

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CARLOS E. JORDAN and DEPARTMENT OF THE ARMY,
REDSTONE ARSENAL, Redstone, AL

*Docket No. 03-1556; Submitted on the Record;
Issued December 31, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's wage-loss compensation on the basis that the position of part-time surveillance system monitor represented his wage-earning capacity.

On December 18, 1974 appellant, a 38-year-old engineering technician, filed a traumatic injury claim alleging that he injured his back on December 11, 1974 while in the performance of duty. The Office accepted the claim for a lumbar strain and herniated disc at L5 and paid appropriate wage-loss compensation. Appellant elected a disability retirement effective September 13, 1979 and returned to work in January 1984. He sustained a recurrence of disability in February 1990 and the Office subsequently placed him on the periodic rolls for temporary total disability.

In a February 14, 2000 report, Dr. Stanley G. Hopp, appellant's attending Board-certified orthopedic surgeon, concluded that appellant was capable of working in a position requiring only light to medium activities.

On March 28, 2000 the Office referred appellant to vocational rehabilitation based upon Dr. Hopp's opinion that he was capable of limited-duty work.

In a September 29, 2000 report, Dr. B. Frank Hatchett, Jr., an attending Board-certified orthopedic surgeon, diagnosed failed back syndrome based upon appellant's two lumbar laminectomies and "evidence of herniated disc at L5/S1 with severe degeneration of the L5/S1 disc and loss of disc space height.... Regarding appellant's work ability, Dr. Hatchett stated that he did "not think [appellant], at his age and condition and with his long history of back pain can be employed." He noted that appellant had severe limitations on activities such as walking, standing, lifting, carrying and repetitive bending and that he would have difficulty driving to a job site or staying on the job site for an eight-hour shift.

In a March 6, 2001 report, Dr. Eric R. Beck, a Board-certified physiatrist, reviewed a February 23, 2001 functional capacity evaluation. He obtained a medical history and, upon physical examination, concluded that appellant was incapable of working eight hours a day, but could work four hours a day with restrictions, which included no climbing, no balance, infrequent bending and stooping, infrequent crouching, infrequent squatting, occasional overhead work and pulling/pushing and no repetitive activities using the lower extremities.

In a July 25, 2001 work restriction Form (OWCP-5), Dr. Larry M. Parker, an attending physician, concluded that appellant was capable of working four hours a day with restrictions based upon the February 21, 2001 functional capacity evaluation.

On October 18, 2001 the Office issued a notice of proposed reduction of compensation on the grounds that appellant had the wage-earning capacity to perform the position of surveillance system monitor for four hours a day at \$255.60 a week.

In a December 3, 2001 report, Dr. Parker concluded that appellant was totally disabled due to his “progressive and severe lumbar radiculopathy in the left lower extremity and the pain medication requirements.”

In response to an Office letter dated April 26, 2002, regarding appellant’s ability to perform the position of part-time surveillance monitor, Dr. Parker found that appellant was capable of performing the position requirements on April 30, 2002.

On June 3, 2002 the Office issued a loss of wage-earning capacity decision and adjusted appellant’s benefits based upon his ability to earn wages in the constructed position of part-time surveillance system monitor.

In a letter dated June 26, 2002, appellant’s counsel requested an oral hearing which was held on January 14, 2003. At the hearing, appellant was represented by counsel and his wife and Julia A. Russell, Ph.D., a licensed professional counselor, were allowed to testify. Dr. Russell testified that appellant would be incapable of working part time due to his pain and the medication he took.

In a March 28, 2003 decision, an Office hearing representative affirmed the June 3, 2002 wage-capacity determination. He found that the evidence of record established that appellant was capable of performing the duties of a surveillance monitor for four hours a day and that the job was reasonably available in his commuting area, on a part-time or full-time basis.

The Board finds that the Office properly based appellant’s wage-loss compensation on a determination that he was partially disabled and that the position of part-time surveillance system monitor represented his wage-earning capacity.

