U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DANIEL RENARD and PEACE CORPS, WORKERS COMPENSATION MANAGER, Washington, DC

Docket No. 97-2793; Submitted on the Record;
Issued April 12, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly adjusted appellant's compensation based upon his actual earnings; (2) whether the Office properly determined that the position of shipmaster represented appellant's wage-earning capacity.

The Office accepted that appellant, a Peace Corps volunteer, sustained a Grade III acromioclavicluar joint sprain of the left shoulder and a back sprain in the performance of duty on November 9, 1994. Appellant received temporary total disability benefits as of November 23, 1994.

In a work restriction evaluation dated September 22, 1995, appellant's treating physician, Dr. Raymond M. Vance, a Board-certified orthopedic surgeon, opined that appellant could return to work subject to restrictions of no lifting more than 20 pounds, intermittent lifting and climbing for 1 hour and no reaching or working above his shoulder. In August 1995, appellant commenced vocational rehabilitation, underwent training and obtained a U.S. Coast Guard license. In the justification for the vocational rehabilitation plan, which is undated, the rehabilitation counselor stated that appellant was retraining as a ship's captain and projected that the annual earnings of that position would range from $12,000.00 to $24,000.00. A labor market survey dated November 15, 1996, stated that the position required good vision, lifting could be avoided and bending and climbing were rarely required.

By letter dated November 25, 1996, the Office informed appellant that, as stated in letters to him dated October 19, 1996, he would receive 90 days of assistance from the Office to reach his goal of trying to find work as a shipmaster or a fishing vessel captain,[1] and that, at the end of

[1] The Department of Labor's, *Dictionary of Occupational Titles* (DOT) lists a ship's captain as the equivalent as a shipmaster. (*See* DOT, Vol. II, p. 54 (3d ed. 1965).

the 90-day period, his disability compensation would be reduced based on a wage-earning capacity of $20,800.00 to $33,280.00 a year.

In a report dated March 19, 1997, the rehabilitation counselor noted that on November 1, 1996 appellant procured employment as a yacht captain part time and "on-call" at a pay rate of $800.00 a month. He found that this level of earning underrepresented appellant's wage-earning capacity as the position of shipmaster with earnings of $350.00 a week was medically and vocationally suitable for appellant and existed in sufficient numbers to be considered reasonably available. In determining that the shipmaster position was reasonably available and that appellant could perform the work of a shipmaster, the rehabilitation counselor relied on a job market survey dated November 15, 1996, which showed that of the 10 potential employers contacted, 1 position of shipmaster was available. This job market survey report also stated that there was no listing for this occupation in any of the occupational outlook handbooks.

By letter decision dated April 18, 1997, the Office found that appellant had been reemployed effective November 1, 1996 as a "yachtsman" with wages of $186.62 per week.[2] The letter noted appellant's physical restrictions and found that the duties of the new position reflected the work tolerance limitations established by the weight of the medical evidence; and that appellant's training, education and work experience had also been considered in determining the suitability of this position. Pursuant to the Federal Employees' Compensation Act, at 5 U.S.C. § 8106, the Office advised that appellant's compensation would be adjusted to reflect his ability to earn actual wages as a "yachtsman." In making this reduction, the Office also noted that the monthly wage earnings of $800.00 for a part-time yachtsman underrepresented appellant's wage-earning capacity as appellant could perform the job of shipmaster and earn $350.00 a week or $1,400.00 a month. The Office further noted that shipmaster positions were reasonably available and were within appellant's physical restrictions. Appellant was advised by the Office in the same April 18, 1997 letter, that a second reduction in his compensation would occur when the Office determined what appellant could have earned if he had been placed through vocational rehabilitation in one of the career goals for which he was trained.

By letter dated April 27, 1997, appellant objected to the wage reduction, stating that he had looked very hard to find his present job and he cooperated and worked closely with the rehabilitation counselor to obtain work. Appellant reiterated that he mailed over 80 job applications and additionally hand delivered over 100 job applications. He noted that he was 50 years old and that "everyone" asked for 5 to 10 years of experience. He further stated that the rehabilitation plan indicated that a ship captain's salary started at $1,000.00 a month and that was not an overwhelming difference from the $800.00 a month he was currently earning. Appellant stated that after 1 or 2 years, it would be likely that he could make $350.00 a week, that almost "no companies hire[d] captains," and that they promoted from within the company.

