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Case No.: 1999-LHC-2582

OWCP No.: 14-121228

In the Matter of

MICHAEL WATERS,

Claimant

v.

U.S. NAVY EXCHANGE,

Employer,

and

CRAWFORD & COMPANY,

Claims Administrator,

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,

Party-in-Interest.

APPEARANCES:

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Port Orchard, Washington 98366
For the claimant

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For the employer/administrator

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For the party-in-interest

BEFORE: DONALD W. MOSSER
Administrative Law Judge

DECISION AND ORDER

This proceeding involves a claim for workers' compensation benefits under the Nonappropriated Fund Instrumentalities Act, as extended by the Longshore and Harbor Workers' Compensation Act, as amended, [33 U.S.C. § 901 *et seq.*], hereinafter referred to as the Act. The case was referred to the Office of Administrative Law Judges on August 4, 1999. (ALJX 1).

Following proper notice to all parties, a formal hearing was held on April 6, 2000, in Seattle, Washington. Exhibits of the parties were admitted in evidence at the hearing pursuant to 20 C.F.R. § 702.338, and the parties were afforded the opportunity to present testimonial evidence and to submit post-hearing briefs.

The findings of fact and conclusions of law set forth in this decision are based on my analysis of the entire record. Each exhibit and argument of the parties, although perhaps not mentioned specifically, has been carefully reviewed and thoughtfully considered. References to ALJX, CX and EX pertain to the exhibits of the administrative law judge, claimant and employer, respectively. The transcript of the hearing is cited as Tr. and by page number.

ISSUES

The only issues remaining for resolution are the nature and extent of claimant's disability resulting from his work-related injury and the amount of claimant's average weekly wage for purposes of computing compensation.

FINDINGS OF FACT

Background

Mr. Waters began working for the U.S. Navy Exchange on October 27, 1995. He was employed in the vending department as a snack machine attendant. His duties were to drive around the shipyard and sell snacks. (EX 1; Tr. 13-14). He was required to lift 50 pounds and was also required to bend, stoop and kneel. (Tr. 15). Mr. Waters was then assigned to an aircraft carrier that was in drydock, where he had to load and unload snacks. He suffered a work-related injury to his lumbar spine on January 18, 1996, while working on that ship. Specifically, he fell while pushing a cart, landing on his back and tailbone. (Tr. 16-18).

Claimant's injury occurred close to the end of his shift. He advised the lead person that he was injured, then his wife came to drive him home. Although in pain, the claimant did not seek medical care on the day of his injury. However, he did seek medical treatment at the emergency room of the Naval Hospital in Bremerton, Washington on the following day. (Tr. 21, 22, 43). He was also scheduled to return to that hospital on January 20. (Tr. 22).

Medical Evidence

A radiologic examination report was conducted on Mr. Waters on January 20, 1996. The films were taken of the SI joints, pelvis and the lumbosacral spine. Dr. Donald Jensen interpreted the tests and noted degenerative changes in the SI joints and to a lesser extent in the lower lumbar spine. No fractures were identified. Dr. Jensen also reported that there appeared to be a bilateral spondylolysis at L5. (CX 14).

The attending physician at the Naval Hospital released Mr. Waters from work as a result of the findings of the January 20 examination and scheduled additional treatment through February 2, 1996. The patient subsequently was referred to Dr. Clayton Turner, an orthopedic spine surgeon at Madigan Army Medical Center, Tacoma, Washington for an evaluation.

Dr. Turner reported that plain radiographic studies of the lumbar spine revealed Grade I spondylolisthesis of L5 and

S1 with bilateral isthmic defects. Magnetic resonance imaging of the lumbar spine confirmed the spondylolisthesis at L5/S1 with additional findings of disk degeneration at the L3/4 and L4/5 levels. The physician indicated that the claimant was suited for sedentary type work only. He restricted Mr. Waters to no repetitious bending, stooping, or lifting. Lifting limitations of 10 pounds also were recommended. He also advised Mr. Waters to continue ongoing conservative treatment. (EX 5).

Magnetic resonance imaging again was conducted on the claimant's lumbosacral spine on July 3, 1996. This test showed disk protrusions at L3-4 and L4-5. It was reported that the findings were compatible with bilateral pars interarticularis defect at L5. (EX 2).

Dr. John Coker, an orthopedist/orthopedic surgeon, examined Mr. Waters on October 1, 1996, apparently at the request of the employer's claims administrator. He also reviewed the x-rays taken on January 20, 1996. The physician noted the progression of Mr. Waters' treatment since the January 18 accident and reported that the claimant was last examined in September of 1996. Dr. Coker diagnosed Mr. Waters with spondylolisthesis, Grade I, L5/S1; bilateral isthmic defects at L5/S1; and chronic sprain syndrome related to the above listed injury. The physician opined that the spondylolisthesis and spondylolysis defects preexisted the industrial injury of January 18, 1996 on a more probable than not basis, but he could not confirm nor deny this. Dr. Coker stated that the January 18, 1996 injury aggravated the pre-existing problem. He also opined that the claimant's condition was not yet fixed and stable. Dr. Coker agreed that conservative care should be continued at least for another few months, but noted there was a possibility the claimant would require a stabilization procedure at L5/S1. (EX 3).

On March 18, 1997, Dr. Turner re-evaluated Mr. Waters' low back condition. The physician noted that Mr. Waters continued to undergo conservative measures with minimal to no improvement in his symptomatology. The physician reported that radiographic findings included a Grade 1 spondylolisthesis of L5 on S1 with bilateral isthmic defects and that magnetic resonance imaging revealed disk degenerative changes at the L3/4 and L4/5 levels. Dr. Turner opined that surgical treatment should be a last resort. At that time, the physician believed the claimant should be treated with inten-

sive physical therapy or a work hardening program. Dr. Turner indicated that after the claimant had been enrolled in a work hardening type program, surgery could be considered. The physician opined that Mr. Waters was only suited for sedentary type work and should not do repetitious bending, stooping or lifting. He also noted the claimant had a lifting limitation of 10 pounds. (CX 5).

