

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JAMES M. HAMADA and DEPARTMENT OF DEFENSE,  
LOS ANGELES AIR FORCE BASE COMMISSARY, El Segundo, CA

*Docket No. 01-1806; Submitted on the Record;  
Issued June 25, 2002*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issue is whether the position of computer programmer/operator represents appellant's wage-earning capacity.

Appellant's occupational disease claim filed on January 23, 1990 was accepted by the Office of Workers' Compensation Programs for depression, based on the reports of Dr. Chun Kee Ryu and Dr. Seawright W. Anderson, both Board-certified psychiatrists. On February 5, 1993 the Office referred him for rehabilitation services.

On June 10, 1993 appellant was referred to Dr. Kaushal K. Sharma, a Board-certified forensic psychiatrist. Based on his June 10, 1993 report, the Office issued a notice proposing to terminate appellant's compensation. On January 19, 1994 the Office terminated his compensation effective February 6, 1994. Appellant requested a hearing and submitted a July 15, 1994 report from Dr. George J. Karamigios, a Board-certified psychiatrist and Dr. John F. Tholen, a clinical psychologist.

On July 29, 1994 the Office determined that appellant's June 27, 1994 letter appeared to change his request for a hearing, scheduled for July 15, 1994, to a review of the written record and denied this request as untimely. Appellant appealed and the Board reversed the termination of compensation and remanded the case for the Office to resolve a conflict in the medical evidence.<sup>1</sup>

On remand the Office reinstated appellant's compensation and referred him to Dr. Warren Taff, a Board-certified psychiatrist, who concluded, in an April 8, 1997 report, that appellant could not return to his preinjury job as produce manager, but should be retrained for another position with less responsibility.

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<sup>1</sup> Docket No. 94-2453 (issued December 11, 1996).

Appellant was again referred for rehabilitation services and completed a computer training course.<sup>2</sup> He participated in an internship program and continued to look for work as a computer programmer/operator.

On July 16, 1999 the Office issued a notice of proposed reduction of compensation based on appellant's ability to earn wages as a computer programmer/operator.

Appellant disagreed with the notice and submitted an August 2, 1999 report from Dr. Ryu, who concluded that appellant was totally disabled for all work due to his depression. On November 18, 1999 the Office referred appellant to Dr. Samuel E. Dey, a Board-certified psychiatrist, to resolve the conflict in the medical opinion evidence on whether appellant was still disabled.<sup>3</sup>

Based on Dr. Dey's January 15, 2000 report, the Office reduced appellant's compensation on July 21, 2000 on the grounds that he had a wage-earning capacity of \$360.00 a week as a computer programmer/operator.

The Board finds that the position of computer programmer/operator represents appellant's wage-earning capacity.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened to justify termination or modification of compensation.<sup>4</sup> If a claimant is no longer totally disabled, but has residual partial disability, the Federal Employees' Compensation Act<sup>5</sup> provides that monthly monetary compensation shall be paid equal to 66 2/3 percent of the difference between monthly pay and wage-earning capacity.<sup>6</sup>

Under section 8115(a) of the 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.<sup>7</sup> 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

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<sup>2</sup> The employing establishment stated in an October 16, 1997 letter that it could not accommodate appellant's work restrictions as outlined in the June 4, 1997 work-capacity evaluation.

<sup>3</sup> The Act provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination. 5 U.S.C. § 8123(a).

<sup>4</sup> *Raymond W. Behrens*, 50 ECAB 221, 222 (1999); *Bettye F. Wade*, 37 ECAB 556, 565 (1986).

<sup>5</sup> 5 U.S.C. §§ 8101-8193.

<sup>6</sup> 5 U.S.C. § 8106(a).

<sup>7</sup> 5 U.S.C. § 8115(a); *Penny L. Baggett*, 50 ECAB 559, 560 (1999).