By decision dated May 21, 1997, the Office found that the selected position of shipmaster represented appellant's wage-earning capacity and further adjusted appellant's weekly compensation rate to $72.81.

[2] While the Office referred to appellant's position as "yachtsman," appellant and the vocational rehabilitation counselor referred to appellant's position as yacht captain.

The Board finds that the Office properly adjusted appellant's compensation based upon his actual earnings.

In the April 18, 1997 letter decision, the Office adjusted appellant's compensation based upon his actual earnings as a yachtsman. This decision did not constitute a formal wage-earning capacity determination, but rather was a reduction of compensation using the *Shadrick*[3] formula. If an appellant returns to work and has earnings, appellant is not entitled to receipt of temporary total disability benefits and actual earnings for the same time period. The Office, therefore, offsets actual earnings pursuant to the *Shadrick* formula. In a prior decision, *Lawrence D. Price*[4], the Board explained that if a reduction of benefits based upon actual earnings is not accompanied by a determination that actual earnings "fairly and reasonably" represent wage-earning capacity, an informal reduction of benefits utilizing the *Shadrick* formula is proper rather than a formal loss of wage-earning capacity determination. As the Office in this case did not find in the April 18, 1997 letter decision that appellant's actual earnings fairly and reasonably represented his wage-earning capacity, the informal reduction of benefits was proper. In this case, the Office did properly apply the *Shadrick* formula to compute the amount of appellant's adjusted compensation benefits.

The Board also finds that the Office improperly determined that the selected position of shipmaster represented appellant's wage-earning capacity.

Once the Office has made a determination that a claimant is disabled as a result of an employment injury, it has the burden of proof of justifying a subsequent reduction in compensation benefits.[5]

The Act, at 5 U.S.C. § 8106(a), provides that "If the disability is partial, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of the difference between his monthly pay and his monthly wage-earning capacity after the beginning of the partial disability, which is known as his basic compensation for partial disability."

Under section 8115(a) of Act,[6] 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. Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing that they do not fairly and reasonably represent the impaired employee's wage-earning capacity, must be accepted as such measure.[7] This principle is premised upon the theory that wage-earning capacity is a measure of the employee's ability to

[3] *See Albert C. Shadrick*, 5 ECAB 376 (1953).

[4] 47 ECAB 120 (1995).

[5] *Louis B. McKenna*, 46 ECAB 328 (1994).

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

[7] *Don J. Mazurek*, 46 ECAB 447 (1995).

earn wages in the open labor market under normal employment conditions and is thus best measured by actual wages earned.[8]

In its April 18, 1997 reduction of compensation, the Office properly adjusted appellant's compensation to reflect his actual wages as a yachtsman, the job appellant currently held, which the Office determined was within appellant's physical restrictions and was compatible with his professional qualifications. In the memorandum dated April 18, 1997, the Office recognized appellant's actual earnings but determined that they did not represent his earning capacity in light of his vocational rehabilitation. In the memorandum to the Director accompanying the May 21, 1997 decision, the Office found that, while appellant had obtained full-time employment in his chosen field, other positions could be identified which would establish a higher wage-earning capacity. The Office noted that a vocational rehabilitation survey indicated that the position of shipmaster, for which appellant had been vocationally rehabilitated, paid a higher salary than appellant was earning as a yachtsman. The Office in effect found that appellant's vocational rehabilitation program had contemplated his employment as a shipmaster and, therefore, a median-entry-level salary in this position reflected appellant's wage-earning capacity.

As appellant did have actual earnings, the Office could only proceed to determine appellant's wage-earning capacity based upon a selected position if the Office first established that appellant's actual earnings did not fairly and reasonably represent his wage-earning capacity, or if the Office established that appellant had not complied with vocational rehabilitation.

Regarding the selection of actual earnings or a selected position as the basis for the wage-earning capacity determination, the Act[9] provides:

> "If the actual earnings of the employee do not fairly and reasonably represent his wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity as appears reasonable under the circumstances is determined with due regard to (1) the nature of his injury; (2) the degree of physical impairment; (3) his usual employment; (4) his age; (5) his qualifications for other employment; (6) the availability of suitable employment; and (7) other factors or circumstances which may affect his wage-earning capacity in his disabled condition."

