U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LAVERN R. DeSPLINTER and DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Aurora, Ill.

Docket No. 96-1843; Submitted on the Record;
Issued September 9, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant had no loss of wage-earning capacity as of January 1, 1992.

This is the third appeal in this case. In a decision dated September 27, 1990, the Board found that the Office had not met its burden of proof in establishing that appellant's employment-related disability had ceased by March 16, 1986.[1] In a decision dated November 5, 1993, the Board found that the Office had not properly determined appellant's loss of wage-earning capacity.[2] The Board found that the Office had not provided a sufficient basis for a determination of the prevailing wage rate for chiropractors in appellant's area, nor had it established that the position was reasonably available. The history of the case is contained in the Board's prior decisions and is incorporated herein by reference.

Following return of the case record to the Office, additional development on the issue of the wage rate for chiropractors was undertaken. A rehabilitation counselor attempted to obtain wage information from chiropractors in the Houston area by sending a letter dated March 2, 1994, which requested information as to average wages for associate chiropractors in their first year following graduation, and after five years, as well as gross and net earnings for those in private practice.[3] The record contains five responses; for associate chiropractors five years after graduation the responses ranged from "unknown" to "$100,000+." In a letter dated April 8, 1994, the rehabilitation counselor discussed the information obtained, noting that the 1992 Texas Occupational Handbook cited a $16.32 per hour wage rate for chiropractors in Texas and a 1991

[1] Docket No. 90-540.

[2] Docket No. 93-92.

[3] An "associate" chiropractor is apparently one who is paid a salary, as opposed to a self-employed chiropractor in private practice.

national census wage data report indicated a $37,648.00 annual median wage for chiropractors. The rehabilitation counselor indicated that he would attempt to obtain additional responses for the local survey data, without providing an opinion as to prevailing wage rate for associate chiropractors in the Houston area.

In a memorandum dated April 18, 1994, an Office rehabilitation specialist indicated that in looking at the reported salaries for associates with 5 years of experience, the median salary was $60,000.00 per year. The specialist stated that in looking at the information gathered by the counselor and the resources used, the data is accurate and could be used for a loss of wage-earning capacity determination.

In a memorandum dated July 13, 1994, the Office rehabilitation specialist recommended using the wage rate of $33,945.60 per year as documented in the Texas Occupational handbook for 1992. The specialist noted that the handbook documented an average annual opening of 160 jobs with wage rates of $16.32 per hour, which appeared to be relevant for the Houston area.

In a decision dated August 29, 1994, the Office determined that the position of associate chiropractor represented appellant's wage-earning capacity as of 1992.[4] The Office found that the wage rate was $64,000.00 per year, based on the average annual income reported by survey respondents for associate chiropractors with 5 years experience.[5] The Office found that appellant had no loss of wage-earning capacity as of January 1, 1992.

Following a hearing on November 30, 1995, an Office hearing representative affirmed the wage-earning capacity determination in a decision dated April 18, 1996.

The Board has reviewed the record and finds that the Office did not properly determine appellant's loss of wage-earning capacity as of January 1, 1992.

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.[6]

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

[4] For the years 1986 to 1991, the Office determined that wage-earning capacity was represented by actual earnings, due to a lack of reliable data on salary and availability of associate chiropractor positions for those years.

[5] For the respondent who indicated "unknown," the Office used an annual salary of $24,000.00.

[6] *Carla Letcher*, 46 ECAB 452 (1995).

availability of suitable employment, and other factors and circumstances which may affect his wage-earning capacity in his disabled condition.[7]

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case 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 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.[8] 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.[9]

In this case, appellant submitted evidence regarding his actual earnings as a chiropractor in 1992 and 1993.[10] The Office determined that this did not fairly and reasonably represent his wage-earning capacity, based on his ability to earn wages as an associate chiropractor at a rate of $64,000.00 per year. In the prior appeal, the Board found that the Office did not have a sufficient basis to determine the prevailing wage rate. Once again the Board finds that the Office has failed to properly determine the wage rate.

The issue of the prevailing wage rate for an identified position within a particular commuting area is an issue that is properly resolved by a vocational specialist. The specialist is an expert in the field of vocational rehabilitation and is familiar with the job market and with the resources necessary to determine wage rate.[11] In this case, the rehabilitation counselor who prepared the survey of local chiropractors did not provide an opinion as to the prevailing wage rate for associate chiropractors as of January 1, 1992.[12] The Office rehabilitation specialist, in his most recent memorandum, used $33,945.00 per year as the wage rate, based on a 1992 Texas Occupational Handbook. The Office did not refer to the rehabilitation specialist's recommendation, nor ask the specialist for further clarification.[13]

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[7] *See Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); *see also* 5 U.S.C. § 8115(a).

[8] *See Dennis D. Owen*, 44 ECAB 475 (1993).

[9] 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.303.

[10] Appellant and his wife reported a net loss for their chiropractic business in 1992, with a small profit reported in 1993.

[11] Office procedures rely on the expertise of rehabilitation specialists to properly determine suitability of a constructed position; *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.8(b) (December 1993).

[12] The Office determined loss of wage-earning capacity as of January 1, 1992, and therefore this is the applicable date for the wage rate determination.

[13] The state handbook refers to 1990 wage data, and it is not clear whether it represents an entry level wage.

The Office made a determination, based on a few widely divergent responses from chiropractors in 1994, as to wage rates in 1992. The Board finds that the record is not sufficient to support the wage rate findings. The Office should have secured an opinion from a rehabilitation specialist, based on all of the relevant information available, as to the 1992 wage rate in appellant's commuting area for an associate chiropractor with appellant's experience. It is the Office's burden to establish wage-earning capacity and it failed to meet its burden of proof in this case.

The decision of the Office of Workers' Compensation Programs dated April 18, 1996 is reversed.

Dated, Washington, D.C.
September 9, 1998

George E. Rivers
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member