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.¹ If the employee's disability is no longer total, but is partial, a claimant is only entitled to the loss of his wage-earning capacity.²

Under section 8115(a) of the Federal Employees' Compensation Act,³ 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 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.⁴

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 the 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 service.⁵ 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.⁶ The basic rate of compensation paid under the Act is 66 2/3 percent of the injured employee's monthly pay.

The initial question presented is whether the Office properly determined that the position of surveillance monitor was medically suitable. The Board finds that the weight of the medical evidence of record supports that appellant has the physical capacity to perform the duties of the selected position. As early as February 14, 2000, Dr. Hopp stated that appellant was capable of working in a position requiring light to medium activities. Based upon a February 23, 2001 functional capacity evaluation, Drs. Beck and Parker noted restrictions for work which included no climbing, no balancing, infrequent bending and stooping, infrequent crouching, infrequent squatting, occasional overhead work and pulling/pushing and no repetitive activities using his lower extremities. In a July 25, 2001 work restriction form, Dr. Parker indicated that appellant was capable of working four hours a day with the restrictions noted in the February 21, 2001 functional capacity evaluation. On April 30, 2002 he reviewed the job description and physical

¹ *Francis J Carter*, 53 ECAB — (Docket No. 00-1789, issued April 11, 2002); *Garry Don Young*, 45 ECAB 621 (1994).

² *Pope D. Cox*, 39 ECAB 143 (1987).

³ 5 U.S.C. § 8101-8193.

⁴ See *James M. Frasher*, 53 ECAB — (Docket No. 01-362, issued September 25, 2002); *Wilson L. Claw, Jr.*, 44 ECAB 157 (1992); 5 U.S.C. § 8115(a).

⁵ *Richard Alexander*, 48 ECAB 432 (1997); *Dorothy Lams*, 47 ECAB 584 (1996).

⁶ *Dorothy Lams*, *supra* note 5; *Albert C. Shadrick*, 5 ECAB 376 (1953).

requirements of the part-time surveillance system monitor position and found that appellant could perform the physical activities described. The Board notes that the selected position was sedentary and required no balancing, no stooping, no crouching, no kneeling and no crawling, as Dr. Parker indicated that appellant could do these activities infrequently. The Board finds that the weight of medical evidence is represented by the reports of Dr. Parker, appellant's attending physician. His reports concluded that appellant was capable of performing the position of surveillance system monitor for four hours a day.

The opinion of Dr. Russell at the hearing that appellant was incapable of working due to his pain and medication that he remains totally disabled and incapable of performing the duties of the selected position is not probative. Section 8101(2) of the Act defines a physician to include surgeons, clinical psychologists and other practitioners as defined by state law.⁷

The Board finds that the weight of the medical evidence of record supports that appellant has the physical capacity to perform the duties of the selected position. The medical evidence supports the wage-earning capacity determination and the Office correctly reduced appellant's compensation benefits based on his capacity to perform the selected position. Drs. Beck, Hopp, and Parker found that appellant was not totally disabled for work and Dr. Beck set forth physical limitations based upon a functional capacity evaluation with which Dr. Parker concurred. Dr. Parker also reviewed the selected position and physical requirements and found that they fell within appellant's physical capabilities. There is no medical evidence of record which indicates that appellant remains totally disabled due to residuals of his accepted condition and resulting surgery and could not perform the selected position.

The opinion of appellant's rehabilitation counselor shows that he was vocationally capable of performing the surveillance system monitor position part time. The evidence of record reflects that the position was reasonably available in his commuting area, on a part-time or full-time basis. For these reasons, the Office met its burden of proof to establish that, as of June 3, 2002, appellant's wage-earning capacity was represented by his ability to work part time as a surveillance system monitor.

The Board concludes that the Office properly determined appellant's wage-earning capacity based on the part-time position of surveillance system monitor. The Office properly applied the *Shadrick* formula to ascertain the percentage of loss of his wage-earning capacity and to reduce his continuing compensation benefits.

⁷ 5 U.S.C. § 8101(2); see *Sheila A. Johnson*, 46 ECAB 323 (1994).

The March 28, 2003 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
December 31, 2003

Alec J. Koromilas
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member