

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JONATHAN BROWN and DEPARTMENT OF THE ARMY,  
ARMY CORPS OF ENGINEERS, Mobile, AL

*Docket No. 01-1282; Submitted on the Record;  
Issued April 25, 2002*

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DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that the position of surveillance system monitor reasonably represented appellant's wage-earning capacity.

On May 24, 1983 appellant, then a 34-year-old drill rig operator, filed a notice of traumatic injury alleging that on May 20, 1983 he slipped and fell between two logs and twisted his back. Appellant's claim was accepted for low back strain and he received compensation benefits until 1994. The Office terminated appellant's compensation benefits by decision dated July 14, 1994, on the grounds that the medical evidence established that appellant was no longer disabled due to the accepted employment injury. By decision dated October 17, 1996, the Board reversed the Office's decision and reinstated his compensation benefits.<sup>1</sup>

In a report dated November 18, 1993, appellant's attending physician, Dr. Melvin D. Russell, a Board-certified family practitioner, opined that appellant's work-related injury had not resolved and stated that he could not recommend any type of treatment to make it possible for appellant to return to work. He indicated in a work capacity evaluation that appellant could not work eight hours per day, could do intermittent sitting, walking and standing, but was restricted from any type of lifting, bending, squatting, climbing, kneeling or twisting. In a report dated January 24, 1994, a second opinion physician, Dr. Jon H. Widener, a Board-certified orthopedic surgeon, stated that there were no objective physical findings to support appellant's complaints of back pain and he saw no reason why appellant could not work eight hours per day. Dr. Russell submitted a second work capacity evaluation dated February 27, 1997 and reiterated that appellant should limit lifting, bending, squatting and prolonged standing to zero hours per day. The Office found a conflict of medical opinion created between Dr. Russell and Dr. Widener.

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<sup>1</sup> Docket No. 95-471 (issued October 17, 1996).

In an impartial medical report dated March 24, 1997, Dr. Warner L. Pinchback, a Board-certified orthopedic surgeon, diagnosed appellant with post-traumatic degenerative disc disease at level L5-S1.<sup>2</sup> In a work capacity evaluation dated December 9, 1997, Dr. Pinchback indicated that appellant could work eight hours per day with certain restrictions. He stated that appellant could do no kneeling, bending, twisting, reaching or lift more than 10 pounds. Dr. Pinchback also noted no prolonged standing, walking or sitting, each limited to 1 hour at a time with 10-minute rests, up to 8 hours per day. He stated that appellant could perform repetitive motions of the wrist and elbow.

In a notice of proposed reduction of compensation, the Office found that appellant was no longer totally disabled due to the accepted work injury and could perform the duties of a surveillance system monitor at the rate of \$222.80 per week. An Office rehabilitation specialist, Lane Westcott, determined that numerous businesses existed in appellant's commuting area which employed persons in surveillance system positions. Ms. Westcott indicated that the position was sedentary in nature and based on the results of appellant's vocational evaluation, appellant possessed the intelligence and skills to be trained in the position. The position entailed sitting and monitoring television screens to detect crimes or disturbances and using the telephone.<sup>3</sup>

By decision dated October 26, 2000, the Office reduced appellant's compensation effective November 5, 2000, based on his ability to perform the position of surveillance system monitor.

The Board finds that the Office properly determined that the position of surveillance system monitor reasonably reflected appellant's wage-earning capacity, effective November 5, 2000, the date that it reduced his compensation benefits.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.<sup>4</sup>

Under section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his 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 wage-earning capacity is determined with due regard to the nature of his injury, his degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect his wage-earning capacity in his disabled condition.<sup>5</sup> Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment

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<sup>2</sup> Dr. Pinchback reiterated the same findings in a second March 26, 1997 report.

<sup>3</sup> Appellant submitted medical reports from Dr. Joel Brustein indicating certain restrictions, but the Board notes these reports are irrelevant since they are in regards to appellant's infected foot, and not his accepted back condition.

<sup>4</sup> *Bettye F. Wade*, 37 ECAB 556, 565 (1986).

<sup>5</sup> *Pope D. Cox*, 39 ECAB 143, 148 (1988).

conditions.<sup>6</sup> The job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives.<sup>7</sup>

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by the Office or 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 that employee's capabilities with regard to his 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 services.

In this case, the impartial medical specialist, Dr. Pinchback, determined that appellant could work for 8 hours per day, with no kneeling, bending, twisting, reaching or lifting over 10 pounds. He also noted no prolonged standing, walking or sitting. In situations where there exists opposing medical reports and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>8</sup> The Board finds that Dr. Pinchback's opinion and medical restrictions carry the weight of the medical evidence in this case.

The Office rehabilitation counselor determined that appellant was able to perform the position of surveillance system monitor and that the position was reasonably available in sufficient numbers as to make it reasonably available within appellant's commuting area and that the wage of the position was \$222.80 per week. The position description indicated that it was a sedentary position, which involved viewing television monitors to detect crimes or disturbances and also involved some use of the telephone. The Board finds that the position of surveillance system monitor conforms with Dr. Pinchback's physical restrictions. The position does not involve any kneeling, bending, twisting, reaching or lifting of more than 10 pounds, which were restricted by Dr. Pinchback. The description also does not state that there would be prolonged standing, walking or sitting. Appellant could also use the telephone as described in this position, as Dr. Pinchback indicated that he does not have any limitations in the fine motor movements of the upper extremities.

The Board finds that the Office considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment and age and employment qualifications, in determining that the position of caseworker represented appellant's wage-earning capacity.<sup>9</sup> The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of surveillance system monitor and that such a position was reasonably available within the general

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<sup>6</sup> *Albert L. Poe*, 37 ECAB 684, 690 (1986).

<sup>7</sup> *Id.*

<sup>8</sup> *Rosie E. Garner*, 48 ECAB 220 (1996).

<sup>9</sup> *Clayton Varner*, 37 ECAB 248, 256 (1985).

labor market of appellant's commuting area. Therefore, the Office properly determined that the position of surveillance system monitor reflected appellant's wage-earning capacity effective November 5, 2000.

The October 26, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
April 25, 2002

Michael J. Walsh  
Chairman

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member