

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of WILLIE M. FOX and DEPARTMENT OF THE NAVY,  
NAVAL SHIPYARD, Philadelphia, PA

*Docket No. 00-1810; Submitted on the Record;  
Issued June 5, 2001*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation effective March 28, 1999 based on his capacity to earn wages as a service dispatcher.

On April 10, 1995 appellant, then a 42-year-old machinist, filed an occupational disease claim for a herniated disc, severe cervical stenosis and lower back pain. The employing establishment terminated appellant's employment effective April 28, 1995 on the grounds that he was physically unable to perform the full duties of his position. Appellant's application for disability retirement was approved, but he elected to receive benefits under the Federal Employees' Compensation Act.<sup>1</sup> The Office accepted that the claim appellant sustained cervical spine stenosis.

On October 13, 1998 the Office proposed to reduce appellant's compensation on the grounds that he had the capacity to earn wages as a service dispatcher. By decision dated March 18, 1999, the Office reduced appellant's compensation effective March 28, 1999 on these grounds. Appellant requested a hearing, which was held on September 21, 1999. By decision dated January 24, 2000, an Office hearing representative found that the Office properly reduced appellant's compensation effective March 28, 1999 based on his capacity to earn wages as a dispatcher.

The Board finds that the Office properly reduced appellant's compensation effective March 28, 1999 based on his capacity to earn wages as a dispatcher.

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

Section 8115 of the Act,<sup>2</sup> titled “Determination of Wage-Earning Capacity” states in pertinent part:

“In determining compensation for partial disability, ... if the actual earnings of the employee do not fairly and reasonably represent his wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity as appears reasonable under the circumstances is determined with due regard to --

- (1) the nature of his injury;
- (2) the degree of physical impairment;
- (3) his usual employment;
- (4) his age;
- (5) his qualifications for other employment;
- (6) the availability of suitable employment; and
- (7) other factors or circumstances which may affect his wage-earning capacity in his disabled condition.”

The position selected by the Office as representative of appellant’s wage-earning capacity is sedentary, according to the Department of Labor’s *Dictionary of Occupational Titles*.<sup>3</sup> The physical demands of this position do not exceed the work tolerance limitations set forth by appellant’s attending physician, Dr. John R. Walsh, in a May 4, 1998 report. They also do not exceed the limitations set forth by an Office referral physician, Dr. Mark P. Brigham, in a March 13, 1996 report of appellant’s work tolerance. There are no medical reports that indicate appellant has more restrictive limitations than those set forth by Drs. Brigham and Walsh.

A rehabilitation counselor, after working with appellant for more than eight months and conducting vocational testing, concluded that appellant met the specific vocational preparation requirements of the position “by virtue of his prior work experience.” This rehabilitation counselor, through contact with the state employment service, ascertained that the position of service dispatcher was reasonably available in appellant’s commuting area. An Office rehabilitation specialist determined the prevailing wage rate for this position and the Office used the low end of such rate as the basis of appellant’s wage-earning capacity.

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<sup>2</sup> 5 U.S.C. § 8115.

<sup>3</sup> No. 959.167.010.

The January 24, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
June 5, 2001

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Member

Priscilla Anne Schwab  
Alternate Member