[8] *See Albert L. Poe*, 37 ECAB 684 (1986).

[9] 5 U.S.C. § 8115(a).

The Office's procedure manual cautions the claims examiner that in determining whether the claimant's earnings fairly and reasonably represent his or her wage-earning capacity, the claims examiner should not consider the factors set forth in 5 U.S.C. § 8115(a).[10] The Board has further held that it is *only* appropriate for the Office to consider the factors enumerated in section 8115(a) when it has been shown that actual wages do not fairly and reasonably represent wage-earning capacity.[11] In most cases, appellant's qualifications for other employment and physical abilities would allow the Office to identify several selected positions within various wage ranges.

The Board has long recognized, however, that actual earnings are generally the best measure of wage-earning capacity as they more reasonably reflect appellant's employment capacity in the open labor market. The Board explained in *Billie S. Miller*[12] that "[g]enerally, actual wages earned in the open labor market more accurately represent an employee's earning capacity and constitute a more reliable gauge than a secondary method such as an opinion of a vocational rehabilitation adviser." In keeping with this principle, to meet its burden of proof the Office must identify a deficiency in appellant's actual earnings such that the actual earnings do not fairly and reasonably represent wage-earning capacity. As the Office bears the burden of proof, the Office may not simply exercise its discretion and select either actual earnings or a selected position as the basis for a wage-earning capacity determination. The Office's procedure manual offers limited guidance in determining whether actual earnings do fairly and reasonably represent wage-earning capacity. The procedure manual notes that the factors to be considered in determining whether the claimant's work fairly and reasonably represents his wage-earning capacity include the kind of appointment, that is whether the position is temporary, seasonal or permanent; and the tour of duty, that is whether the position is part time.[13] In some cases it would, therefore, be obvious that appellant's actual earnings do not "fairly and reasonably" represent wage-earning capacity. The Board's case law has addressed more difficult cases to determine whether actual earnings "fairly and reasonably" represent wage-earning capacity. In the *Miller* case,[14] claimant had completed a 19-month vocational rehabilitation training program to work as an electronics technician. Appellant, however, did not seek employment as an electronics technician in the open labor market, but rather chose self-employment at home performing television repair work as his wife was working and he was needed at home to take care of the children. Given the seemingly sporadic and part-time nature of his at home, self-employment and appellant's unwillingness to pursue a full-time position in the open labor market, the Board concluded that appellant's actual earnings did not fairly and reasonably represent his wage-earning capacity. In the case *William J. Lamontagne,*[15] the Office found that, while appellant had earnings as a taxi driver, the selected position of machine operator

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (December 1993).

[11] *Monique L. Love*, 48 ECAB 378 (1997).

[12] 15 ECAB 168, 172 (1963).

[13] *Supra* note 10.

[14] *Supra* note 12.

[15] 18 ECAB 324, 327 (1967).

represented his wage-earning capacity. The Board found that this wage-earning capacity determination was improper, noting as follows:

> "There is no evidence that his earnings as a taxi driver do not fairly represent his wage-earning capacity. This is not a situation where an employee improperly refused to accept work at a higher wage or voluntarily worked below his capacity. Appellant attempted unsuccessfully to secure jobs with greater earnings. His work and earnings as a taxi driver represent an honest endeavor to secure suitable work."

In the present case, while the Office's rehabilitation specialist noted in a memorandum dated November 6, 1996 that appellant's employment was as a part-time, on-call ship's captain, there is no documentation of record that appellant's employment position was in fact part time, or "on call." Appellant informed the Office on several occasions that his position was full time and permanent. The record substantiates that appellant's employment as a yachtsman was not part time, seasonal, or temporary employment.