Mr. Waters continued to have persistent symptoms with his back through August of 1997 and Dr. Turner considered pursuing a surgical procedure. The patient indeed underwent a lumbar fusion on December 15, 1997. (CX 17). However, the medical records from Madigan Army Medical Center indicate that as of March 20, 1998, the claimant still was restricted to lifting no more than ten pounds and could not perform vigorous activities. (CX 16, 17).

Dr. Turner re-evaluated Mr. Waters on July 17, 1998, approximately eight months after his lumbar fusion. He noted that the claimant was making an excellent recovery, but that Mr. Waters would likely be left with significant limitations and activity restrictions. Dr. Turner opined that it is in Mr. Waters' best interest to consider vocational rehabilitation because he did not anticipate the claimant returning to manual labor. (CX 4).

Drs. Edward Devita and Ivan Birkeland, Jr. performed an examination of Mr. Waters on August 25, 1998 at the request of the employer's claims administrator. These physicians diagnosed the claimant with lumbosacral strain, related to the industrial injury of January 18, 1996, and with pre-existing pars inter- articularis defects with Grade I spondylolisthesis at L5/S1.
The physicians opined that Mr. Waters' condition was fixed and stable and that he required no further diagnostic testing or treatment. They indicated that it was difficult to provide an impairment rating because there were insufficient records and no radiographs to review, but concluded that the claimant would be at least a category 4 impairment level for lumbosacral impairment. Drs. Devita and Birkeland opined that Mr. Waters' prognosis was good, that his treatment had been reasonable and necessary and that he had reached maximum medical benefit from the treatment. The physicians indicated the claimant could perform sedentary work with a maximum lifting of ten pounds and that he should avoid bending, stooping, or squatting at the waist. (EX 4).

On November 18, 1998, Dr. Michael Kirk, from the Madigan Army Medical Center, reported in a letter that he had known Mr. Waters as a patient for approximately 14 months and acknowledged that the claimant had a spinal fusion of his lumbar spine in December 1997. Dr. Kirk stated that Mr. Waters was limited in his ability to lift and carry heavy objects due to pain. He opined that the claimant's vocational rehabilitation should include those restrictions and that Mr. Waters should have a non-manual labor job for the long term, perhaps in the computer field. Dr. Kirk stated that the possibility of further surgery was of low likelihood. (CX 3).

Dr. Robert Molinari also confirmed in a letter dated December 4, 1998 that the claimant had surgery for spondylolisthesis in his lumbar spine and that the surgery was successful in achieving a stable, fused lower lumbar spine. Dr. Molinari noted normal neurologic function and that the claimant's prognosis was good for returning to work with limited restrictions. The physician opined that Mr. Waters would have spasms and pain intermittently in the future, but that it could be managed conservatively without surgery. He stated the claimant did not need additional physical therapy. (CX 2).

In response to questions propounded by the claimant's attorney on February 16, 1999, Dr. Molinari stated that Mr. Waters was unable to drive an automobile to Tacoma from Port Orchard on a daily basis due to chronic low back pain after surgery. He further indicated that Mr. Waters' medication did not affect the claimant's ability to drive a car or operate equipment. Dr. Molinari reported that Mr. Waters would likely be taking this or similar medication for the rest of his life. The physician opined that the claimant would not be able to move very quickly with his back pain, but that additional surgery or paralysis because of his back condition was not likely. The physician stated that claimant should change his job to one of low physical demand, such as a desk job. Dr. Molinari placed no restrictions on Mr. Waters and stated that only pain would limit his activities. (CX 1).

As of June 11, 1999, the records of Madigan Army Medical Center indicate that Mr. Waters continued to have chronic pain in the lumbar region, was on Zoloft and was being seen in the pain clinic. Also, it was noted that Mr. Waters had been

unable to work for the past 24 months and was still restricted to light work. (CX 6, 17).

Dr. Lynn L. Staker evaluated Mr. Waters on February 16, 2000 at the request of counsel for the claims administrator. The physician performed a physical examination and reviewed medical records on the claimant. She diagnosed Grade I spondylolisthesis L5-S1 which pre-existed the injury of 1996. She also diagnosed disc protrusions at L4/5 on the left which definitely could be related to the on-the-job injury plus central disc protrusion at L3/4. Dr. Staker opined that Mr. Waters' condition is fixed and stable. She does not think further surgical approach, instrumentation or fusion is going to significantly alter the claimant's overall symptomatology. Dr. Staker indicated that she concurs with previous physical limitations that Mr. Waters could lift 10 pounds on an infrequent basis and not do any prolonged sitting, standing, walking, lifting, bending, or twisting. The physician stated that Mr. Waters could perform a sedentary job. (EX 6).

Mr. Waters believes his physical condition has not improved since the date of his injury. Because of his pain, he is more comfortable standing than sitting. Extended sitting causes headaches and back spasms. (Tr. 28).

Claimant takes several medications because of his back condition and acknowledged that some of the prescribed medication affect his daily life. (Tr. 35). At the time of the hearing, Mr. Waters was taking sertraline (Zoloft), methocarbamol, oxycodone and naprozen (ibuprofen). The sertraline was prescribed because of depression and Mr. Waters takes it at night as it helps his sleeping. The other medications were prescribed for his back condition. The methocarbamol is a muscle relaxer and was prescribed for use as needed. The other medications were prescribed for pain and also on an "as need" basis. All of the medications are used by Mr. Waters daily except for the oxyco- done. He takes the oxycodone about 50 percent of the time and usually at night because it makes him drowsy and affects his alertness. He avoids this medication during the day because it prevents him from driving his automobile or efficiently using his home computer. The label on this prescription indeed indicates that the prescription may cause drowsiness. (Tr. 34-37, 73-74, 87-88; CX 16). Despite the side effects from these prescriptions, Mr. Waters indicated that he had not discussed

changing any of his current medications with his doctors. (Tr. 89).

Vocational Evidence

Mr. Waters is 53 years of age. He has an Associate of Arts degree in general studies. His course of studies included various business classes, as well as computer courses. He served in the U.S. Navy from 1965 until 1991, working primarily in logistics. His principal Navy position was storekeeper, which involved goods procurement, logistics, inventory control and other responsibilities associated with operating a store. (EX 9; Tr. 29-30, 32).

