Once the Office accepts a claim, it has the burden of proof to establish that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.²

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.³ When the Office makes a medical determination of partial disability and of the specific work restrictions, it should 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 labor market, that fits the employee's capabilities in light of 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 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.⁴

The Board has held that the Office may not base a determination of wage-earning capacity on medical evidence that is not current. In *Ellen G. Trimmer*,⁵ for example, the Board found that the Office had not met its burden of proof to justify the reduction of the claimant's monetary compensation when it based its decision on a medical report that was almost two years old. The Board found that the passage of time had lessened the relevance of the report. In *Samuel J. Russo*,⁶ the Board reversed where the Office determined the claimant's wage-earning capacity without a current medical evaluation of the claimant's work limitations. The most recent medical reports regarding such limitations in that case were made three years prior to the Office's determination. And in *Anthony Pestana*,⁷ the Board held that the Office failed to ensure that the record contained a detailed current description of the claimant's disabled condition and ability to perform work. In that case, the Office made its wage-earning capacity determination nearly five years after the claimant's most thorough physical examination and evaluation.

² *Carla Letcher*, 46 ECAB 452 (1995).

³ *James Henderson, Jr.*, 51 ECAB ____ (Docket No. 98-616, issued January 10, 2000); see 5 U.S.C. § 8115(a).

⁴ *James A. Birt*, 51 ECAB ____ (Docket No. 98-1117, issued January 20, 2000); *Hattie Drummond*, 39 ECAB 904 (1988); see *Albert C. Shadrick*, 5 ECAB 376 (1953).

⁵ 32 ECAB 1878 (1981).

⁶ 28 ECAB 43 (1976).

⁷ 39 ECAB 980 (1988).

The Office in this case based its December 16, 1998 determination of wage-earning capacity on medical evidence obtained from Dr. Wert dated May 8, 1995. Consistent with its case precedent, the Board finds that this evidence is stale and cannot form a valid basis for a loss of wage-earning capacity determination.

It is well established that, once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.⁸ The Board finds that the Office failed to meet its burden of proof by failing to demonstrate that the selected position of cashier was consistent with appellant's current work tolerance limitations.

The decision of the Office of Workers' Compensation Programs dated December 16, 1998 is hereby reversed.

Dated, Washington, DC
February 26, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

⁸ *Harold S. McGough*, 36 ECAB 332 (1984).