The only identifiable difference between the position in which appellant was employed and the selected position, as established by the evidence of record, is that the shipmaster's position offered a somewhat higher wage-earning capacity. This alone is not enough. As in *Lamontague,* the Office is attempting to substitute its opinion as to what appellant's earnings should be given his qualifications for other employment, instead of focusing on whether appellant's actual earnings fairly represent his honest ability to obtain earnings in the open labor market. As the Office never identified why appellant's actual earnings did not fairly and reasonably represent his wage-earning capacity, consistent with its own procedures and the Board's prior case law, the Office was precluded from evaluating appellant's wage-earning capacity pursuant to the factors provided in 5 U.S.C. § 8115.

Notwithstanding appellant's actual earnings, the Office may proceed to a wage-earning capacity determination based upon a selected position if the Office has established that appellant, without good cause, failed to participate in or cooperate with vocational rehabilitation. In such a case, a reduction of compensation could be made under the provision of section 8113(b) of the Act[16] to reflect appellant's probable wage-earning capacity had he continued to participate in vocational rehabilitation placement efforts. The Office's regulations state that the Office may direct a permanently disabled employee to undergo vocational rehabilitation. If an employee without good cause fails or refuses to apply for, undergo, participate in, or continue participation in a vocational rehabilitation effort when so directed, the Office will, in accordance with 5 U.S.C. § 8113(b) reduce prospectively the employee's monetary compensation based on what would probably have been the employee's wage-earning capacity had there not been such failure or refusal.[17]

[16] 5 U.S.C. § 8113(b).

[17] 20 C.F.R. § 10.124(e).

The record establishes that appellant had commenced vocational rehabilitation in August 1995, undergone training and obtained a Coast Guard license. On October 19, 1996 appellant was advised that he would be given a 90-day period in which to seek and obtain employment. As a result of a substantial job search, appellant obtained employment as a "yachtsman" on November 1, 1996. The Office's regulations at 20 C.F.R. § 10.124(d) provide in pertinent part that "when a permanently disabled employee who cannot return to the position held at the time of injury due to the residuals of the employment injury has recovered sufficiently to be able to perform some type of work, the employee must seek suitable work either in the government or in private employment." Pursuant to this regulatory requirement and to the Office's October 19, 1996 advisory that he seek employment, appellant did obtain employment as a yachtsman on November 1, 1996, a position which was within the training provided by his vocational rehabilitation. In reducing appellant's wage-earning capacity to reflect his ability to earn wages as a shipmaster, the Office concluded that appellant should not have accepted the position of yachtsman, as he was capable of being employed as a shipmaster. This finding was not proper.

The Office has not made a showing that appellant "without good cause" refused to continue with vocational rehabilitation. Appellant was directed to seek employment, he did so and was successfully reemployed. The Office did not, thereafter, direct appellant to seek other employment and did not in any manner attempt to continue vocational rehabilitation efforts. The Office, therefore, could not proceed to determine appellant's wage-earning capacity based upon its own determination of what probably would have been appellant's wage-earning capacity, had he continued with vocational rehabilitation efforts, as appellant had not obstructed or refused to continue with vocational rehabilitation efforts.[18]

Appellant's actual earnings are accepted as fairly and reasonably representing his wage-earning capacity, in the absence of evidence to the contrary. In this case, the Office's ability to identify a position in which appellant could possibly have earned more had vocational rehabilitation been fully successful, does not meet the Office's burden of establishing that appellant's actual earnings did not fairly and reasonably represent his wage-earning capacity.

[18] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.11(c) (November 1996).

The decision of the Office of Workers' Compensation Programs dated May 21, 1997, is hereby reversed and the decision of the Office dated April 18, 1997 is hereby affirmed.[19]

Dated, Washington, D.C.
April 12, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

[19] The Board notes that, by decision dated September 24, 1997, the Office found that an overpayment had occurred in the amount of $2,618.76 due to the fact that appellant was receiving temporary total disability benefits through March 29, 1997 even though he returned to work on November 1, 1996. Appellant filed his appeal to the Board on August 25, 1997. Because the Office's September 24, 1997 decision was issued after appellant filed his August 25, 1997 appeal to the Board, the Board lacks jurisdiction to review the Office's September 24, 1997 decision. The Board may only review decisions issued by the Office within one year prior to appellant's appeal to the Board. 20 C.F.R. §§ 501.2(c), 501.3(d)(2); *see Jeanette Butler*, 47 ECAB 128, 130 (1995).