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>8</sup>

Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.<sup>9</sup> The job selected for determining wage-earning capacity must be reasonably available in the general labor market in the commuting area in which the employee lives.<sup>10</sup>

After the Office makes a medical determination of partial disability and specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by the Office or to an Office 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; this position must fit that employee's capabilities with regard to his physical limitations, education, age and prior experience.<sup>11</sup> Once this selection is made, a wage rate and the availability of the selected position in the open labor market should be determined through contact with the state employment service or other applicable service.<sup>12</sup>

In this case, the Office selected the position of computer programmer/operator after Dr. Taff found that appellant could not return to his previous job as a produce manager due to his work-related depression. Appellant's treating psychiatrist, Dr. Ryu, stated in a May 25, 1993 report, that appellant could spend up to six hours a day in retraining or schooling and, was in fact, motivated to return to work in some capacity.

The positions of computer programmer and operator are listed as sedentary and light, with 10- to 20-pound lifting restrictions. Nothing in the position descriptions indicates that either of these jobs would be particularly stressful or require appellant to shoulder great responsibility.

The impartial medical examiner, Dr. Dey, found that appellant was capable from a psychiatric viewpoint of performing the duties of either job, stating that he could work in a position with less responsibility. The Board has long held that the opinion of an impartial medical specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight in resolving a conflict in medical opinion evidence.<sup>13</sup>

Dr. Dey reviewed a statement of accepted facts and a supplement, appellant's many letters to the Office, the various reports and tests of the psychiatrists and psychologists who

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<sup>8</sup> *Richard Alexander*, 48 ECAB 432, 434 (1997); *Pope D. Cox*, 39 ECAB 143, 148 (1988).

<sup>9</sup> *Dim Njaka*, 50 ECAB 425, 433 (1999); *Albert L. Poe*, 37 ECAB 684, 690 (1986).

<sup>10</sup> *Philip S. Deering*, 47 ECAB 692, 699 (1996).

<sup>11</sup> *Dorothy Lams*, 47 ECAB 584, 586 (1996).

<sup>12</sup> *James R. Verhine*, 47 ECAB 460, 464 (1996); *Albert C. Shadrick*, 5 ECAB 376 (1953).

<sup>13</sup> *Sherry A. Hunt*, 49 ECAB 467, 471 (1998).

treated him, his work history and personal background. He concluded that appellant would be able to take supervision, work with others and meet deadlines, but should be placed in a work setting that would minimize the amount of stress he would face. Dr. Dey's report represents the weight of the medical evidence and establishes that appellant was capable of performing the duties of a computer programmer/operator.<sup>14</sup>

While appellant was not entirely pleased with the computer training he received, he did complete a four-month course and pursued employment in that field. The rehabilitation counselor confirmed with the state employment agency that computer jobs were reasonably available within appellant's commuting area and noted her research on the internet and placement efforts on appellant's behalf. The fact that appellant was unable to obtain a job in the computer industry does not establish that such work was not reasonably available.<sup>15</sup>

The Board also finds that the Office considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment, age and employment qualifications, in determining that the position of computer programmer/operator represented appellant's wage-earning capacity.<sup>16</sup> The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to work in the computer industry in a light-duty position and that such positions were reasonably available within the general labor market of appellant's commuting area. Therefore, the position of computer programmer/operator reflected appellant's wage-earning capacity and the Office properly reduced appellant's wage-loss benefits accordingly.

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<sup>14</sup> See *Richard L. Rhodes*, 50 ECAB 259, 263 (1999) (finding that the Office met its burden of proof in relying on the impartial medical examiner's conclusion that appellant's hysterical conversion disorder had resolved).

<sup>15</sup> See *Marilyn J. Carter*, 49 ECAB 661, 664 (1998) (finding that lawyer positions were reasonably available within appellant's commuting area, based on rehabilitation specialist's opinion).

<sup>16</sup> See *Donald W. Woodall*, 49 ECAB 415, 421 (1998) (finding that the Office followed its established procedures for determining that the position of gate guard represented appellant's wage-earning capacity).

The March 21, 2001 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC  
June 25, 2002

Michael J. Walsh  
Chairman

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member