After his military discharge, Mr. Waters worked for a little over four years with General Dynamics-Lockheed Martin in Nevada. In this job, he was responsible for computerized inventory control relating to aircraft consumables and repairables. This involved using computers extensively to track inventory, locate inventory and storage facilities and retrieve and deliver the inventory to the flight line. He left this job in April of 1995 due to a change in contract and a reduction in wages. (EX 9; Tr. 40).

Mr. Waters started his employment with the U.S. Navy Exchange as a temporary employee in October of 1995. (EX 7). His job title for this employer was driver/vending machine supply person, which involved stocking vending machines and collecting money. He initially drove a vending truck around the navy base and also worked in the vending machine area. I reiterate that he was assigned to the vending machine onboard an aircraft carrier at the time he suffered the injury involved in this case in January of 1996. Mr. Waters has not worked since that injury. (EX 9).

Employer’s claims administrator had several labor market surveys conducted to assess Mr. Waters’ ability to obtain a job which he could perform, given his limitations. The surveys conducted in May of 1997 showed two potential jobs for the claimant. Both involved security guard positions paying between $5.25 and $6.00 per hour. The physical demands of the positions required the worker to lift ten pounds or less, alternatively sit/stand/walk during the shift, some patrolling and no overhead reaching. Both of these positions were in Tacoma, Washington, which is approximately 28 miles from the

claimant's residence.[1] (EX 8, pp. 56, 60). These surveys, and apparently two others involving comparable jobs, were submitted to Dr. Coker for review and he indicated in a July 24, 1997 response that he approved these job openings for Mr. Waters. (EX 8, p. 50).

The vocational consultant apparently also submitted information regarding four job openings as a security guard to Dr. Birkeland, who approved these job openings for Mr. Waters in a response dated August 27, 1998. (EX 8, p. 53). The vocational consultant therefore prepared a closing report on September 21, 1998 regarding Mr. Waters' employability as a security guard in the four positions surveyed. The consultant concluded that the file relating to the claim should be closed since two independent medical physicians had approved Mr. Waters' ability to perform the security guard positions set forth in the surveys. These listed positions in the Tacoma, Washington area were with Northwest Protective Services, Pierce County Security, PMP and Burns Security. (EX 8, p. 46-49).

The next labor market surveys included in the record are dated January 6, 1999. These surveys also relate to security guard positions at Pierce County Security, Northwest Protective Services, American Protective Services, Security Masters Protective and Security Professional Services. The physical limitations of these positions are essentially identical to the ones identified in 1997 and the wages ranged from $5.50 to $8.00 per hour. All of these positions are located in the area of Tacoma, Washington. (EX 8, pp. 54, 55, 57, 58, 59).

Kent Shafer, a vocational rehabilitation counselor, interviewed Mr. Waters on February 10, 2000. He also reviewed medical records, college transcripts, and vocational records relating to Mr. Waters, as well as the previously conducted labor market surveys. Mr. Shafer also performed a labor market survey which located eight potential jobs for the claimant between February 23, 2000 and March 1, 2000. On March 3, 2000, Mr. Shafer prepared a closing report relating

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[1]Findings of fact set forth in this decision regarding driving distances from the claimant's residence in Port Orchard, Washington are based on RAND McNALLY ROAD ATLAS (2000).

to Mr. Waters' wage earning capacity in alternate employment. (EX 9, pp. 61-67).

Mr. Shafer noted in his report that the physicians of record all placed similar restrictions on Mr. Waters, *i.e.*, that he is unable to return to heavy manual labor, but is suited for a sedentary type of job. He also noted that vocationally the claimant has a broad knowledge of computers, operating systems, and software, in addition to skills in the administrative area, logistics, management, and purchasing. The vocational consultant opined that Mr. Waters' skills qualify him for a broad range of office and clerical work. (EX 9).

All of the potential jobs located by Mr. Shafer were within the sedentary work category. The jobs included customer service representative, client service representative, office assistant, sales coordinator, customer sales and service representative, inside sales, and police clerk. The wages of the jobs ranged from $9.00 to $15.00 per hour. (EX 9).

Except for the job at AT&T Cable Services, all of the positions surveyed by Mr. Shafer required lifting of less than 10 pounds and allowed the worker the ability to stand and stretch as desired. The job at AT&T required lifting a digital cable converter box which weighed less than 15 pounds. He noted, however, this employee would seldom have to lift this amount of weight. (EX 9).

Mr. Shafer testified at the hearing that Mr. Waters is capable of doing sedentary office type work and that there is a wide range of clerical type jobs which he could perform based on his background, education, and training. (Tr. 55). He reiterated that based upon the labor market survey he conducted, some of the jobs were customer service representative, client service representative, sales coordinator, customer invoicing representative, office assistant, sales coordinator, customer sales and service representative, police clerk, purchasing agent, receptionist/office assistant and a sales coordinator. (Tr. 55). All of the jobs, except one, were full time jobs and Mr. Shafer believes that Mr. Waters would be a good candidate for the jobs identified by the survey. (Tr. 56).

Mr. Shafer located jobs on the Kitsap Peninsula which is across the water from where Mr. Waters resides. (Tr. 56). He also found jobs in the Seattle area. He stated the pay for the jobs ranged form $7.00 to $15.00 per hour. (Tr. 56). Mr. Shafer also testified that Mr. Waters' work background and skills were described to the potential employers and the physical demands of the jobs were compared against the restrictions from Mr. Waters' various doctors. (Tr. 57).

He pertinently noted in this regard that Mr. Waters has a broad knowledge of computers, as well as skills in the administrative area, logistics, inventory control, supervision, management, purchasing and generalized accounting. (Tr. 60). Based upon these skills, Mr. Shafer opined that Mr. Waters could do the identified sedentary work, which he stated were actual job openings. (Tr. 61, 65).

