

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ROBERT NELSON and DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATIVE MEDICAL CENTER, New Orleans, LA

*Docket No. 00-649; Submitted on the Record;  
Issued October 18, 2001*

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DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,  
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation based on its determination that the selected position of dispatcher represented appellant's wage-earning capacity.

The Board has duly reviewed the case record and finds that the Office properly reduced appellant's compensation.

On December 5, 1991 appellant, then a 47-year-old police supervisor working as a police dispatcher, filed a traumatic injury claim alleging that on November 7, 1991 he experienced pain in his back, legs, both feet and shoulders when he reached for the door. By letter dated May 8, 1992, the Office accepted appellant's claim for lumbar strain.

In a February 16, 1993 decision, the Office terminated appellant's compensation effective that date on the grounds that appellant no longer had any residuals of his November 7, 1991 employment injury. By letter dated February 22, 1993, appellant requested an oral hearing.

Appellant returned to work at the employing establishment on March 29, 1993 as an administrative assistant. On July 22, 1993 appellant filed a claim alleging that he sustained a recurrence of disability of his November 7, 1991 employment injury and stopped work on that date.

Prior to the scheduling of appellant's oral hearing, the hearing representative set aside the Office's decision dated July 12, 1993.<sup>1</sup>

By letter dated August 30, 1994, the employing establishment offered appellant the position of security guard based on the November 5, 1993 opinion and February 17, 1994 work

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<sup>1</sup> The Board notes that subsequent to the hearing representative's July 12, 1993 decision remanding the case to the Office, the Office, in an August 11, 1993 internal memorandum, reinstated appellant's compensation.

capacity evaluation of Dr. Carlos R. Gorbitz, a Board-certified neurologist and a second opinion physician, that appellant was capable of working eight hours a day with certain restrictions.

In an October 13, 1994 letter, the Office advised appellant that the security guard position was suitable and within his work tolerance limitations. The Office further advised appellant of the penalties for his failure to accept the offered position under 5 U.S.C. § 8106(c)(2). Appellant did not respond to the Office's letter.

By decision dated December 28, 1994, the Office terminated appellant's compensation on the grounds that he refused suitable work. In a letter dated January 13, 1995, appellant, through his counsel, requested an oral hearing.

In a December 7, 1995 decision, the hearing representative found a conflict in the medical opinion evidence on whether appellant was able to perform the duties of the offered position. Accordingly, the hearing representative set aside the Office's decision and remanded the case for further development.

By letter dated April 29, 1996, the Office referred appellant, a statement of accepted facts, a list of specific questions and medical records to Dr. Maria Palmer, a Board-certified neurologist, for an impartial medical examination. By letter of the same date, the Office advised Dr. Palmer of the referral.

In a May 7, 1996 report, Dr. Palmer opined that appellant could not perform the duties of a security guard. In a work capacity evaluation form dated May 16, 1996, Dr. Palmer indicated appellant's physical restrictions and stated that appellant could work six hours a day.

By letter dated April 9, 1997, the Office requested that Dr. Edward M. Gaber, a Board-certified internist and appellant's treating physician, provide appellant's current medical status. In his September 3, 1997 response, Dr. Gaber stated that there had been no change in appellant's condition since his previous report.<sup>2</sup>

On October 20, 1998 appellant underwent vocational rehabilitation services based on Dr. Palmer's finding that appellant could work six hours a day with certain physical restrictions. In a report dated July 6, 1999, the vocational rehabilitation counselor identified the position of dispatcher as being available within appellant's commuting area although appellant had unsuccessfully attempted to obtain this position.

In an August 27, 1999 notice, the Office advised appellant that it proposed to reduce his compensation because the factual and medical evidence of record established that he was no longer totally disabled. The Office further advised appellant to submit additional evidence or argument within 30 days if he disagreed with the proposed action.

By decision dated October 5, 1999, the Office reduced appellant's compensation effective October 10, 1999 based on his capacity to earn wages as a dispatcher.

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<sup>2</sup> In a September 26, 1995 report, Dr. Gaber opined that appellant was totally disabled even for security guard work due to its stress and physical demands.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>3</sup> Pursuant to section 8115(a) of the Federal Employees' Compensation Act,<sup>4</sup> wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, his or her usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect wage-earning capacity in his or her disabled condition.<sup>5</sup>

When the Office makes a medical determination of partial disability and of specific 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 labor market should be made through contact with the state employment service or other applicable service.<sup>6</sup> Finally, application of the principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.<sup>7</sup>

In this case, the Office determined that appellant could work six hours a day based on Dr. Palmer's May 16, 1996 work capacity evaluation. On the form, Dr. Palmer indicated appellant's physical restrictions, which included limited kneeling, standing, bending, twisting, reaching and lifting. Dr. Palmer specifically indicated that appellant could kneel occasionally, stand no more than one-half hour, bend only occasionally, never twist, reach above the head only occasionally and lift no more than 20 pounds. Dr. Palmer stated that appellant could work six hours a day with the above limitations.

The physical requirements of the selected position of dispatcher were sedentary and required, *inter alia*, no climbing, balancing, stooping, kneeling, crouching and crawling. It also required frequent reaching, handling and fingering. Appellant worked previously as a police dispatcher for the employing establishment at the time of his November 7, 1991 employment injury. The position, therefore, is within appellant's physical limitations and vocational capabilities.

Moreover, the Office properly calculated appellant's wage-earning capacity based on the difference between his weekly wage at the time of the injury, \$521.44, and the weekly wage of a

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<sup>3</sup> *Patricia A. Keller*, 45 ECAB 278 (1993).

<sup>4</sup> 5 U.S.C. § 8115(a).

<sup>5</sup> *See Dorothy Lams*, 47 ECAB 584 (1996).

<sup>6</sup> *See Dennis D. Owen*, 44 ECAB 475 (1993).

<sup>7</sup> 5 ECAB 376 (1953).

dispatcher, \$229.43, using the *Shadrick* formula.<sup>8</sup> The Office therefore met its burden of proof in reducing appellant's compensation based on his wage-earning capacity as a dispatcher.

Accordingly, the Board finds that the Office properly determined that appellant was no longer totally disabled as a result of his November 7, 1991 employment-related injury and followed established procedures for determining that the selected position of dispatcher represented appellant's wage-earning capacity. The Board, therefore, finds that the Office has met its burden of proof in reducing appellant's compensation based on his wage-earning capacity as a dispatcher.

The October 5, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
October 18, 2001

Michael J. Walsh  
Chairman

Michael E. Groom  
Alternate Member

Priscilla Anne Schwab  
Alternate Member

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<sup>8</sup> *Albert C. Shadrick, supra* note 7.