

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of KENNETH H. WIGGINS and TENNESSEE VALLEY AUTHORITY,  
DIVISION OF FOSSIL & HYDRO POWER, Kingston, TN

*Docket No. 01-1405; Submitted on the Record;  
Issued October 4, 2002*

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DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that the position of parking lot attendant fairly and reasonably represented appellant's wage-earning capacity, effective May 21, 2000, the date it reduced his compensation benefits.

This case has been before the Board previously. By decision dated June 5, 1997, the Board found that the Office had not properly evaluated whether a November 2, 1993 wage-earning capacity determination was erroneous and remanded the case to the Office. Upon remand, the Office was to further develop the evidence and determine what position appellant was capable of performing and whether the November 2, 1993 wage-earning capacity determination should be modified.<sup>1</sup> The law and facts as set forth in the previous Board decision is incorporated herein by reference.

Subsequent to the Board's June 5, 1997 decision, by decision dated July 18, 1997, the Office issued a retroactive wage-earning capacity, based on appellant's actual earnings as a modified machinist, to cover the period October 1, 1992 to April 6, 1994 only. The Office continued to develop the claim and in November 1998 referred appellant, along with a statement of accepted facts, a set of questions and the medical record, to Dr. Stephen E. Natelson, a Board-certified neurosurgeon, for a second-opinion evaluation.

In a work capacity evaluation dated January 22, 1999, Dr. Natelson provided restrictions to appellant's physical activity, advising that he was to avoid lifting over 20 pounds and should not bend, twist, push or pull. He could sit for six to eight hours, lift and walk for two to four hours intermittently. By report dated February 4, 1999, the physician diagnosed cervical and lumbar spondylosis with chronic symptoms, which he opined were employment related. Dr. Natelson noted that a magnetic resonance imaging (MRI) done in January 1999 revealed spondylitic and postoperative changes of the lumbar spine with spinal stenosis and that a cervical

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<sup>1</sup> Docket No. 95-1581.

spine x-ray revealed fixed cervical lordosis with no abnormal motion or instability. Dr. Natelson advised that appellant was unable to perform the physical requirements of machinist, his date-of-injury job, due to the cervical and lumbar spondylosis. He concluded that appellant could perform light-duty work with the above restrictions.

The record indicates that beginning in April 1999, rehabilitative efforts were undertaken in an effort to return appellant to work. In a March 9, 2000 report, Jane Colvin-Roberson, a vocational consultant, completed a labor market survey and determined that the position of parking lot attendant, based on the Department of Labor, *Dictionary of Occupational Titles*, fit appellant's capabilities. Ms. Colvin-Roberson stated, however, that rehabilitative services were being terminated due to noncooperation by appellant.

By letter dated April 7, 2000, the Office advised appellant that it proposed to reduce his compensation based on his ability to earn wages as a parking lot attendant. The Office noted that the medical evidence of record demonstrated that he could perform the position and advised that if he disagreed with its proposed action, he should submit contrary evidence or argument within 30 days. In a letter dated April 21, 2000, appellant disagreed with the proposed reduction. By decision dated May 15, 2000, the Office finalized the reduction of his compensation, effective May 21, 2000, based on his capacity to earn wages as a parking lot attendant. The Office determined that the position of parking lot attendant fairly and reasonably represented appellant's wage-earning capacity and found that it was available in his commuting area.

On December 13, 2000 appellant, through his attorney, requested reconsideration and contended that the Office had erred in failing to take the natural aging process into consideration in determining that he had the capacity to earn wages as a parking lot attendant. An incomplete medical report was also submitted.<sup>2</sup> In a decision dated April 6, 2001, the Office denied modification of the prior decision. The instant appeal follows.

The Board finds that the Office met its burden of proof to reduce appellant's compensation effective May 21, 2000, based on his ability to perform the duties of the selected position, parking lot attendant.

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction in such benefits.<sup>3</sup> Under 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, wage-earning capacity is determined with due regard to the nature of injury, degree of physical impairment, usual employment, age, qualifications for other

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<sup>2</sup> This report consisted of the top half only of a three-page work capacity evaluation that did not contain a signature.

<sup>3</sup> *Garry Don Young*, 45 ECAB 621 (1994).

<sup>4</sup> 5 U.S.C. §§ 8101-8193.

employment, the availability of suitable employment and other factors and circumstances which may affect the employee's wage-earning capacity in his or her disabled condition.<sup>5</sup>

When the Office makes a medical determination of disability and of specific work restrictions, it may refer the employee's case to an Office specialist for selection of a position, listed in the Department of Labor, *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, by applying the principles set forth in *Albert C. Shadrick*, the employee's loss of wage-earning capacity can be ascertained.<sup>7</sup>

In this case, the job description for the position of parking lot attendant indicates that it requires light strength with occasional lifting, carrying, pushing and pulling 20 pounds. There is, therefore, no indication that the selected position of parking lot attendant is outside the restrictions set forth by Dr. Natelson. The Board, therefore, finds that the Office properly assessed appellant's physical impairment in determining that the position of parking lot attendant reasonably represented his wage-earning capacity. As noted above, the selected position must not only be medically suitable but must also be available in appellant's commuting area. The rehabilitation counselor in this case indicated that the recommended position was reasonably available and that the position paid \$6.00 an hour in the open market. Appellant's compensation was accordingly reduced to reflect such wage-earning capacity under the principles set forth in *Shadrick*.<sup>8</sup> While appellant also contended that the natural aging process precluded him from performing the selected position and age is a factor which may affect wage-earning capacity,<sup>9</sup> the position description for parking lot attendant does not include an age requirement and a mere perception that he would not be hired for a selected position because of age is not a basis for finding that the selected position did not represent his wage-earning capacity.<sup>10</sup> Furthermore, the Office is not required to consider medical conditions arising subsequent to the work-related injury or disease in determining whether a position constitutes an employee's wage-earning capacity.<sup>11</sup> The Office, therefore, properly determined that the position of parking lot attendant fairly and reasonably represented appellant's wage-earning capacity.<sup>12</sup>

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<sup>5</sup> See *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); 5 U.S.C. § 8115(a).

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

<sup>7</sup> 5 ECAB 376 (1953); see 20 C.F.R. § 10.303.

<sup>8</sup> *Supra* note 7.

<sup>9</sup> See *Wilson L. Clow, Jr.*, *supra* note 5.

<sup>10</sup> *Alfred R. Hafer*, 46 ECAB 553 (1995).

<sup>11</sup> *Dorothy Jett*, 52 ECAB \_\_\_ (Docket No. 99-297, issued January 29, 2001).

<sup>12</sup> The Board notes that appellant submitted medical evidence with his appeal to the Board. The Board cannot consider this evidence, however, as its review of the case is limited to the evidence of record which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c).

The decisions of the Office of Workers' Compensation Programs dated April 6, 2001 and May 15, 2000 are hereby affirmed.

Dated, Washington, DC  
October 4, 2002

Alec J. Koromilas  
Member

David S. Gerson  
Alternate Member

A. Peter Kanjorski  
Alternate Member