Mr. Shafer did not discuss with any of Mr. Waters' physicians the claimant's ability to travel from the Kitsap Peninsula to other locations to obtain and perform alternate work. (Tr. 63). He noted that the claimant has a disability endorsement on his license and that Mr. Waters drives when his wife is unavailable. (Tr. 64). Mr. Shafer testified that he was unaware that Mr. Waters tested low on finger and manual dexterity, but that he believes it is not unusual to see someone test poorly on a test like that, even with no physical limitations of their fingers. (Tr. 64).

I reiterate the job openings identified by Mr. Shafer were located in various places in the State of Washington. Some of the positions were on Bainbridge Island and in Seattle, which are about 34 miles and 60 miles, respectively, in driving distance from Port Orchard, where the claimant resides. An alternative manner of commuting to Seattle is by ferry, but this would involve commuting in some manner to and from the ferry terminals and possibly climbing stairs at the terminals. (Tr. 70-73). Mr. Waters estimated that the commute time to get to a job in Seattle and back to his home in Port Orchard would be approximately 3-1/2 hours a day. (Tr. 72). Three other locations having potential job openings for Mr. Waters were in Gig Harbor, Silverdale and Bremerton, all of which are less than 20 miles in one way driving distance from Port Orchard.

Mr. Waters testified that he has not looked for a job on his own during the four years since his accident. (Tr. 81,

84). He did indicate that he checked on several of the positions contained in Mr. Shafer's labor market survey, but did not specify which ones. (Tr. 83-84). He expressed concern about his medications because all of the positions required drug testing. (Tr. 79). He also has reservations about some of the positions because he perceived them to be high stress jobs. (Tr. 80).

Average Weekly Wage

Mr. Waters worked for General Dynamics-Lockheed Martin in Nevada after leaving the Navy. (EX 9, p. 65). His wages in that job differed depending on the shift that he worked, but they ranged from $12.00-$14.00 per hour. (Tr. 32-33). He started that job in February of 1992 and left around the end of April of 1995. He was unemployed until he obtained the position with the U.S. Navy Exchange in October of 1995. His total wages from General Dynamics-Lockheed Martin in 1995 were $9,082.92. Of this amount, $1,450.80 was received as wages between January 1 and January 19, 1995. (CX 8, 11).

Mr. Waters began working as a temporary employee for the U.S. Navy Exchange on October 27, 1995 at the rate of $6.37 per hour. Between that date and January 11, 1996, the claimant earned total wages from that employer of $3,261.11. Mr. Waters estimated that he worked 50-60 hours per week in this job, but the payroll records show an average of 43.6 hours per week during this 11 weeks of employment. (Tr. 40; EX 7, p. 40).

While working for the Naval Exchange, the claimant applied for a logistics technician position with SEACOR Corporation. The position included responsibilities associated with inventorying repairables and electronic repair parts for use aboard naval ships. Mr. Waters indicated that he was offered the position and that he was to be paid $13.50 to $14.00 an hour. However, he admitted that this job was contingent on SEACOR obtaining a government contract with the U.S. Navy, which never occurred. (Tr. 30-39; CX 10).

The employer paid Mr. Waters temporary total disability compensation relating to the January 18, 1996 injury totalling $5,756.51 from January 22, 1996 through August 14, 1996. The compensation was paid for 29-3/7 weeks at the rate of $195.61 per week, based on an average weekly wage of $254.80. (EX 1,

pp. 2-6). The evidentiary record indicates that the compensation was to terminate on August 14, 1996, because the claims administrator did not have any current medical evidence to justify continuing the disability compensation. (EX 7, p. 3). However, the administrator subsequently concluded that compensation should be continued to the claimant at the same rate beginning on September 23, 1996. (EX 7, p. 1). The record does not establish the total amount of compensation paid Mr. Waters by the employer.

CONCLUSIONS OF LAW

Nature and Extent of Disability

Michael Waters seeks temporary total disability benefits from January 18, 1996 for a low back injury. *See* 33 U.S.C. § 908(b). As noted above, the evidence establishes that claimant sustained injuries, as defined under the Act, to his back arising from his employment with the U.S. Navy Exchange. Therefore, the primary issue remaining for resolution is the nature and extent of any disability that is caused by his injury.

Under the Act, “disability” is defined as the “incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or other employment.” 33 U.S.C. § 902(10). Generally, disability is addressed in terms of its extent, total or partial, and its nature, permanent or temporary. A claimant bears the burden of establishing both the nature and extent of his disability. *Eckley v. Fibrex and Shipping Co.*, 21 BRBS 120, 122 (1988); *Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56, 59 (1985).

The extent of disability is an economic concept. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981); *Quick v. Martin*, 397 F.2d 644, 648 (D.C. Cir. 1968). Thus, in order for a claimant to receive an award of compensation, the evidence must establish that the injury resulted in a loss of wage earning capacity. *See Fleetwood v. Newport News Shipbuilding and Dry Dock Co.*, 776 F.2d 1225, 1229 (4th Cir. 1985); *Sproull v. Stevedoring Servs. Of America*, 25 BRBS 100, 110 (1991). A claimant establishes a *prima facie* case of total disability by showing that he cannot perform his usual work because of a work-related injury. Once

a *prima facie* case is established, the claimant is presumed to be totally disabled, and the burden shifts to the employer to prove the availability of suitable alternate employment. *See Turner*, 661 F.2d at 1038; *Trans-State Dredging v. Benefits Review Bd. [Tarner]*, 731 F.2d 199, 200-02 (4th Cir. 1984); *Elliott v. C & P Telephone Co.*, 16 BRBS 89, 92 (1984). If the employer establishes the existence of such employment, the employee's disability is treated as partial rather than total. However, the claimant may rebut the employer's showing of suitable alternate employment, and thus retain entitlement to total disability benefits, by demonstrating that he diligently sought but was unable to obtain such employment. *See Palombo v. Director, OWCP*, 937 F.2d 70, 73 (2d Cir. 1991); *Director, OWCP v. Berkstresser*, 921 F.2d 305, 312 (D.C. Cir. 1991).

