

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JESUS L. RUIZ and DEPARTMENT OF THE AIR FORCE,  
AIR LOGISTICS CENTER, KELLY AIR FORCE BASE, TX

*Docket No. 00-2514; Submitted on the Record;  
Issued January 10, 2002*

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DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,  
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation effective January 30, 2000 based on his capacity to earn wages as a timekeeper.

The Board finds that the Office improperly reduced appellant's compensation based on his capacity to earn wages as a timekeeper.

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>1</sup> The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>2</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>3</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>1</sup> *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

<sup>2</sup> *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

<sup>3</sup> *See Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C § 8115(a).

conditions.<sup>4</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>5</sup>

On November 5, 1997 appellant, then a 50-year-old machinist, sustained an employment-related lumbar strain and permanent aggravation of preexisting lumbar arthritis. Appellant stopped work on November 5, 1997 and began to participate in vocational rehabilitation efforts in early 1999. By decision dated January 10, 2000, the Office adjusted appellant's compensation based on his capacity to earn wages as a timekeeper.<sup>6</sup> By decision dated May 30, 2000, the Office affirmed its January 10, 2000 decision.

The Board finds that the Office did not show that appellant was physically capable of performing the duties of the timekeeper position and therefore did not meet its burden of proof to justify its reduction of appellant's compensation.

The Office based its determination on a March 1, 1999 work restriction report completed by Anne S. Kuan, an attending Board-certified internist, who indicated that appellant could work eight hours a day but had limitations on such activities as lifting, reaching and walking.<sup>7</sup> However, Dr. Kuan's report is nonspecific about the extent of appellant's limitations. For example, Dr. Kuan did not provide any limitation regarding the amount of weight appellant was capable of lifting.

Moreover, the record contains medical evidence which shows that appellant's November 5, 1997 employment injury and his preexisting conditions prevented him from being physically capable of doing the timekeeper job.

In a report dated January 18, 1999, Dr. Gene R. Smith, a Board-certified orthopedic surgeon to whom the Office referred appellant, stated that appellant continued to be totally disabled due to his November 5, 1997 employment injury. Dr. Smith noted that in addition to the accepted employment injury appellant had underlying rheumatoid arthritis, ankylosing spondylitis, Reiter's syndrome, cornice bleeding, peptic ulcer, degenerative joint disease of the cervical spine, anemia and recurrent uveitis.<sup>8</sup> In a report dated February 10, 1999, Dr. Smith also indicated that appellant's multiple conditions prevented him from doing any work.

In a report dated January 6, 1999, Dr. Amulfo Garza-Vale, a Board-certified neurosurgeon to whom the Office referred appellant, agreed with Dr. Smith that appellant was

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<sup>4</sup> *Albert L. Poe*, 37 ECAB 684, 690 (1986), *David Smith*, 34 ECAB 409, 411 (1982).

<sup>5</sup> *Id.*

<sup>6</sup> The timekeeper position involved compiling and recording time records and required lifting up to 10 pounds, handling, typing and walking.

<sup>7</sup> Dr. Kuan indicated that appellant could walk on an "intermittent" basis.

<sup>8</sup> The record contains medical evidence which shows that these conditions preexisted the injury sustained on November 5, 1997. In determining wage-earning capacity based on a constructed position, consideration is given to the residuals of the employment injury and the effects of conditions which preexisted the employment injury. *See Jess D. Todd*, 34 ECAB 798, 804 (1983).

totally and permanently disabled due to his condition which “affects both his cervical spine and his lumbar spine as well as his back and severely limits motion of even his extremities.” In a report dated July 14, 1999, Dr. Angel M. Roman, an attending physician Board-certified in physical medicine and rehabilitation, indicated that appellant was totally disabled from any occupation due to the abnormalities and limitations of his lumbar spine, thoracic spine, cervical region, and extremities. In a report dated March 9, 2000, Dr. Salvador Baylan, an attending physician Board-certified in physical medicine and rehabilitation, indicated that appellant was totally disabled due to his back and neck conditions.

For these reasons, the Office improperly reduced appellant’s compensation effective January 30, 2000 based on his capacity to earn wages as a timekeeper.

The May 30 and January 10, 2000 decisions of the Office of Workers’ Compensation Programs are reversed.

Dated, Washington, DC  
January 10, 2002

David S. Gerson  
Member

Bradley T. Knott  
Alternate Member

Priscilla Anne Schwab  
Alternate Member