I initially conclude that Mr. Waters has successfully established a *prima facie* case. All of the physicians opined that Mr. Waters can only perform sedentary work. Dr. Turner placed a restriction on Mr. Waters to lift no more than 10 pounds. Drs. Staker, Devita, and Birkeland also agree that Mr. Waters should be limited to a 10 pound lifting restriction. Drs. Devita and Birkeland also note that the claimant should avoid bending, stooping, or squatting at the waist. Dr. Kirk concurred that Mr. Waters should be limited in lifting and carrying heavy objects. As Mr. Waters' job with the U.S. Navy Exchange required lifting 50 pounds and bending, stooping, and kneeling, he clearly has shown he cannot return to that job. No evidence in the record suggests that he can do so currently. Thus, Mr. Waters has shown that he is totally disabled within the meaning of the Act. It now becomes the employer's responsibility to overcome the presumption.

In order to overcome the presumption of total disability, the employer must demonstrate the availability of employment that the claimant could perform. A showing of suitable alternate employment must account for a claimant's age, background, employment history, and physical and intellectual capabilities. *See Turner*, 661 F.2d 1042-43. In addition, such employment must be a position within the claimant's community that the claimant realistically could secure with a diligent effort. *Id.* Local community has been interpreted to mean the community in which the injury occurred but may include the area where the claimant resided at the time of the injury. *Jameson v. Marine Terminals*, 10 BRBS 194 (1979). The relevant geographic area or local community has been held to extend to

at least 25 miles from the worker's home. *Newport News Shipbuilding and Dry Dock Company v. Tann*, 841 F.2d 540, 543 (4th Cir. 1988). The Board has held that jobs 65 and 200 miles away are not within the geographical area, even if the employee took such jobs before his injury. *Kilsby v. Diamond M. Drilling Co.*, 6 BRBS 114 (1977), *aff'd sub. nom. Diamond M. Drilling Co. v. Marshall*, 577 F.2d 1003 (5th Cir. 1978). While the employer need not specifically place the claimant in an actual job, it must establish the precise nature, terms and availability of the job opportunity. *Tarner*, 731 F.2d at 201; *Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94, 97 (1988). The presumption of total disability continues until the employer satisfies this burden.

The employer presented vocational evidence regarding the availability of potential jobs for Mr. Waters, given his limitations. All of the jobs initially identified were for security guard positions located in the area of Tacoma, Washington. Mr. Shafer subsequently located potential positions also in Seattle, Gig Harbor, Bremerton, Bainbridge Island, Silverdale, and Port Orchard.

Dr. Molinari opined that Mr. Waters would not be able to drive to Tacoma from his home in Port Orchard, which is approximately 28 miles, on a daily basis due to back pain. I give weight to his testimony, as no other physician of record voiced an opinion regarding the claimant's ability to travel. Therefore, all of the jobs in Tacoma are not suitable alternative employment because these positions do not fit within Mr. Waters' physical limitations. Dr. Staker also indicated that Mr. Waters should not do any prolonged sitting. I give weight to her testimony also because it is the most recent examination of the claimant and is likely to most accurately represent his current physical state.

It follows that due to Dr. Molinari's opinion that Mr. Waters cannot drive the 28 miles one way to Tacoma on a daily basis, the claimant would also be unable to drive to Seattle or to Bainbridge Island, since both of these destinations are farther from Mr. Waters' residence than Tacoma. Although there is evidence that the claimant could alternatively commute to Seattle by ferry, I find this to be unreasonable for this claimant given his physical limitations and the time and effort involved in such a commute. Therefore, I find all of the potential jobs located by Mr. Shafer that were located in

Seattle or Bainbridge Island do not constitute suitable alternative employment for Mr. Waters.

Of the positions identified by Mr. Shafer which are not located in either Seattle or Bainbridge Island, I find that the position at AT&T Cable Services in Bremerton also is not suitable alternative employment for this claimant. Drs. Turner, Staker, Devita and Birkeland concur that Mr. Waters should be limited to lifting no more than 10 pounds. Dr. Kirk also opined that the claimant should not lift or carry heavy objects. The job at AT&T Cable Services required occasional lifting of up to 15 pounds. Hence, I find this job does not fit within the claimant's physical restrictions and, therefore, is not suitable alternative employment.

I also find that the job at West Sound Workforce is not suitable alternative employment because Mr. Waters does not have the required skills necessary to perform the job. The claimant stated that he does not have any experience with the software program Excel. (Tr. 78). Knowledge of Excel is listed as a minimum qualification and there is no indication that the employer would provide on-the-job training. Hence, this is not suitable alternative employment.

I find that suitable alternative employment for Mr. Waters has been established by the employer/administrator as of February 23, 2000, based on the other jobs identified in Mr. Shafer's labor market survey. The jobs with the City of Port Orchard, Express Personnel Services, Olympic Peninsula Personnel, Manorcare Health Services, Bay Pointe Retirement Community, and Kitsap County Consolidated Housing Authority all constitute suitable alternative employment for Mr. Waters. Of these positions, the farthest city from the claimant's home is Gig Harbor, which is about 17 miles one way. I reiterate that there is no medical evidence that Mr. Waters cannot travel such a distance one way on a daily basis. I therefore find that the distance to each of the remaining jobs identified by Mr. Shafer does not render these jobs unavailable based solely on the commuting distance and the medical opinion evidence.

I further find that Mr. Waters had a realistic chance of securing one of the positions based on his educational and professional background. Specifically, Mr. Waters' work experience would likely increase his chances for obtaining a position at Express Personnel Services, which viewed military

experience as a strong asset. Therefore, I find the employer/administrator has met its burden of proving the availability of suitable alternative employment.

Once the employer has established suitable alternate employment, the employee can nevertheless prevail in his quest to establish total disability if he demonstrates that he diligently tried and was unable to secure employment. *Hairston v. Todd Pacific Shipyards Corp.*, 849 F.2d 1194, 1196 (9th Cir. 1988); *Fox v. West State Inc.,* 31 BRBS 118 (1997). A trier-of-fact does not abuse his discretion by noting the claimant's lack of diligence in seeking employment. *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 236-37 n. 7 (1985). Mr. Waters stated he has not looked for a job on his own in the four years he has been off work. However, the claimant indicated he checked on some of the positions contained in the labor market survey performed by Mr. Shafer. He testified, however, that he did not believe he could perform some of the jobs because they were very stressful. Further, he contends that he was concerned about the jobs which require drug testing. However, the claimant testified that the employers told him they could not discriminate against him based upon that basis.

Although Mr. Waters indicated that he thought he could not perform some of the positions because of the stress level associated with the jobs, no physician has limited his ability to withstand a particular amount of stress. I also find it significant that the claimant did not attempt to even look for a job for the four years he had been off work until he was advised by his attorney prior to the hearing that he should contact some of the potential employers identified by Mr. Shafer. Moreover, he has not discussed changing his prescription medication with his treating physician to accommodate his employment opportunities. I reiterate that many of these jobs were within 25 miles of the claimant's residence and I believe he could have arranged for some type of transportation to commute to the jobs even if he believes it would be difficult for him to drive his own automobile. I therefore find that Mr. Waters did not exercise reasonable diligence in attempting to secure some type of employment within the scope of suitable available jobs.

Since the employer has shown suitable alternative employment, claimant's permanent disability is partial, rather than

total. Total disability becomes partial on the earliest date that the employer establishes suitable alternate employment. *Palombo v. Director, OWCP,* 937 F.2d 70, 25 BRBS 1 (CRT) (2nd Cir. 1991). From the date of maximum medical improvement to the date suitable alternate employment is shown, the claimant's disability is total. *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89 (CRT) (9th Cir. 1990), *rev'g Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155 (1989), *cert denied*, 498 U.S. 1073 (1991). Thereafter, permanent partial disability and compensation is computed under Section 8(c)(21) of the Act.

The parties disagree as to whether the claimant has reached maximum medical improvement. The claimant asserts that he is still undergoing therapy, continues to be in pain, and is continuing to take medication. Hence, the claimant contends he has not reached maximum medical improvement. The employer argues that Mr. Waters reached maximum medical improvement on July 30, 1998, at the earliest, as indicated by Dr. Turner, or August 25, 1998, at the latest, as found by Drs. Devita and Birkeland.

Courts have devised two legal standards to determine whether a disability is permanent or temporary in nature. Under one standard, a disability is considered to be permanent where the underlying condition has reached the point of maximum medical improvement. *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56, 60 (1985). To establish permanency under this standard, the medical evidence must prove the date on which the claimant has received the maximum medical benefit of medical treatment such that his condition will not improve. *Id.* Under another standard, a permanent disability is one that "has continued for a lengthy period and . . . appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period." *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968). These two standards, while distinguishable, both define the permanency of a disability in terms of the potential for further recovery from the injury.

On August 25, 1998, Drs. Devita and Birkeland opined that Mr. Waters' condition was fixed and stable and that he had reached the maximum medical benefit of the treatment. Dr. Molinari stated on February 16, 1999 that Mr. Waters is not likely to face additional surgeries in the future. In addi-

tion, Dr. Staker also noted Mr. Waters' condition was fixed and stable as of February 16, 2000.

I find the date of maximum medical improvement to be August 25, 1998 based upon the opinions of Drs. Devita and Birkeland. Under the *Trask* standard, I find Mr. Waters' disability is permanent and has been since he reached maximum medical improvement on August 25, 1998. Therefore, I find Michael Waters was temporarily totally disabled from the date of his injury until August 25, 1998. The quality of the claimant's disability changed on that date and I conclude that he remained permanently and totally disabled until suitable alternate employment was presented to him on February 23, 2000. On that date, the character of the claimant's disability changed from total to partial. Therefore, I find that February 23, 2000 is the date on which the claimant's disability changed from total to partial.

Average Weekly Wage

The provisions for determining a claimant's average weekly wage are set forth in Section 10 of the Act. 33 U.S.C. § 910. Section 10(d) provides that the average weekly wage is the claimant's average annual earnings divided by 52. The methods for determining average annual earnings are set forth by Sections 10(a)-(c). Section 10(a) is applicable when a claimant's work during the year preceding his injury was permanent and continuous. *Duncanson-Harrelson Co. v. Director, OWCP*, 686 F.2d 1336, 1342 (9th Cir. 1982), *reh'g denied*. Subsection (b) is similar to Section 10(a) in that it pertains to permanent and continuous jobs but it focuses on the wages of other workers in the same or similar employment of the claimant who have worked for substantially the whole year preceding the claimant's injury. *McKee v. D.E. Foster Co.*, 14 BRBS 513 (1981). Section 10(c) applies where a claimant's employment is seasonal, part-time, intermittent or discontinuous. *Id.* at 1341.

Claimant asserts that he should be paid compensation under the Act based on his potential earning power because his actual wages do not fairly represent his wage-earning capacity. He goes on to argue that his average weekly wage should be computed on an hourly rate of $13.00 per hour based on the job offer he received from SEACOR Corporation. Employer counters that Mr. Waters' average weekly wage should be

$254.80 based on his actual earnings while working for the U.S. Navy Exchange.

Section 10(a) is to be applied if the employee "worked in the employment . . . whether for the same or another employer, during substantially the whole of the year immediately preceding" the injury. 33 U.S.C. § 910(a); *Empire United Stevedores v. Gatlin*; 936 F.2d 819 (5th Cir. 1991). A substantial part of the year may be composed of work for two different employers where the skills used in the two jobs are highly comparable. *Hole v. Miami Shipyards Corp.*, 12 BRBS 38 (1980), *rev'd on other grounds*, 620 F.2d 769 (5th Cir. 1981). Although Mr. Waters did work for General Dynamics-Lockheed Martin for four months during the year preceding the injury, it is not apparent from the evidence presented what type of position he held, what skills were required for the job, and if they were comparable to his position at the U.S. Navy Exchange. Thus, I cannot determine whether his position with that company was comparable to the position he held at the U.S. Navy Exchange. It therefore follows that I cannot consider Mr. Waters' work for that company under Section 10(a) in determining whether the claimant worked "substantially the whole of the year immediately preceding" his injury.

I further note that Mr. Waters only worked 11 weeks for the U.S. Navy Exchange. Also, Mr. Waters was designated a temporary employee by the U.S. Navy Exchange. The Benefits Review Board has held that as few as 28 weeks constitutes employment for substantially the whole year. *Eleazer v. General Dynamics Corp.*, 17 BRBS 75 (1987). Since Mr. Waters' total work for the employer did not begin to approach that level and because his position was temporary in nature, I conclude that the claimant's employment in the 52 weeks prior to his injury was not regular and continuous. Hence, Section 10(a) is not applicable.

Section 10(b) is not applicable because no evidence is contained in the record that shows the wages of the claimant's co-workers. *See* 33 U.S.C. § 910(b). Thus, Section 10(c) should be used to calculate Mr. Waters' average weekly wage. *See Todd Shipyards Corp. v. Director, OWCP*, 545 F.2d 1176 (9th Cir. 1976) *aff'g and remanding in part* 1 BRBS 159 (1974).

The employer argues that the claimant's average weekly wage is $254.80 based upon his hourly wage of $6.37 per hour

multiplied by 40 hours per week. The claimant argues that his average weekly wage should be based on the earning capacity shown from the $13.00 job offer he received for SEACOR Corporation.

The objective of Section 10(c) is to reach a fair and reasonable approximation of the claimant's annual wage-earning capacity at the time of the injury. *Gatlin*, 936 F.2d at 823. The use of probable future earnings of the claimant is appropriate in extraordinary circumstances, where previous earnings do not realistically reflect wage-earning potential. *Walker v. Washington Metro. Area Transit Auth.*, 793 F.2d 319, 321 (D.C. Cir. 1986), *cert denied*, 479 U.S. 1094(1984). Where no exceptional circumstances relating to the intermittent nature of the work or the employee's capacity to work, the case presents no cause for looking at factors other than the actual hourly rate prior to the injury. *Id.* at 322.

Mr. Waters' offer of employment with SEACOR Corporation was a contingent offer, dependent on the award of a government contract to that company. (CX 10). Because of the uncertainty with the contingent offer of employment, I find it would be unreasonable to use the hourly rate of pay that Mr. Waters anticipated receiving from SEACOR to calculate his average weekly wage for purposes of this case. Thus, I reject this position of the claimant.

I should note that an administrative law judge has broad discretion in determining annual earning capacity under Section 10(c). *Hicks v. Pacific Marine & Supply Co., Ltd.*, 14 BRBS 549 (1981). One acceptable method to compute the annual wage under Section 10(c) may be based on a claimant's earning capacity over a period of years prior to the injury. *Konda v. Bethlehem Steel Corp.*, 5 BRBS 58 (1976). However, actual wages should be used where a claimant voluntarily leaves the labor market and, therefore, has earnings lower than his earning capacity. *Geisler v. Continental Grain Co.*, 20 BRBS 35 (1987). To hold an employer responsible for a claimant's pre-injury removal of self from the work force would be manifestly unfair. *Id.*

Prior to working for the U.S. Navy Exchange, Mr. Waters voluntarily left his position in April of 1995 with General Dynamics-Lockheed Martin apparently because he thought he would be able to find a better paying job. Mr. Waters did not

work from late April 1995 until late October 1995. (Tr. 39-40). Thus, the claimant apparently chose to remove himself from a higher paying job and ultimately moved to a lower paying job. To hold the employer responsible for this removal would be unfair. I therefore find that the claimant's actual wages from the U.S. Navy Exchange should be used to calculate his average weekly wage for purposes of this case.

The party contending actual wages are not representative of that party's actual wage earning capacity has the burden of producing supporting evidence. *Todd Shipyards Corp. v. Director, OWCP*, 545 F.2d 1176 (9th Cir. 1976). A claimant's testimony, if credible, may be considered substantial evidence to support such an allegation. *Carle v. Georgetown Builders*, 14 BRBS 45, 51 (1980). In this regard, I note that the claimant testified that his wages were not representative of his earning capacity because he worked an average of 50 to 60 hours per week. (Tr. 40). While I agree that the hours Mr. Waters worked for the U.S. Navy Exchange differed from pay period to pay period, the average number of hours that Mr. Waters worked was 43.46 hours per week. Thus, I believe it is more acceptable in determining the claimant's wage earning capacity at the time of injury to multiply his known hourly rate by the time variable of 43.46 hours per week.
See Eckstein v. General Dynamics Corp., 11 BRBS 781 (1981); *Orkney v. General Dynamics Corp.*, 8 BRBS 543 (1978). Mr. Waters was earning $6.37 per hour with the employer. Applying this hourly rate to the 43.46 hours per week that he averaged in working and multiplying this by 52 weeks, results in average annual earnings of $14,396.00. When this figure is divided by 52, as required by Section 10(d), this equates to an average weekly wage of $276.84. Obviously, this same average weekly wage could simply be obtained by multiplying 43.46 average hours of work per week times Mr. Waters' $6.37 hourly rate of pay.

Compensation

In conclusion, Mr. Waters initially is entitled to temporary total disability compensation under Section 8(b) of the Act from the date of his injury through August 25, 1998, the date he reached maximum medical improvement. This compensation is to be computed at the rate of 66-2/3 percent of the claimant's average weekly wage of $276.84, which is $184.58 per week. 33 U.S.C. § 908(b). Mr. Waters next is entitled to

permanent total disability compensation from the date of maximum medical improvement until February 23, 2000, the date suitable alternative employment was established by the employer. 33 U.S.C. § 908(a). The rate of this compensation for Mr. Waters is computed in the same way as the temporary total disability compensation, in that he is entitled to compensation of $184.58 per week. However, Section 10(f) of the Act requires this compensation rate to be adjusted annually. *See* 33 U.S.C. § 910(f).

The character of the claimant's disability changed from total to partial on February 23, 2000 when the employer established suitable alternative employment. The remaining question is whether Mr. Waters is entitled to permanent partial disability compensation under Section 8(c)(21) of the Act. This section of the Act provides that compensation for permanent partial disability is 66-2/3 percent of the difference between the claimant's average weekly wage at the time of the injury and his wage-earning capacity in the same or other employment, to be paid for the duration of the partial disability. 33 U.S.C. § 908 (c)(21). Where the employee has no actual earnings upon which to determine his wage-earning capacity, the latter may be determined "as shall be reasonable, having due regard to the nature of [the claimant's] injury, the degree of physical impairment, his usual employment and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future." 33 U.S.C. § 908(h).

The Benefits Review Board has held that where the claimant has sought total disability benefits and the employer has proved the existence of suitable alternative employment, the claimant's earning capacity is demonstrated by the wages established for the suitable alternative employment. *Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 BRBS 231, 233, 234 (1984), *rev'd on other grounds sub nom. Director, OWCP v. Berkstresser*, 921 F.2d 306 (D.C. Cir. 1990). I found that the employer proved several jobs were available in February 2000 that fit within Mr. Waters' work restrictions. The starting pay for these jobs ranged from a low of $8.69 for a part time position at the City of Port Orchard to a high of $10-12 per hour for a full time position at Kitsap County Consolidated Housing Authority.

The employer/administrator argues that Mr. Waters has a wage-earning capacity of anywhere between $5.50 to $15.00 per hour and that he has no loss of wage-earning capacity. (Tr. 9). All of the jobs found to be suitable alternative employment, except one, are full time positions. Therefore, I find it more reasonable to expect Mr. Waters' wage-earning capacity in 2000 to be based on full-time work given the availability of the positions, his education and experience, and his physical limitations.

I have found six of the positions located by the employer/administrator constitute suitable alternative employment. Averaging the hourly wages of jobs found to be suitable alternative employment has been held to be a reasonable method of calculating wage-earning capacity. *See Avondale Industries v. Director, OWCP*, 137 F.3d 326 (5th Cir. 1998). Due to the fact that an employer need not show a specific job opening is available when proving suitable alternative employment, courts have no way of determining which job, of the ones proven available, the employee will obtain. *Id.* at 328. Averaging ensures that the post-injury wage-earning capacity reflects all jobs available. *Id.* Assuming the claimant would start at the lowest end of the salary range of these six positions, after averaging the hourly wages of the suitable alternate positions, I find that Mr. Waters wage-earning capacity is $331.27. This calculation is based on an hourly rate of $8.28 for a 40 hour a week job.

When suitable alternative employment is shown, the wages which the new positions would have paid at the time of the claimant's injury are compared to his pre-injury wage to determine if he has sustained a loss of wage earning capacity. *Richardson v. General Dynamics Corp.*, 23 BRBS 327, 330 (1990). In *Richardson*, the Board instructed that the present wage rate of the suitable alternative employment should be adjusted downward to the level it would have paid at the time of the injury by utilizing the percentage increase of the National Average Weekly Wage (NAWW) calculations of the U.S. Department of Labor. *Id.* at 330-31. I have found that the employer/administrator met the requirement of proving suitable alternative employment on February 23, 2000. The claimant's injury occurred on January 18, 1996. The NAWW from October 1995 through September 1996 was $391.22 and the NAWW from October 1999 through September 2000 was $450.64. Thus, the 1996 wage was approximately 87 percent of the average wage for

2000. When this percentage change is applied to the wage of the suitable alternative employment identified in 2000, the resulting wage for that employment in 1996 would have been approximately $7.20 per hour ($8.28 x .87). Thus, I find the evidence shows that Mr. Waters has a wage earning capacity of $7.20 per hour or $288.16 per week for purposes of determining whether he has suffered a loss of wage earning capacity.

The claimant's average weekly wage at the time of his injury was $276.84. However, his post-injury full time wage-earning capacity has been calculated to be $288.16 per week. Therefore, Mr. Waters has not suffered a loss of wage earning capacity and, hence, is not entitled to compensation for permanent partial disability under Section 8(c)(21).

Th Supreme Court had held that a *de minimis* award, under certain circumstances, can be appropriate. When an employee has proven a medical disability which presently causes no loss of wage-earning capacity, but has a reasonable expectation that a loss in wage-earning capacity will occur in the future, a *de minimis* award is appropriate. *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 117 S.Ct. 1953 (1997). However, there is no evidence in this case that Mr. Waters will suffer a loss of wage-earning capacity in the future. The claimant has a college education and has been given permission by his physicians to perform sedentary work. Thus, I find that based upon the labor market surveys there are, and will continue to be, positions available for Mr. Waters considering his educational and professional background. A *de minimis* award is not appropriate.

Attorney's Fee

I cannot determine from the evidentiary record whether Mr. Waters' appeal of his claim for compensation to the Office of Administrative Law Judges has successfully resulted in him obtaining additional compensation. Therefore, claimant's counsel is allowed thirty days from the service date of this decision to file his attorney fee application, if appropriate. The application shall be prepared in strict accordance with 20 C.F.R. §§ 725.365 and 725.366. The application must be served on all parties, including the claimant, and proof of service must be filed with the application. The parties are allowed thirty days following service of the application to file objections to the application for an attorney's fee.

ORDER

Based on the above findings of fact and conclusions of law, IT IS HEREBY ORDERED that Michael Waters is entitled to the compensation listed below as a result of the claim involved in this proceeding, the specific computations of the award and interest shall be administratively performed by the district director.

1. Employer/Administrator shall pay to Michael Waters compensation for temporary total disability under Section 8(b) of the Act at the rate of $184.58, based on an average weekly wage of $276.84, from January 18, 1996 to August 25, 1998.

2. Employer/Administrator shall pay to Michael Waters compensation for permanent total disability under Section 8(a) of the Act at the rate of $184.58, based on an average weekly wage of $276.84, from August 25, 1998 to February 23, 2000, as adjusted annually under Section 10(f) of the Act.

3. The Employer/Administrator is entitled to credit for the disability payments already paid to the claimant under the Act, which total at least $5,756.51.

4. Interest shall be paid on all accrued benefits in accordance with the rate applicable under 28 U.S.C. § 1961, computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this decision with the district director.

5. Employer shall furnish reasonable, appropriate and necessary medical care to Mr. Waters as required by Section 7 of the Act.

A
DONALD W. MOSSER
Administrative Law Judge