U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JONNY COLON and DEPARTMENT OF AGRICULTURE, APHIS -- VETERINARY SERVICES, San Juan, PR

Docket No. 98-2238; Submitted on the Record;
Issued August 28, 2000

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, VALERIE D. EVANS-HARRELL

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant's actual wages as an instructor vocational training fairly and reasonably represent his wage-earning capacity effective August 18, 1996; and (2) whether appellant met his burden of proof in establishing that modification of the wage-earning capacity determination was warranted.

In this case, the Office accepted appellant's claim for a February 11, 1986 injury for the conditions of right lumbar radiculopathy L4-5 and a herniated nucleus pulpous (HNP) L4-5. Appellant stopped work on February 11, 1986 and received appropriate compensation benefits. Appellant underwent a functional capacities evaluation on July 23, 1993 whereby his treating physician, Dr. Rafael E. Sein, a Board-certified physiatrist, opined that appellant could return to work within the restrictions provided. By letter dated December 22, 1993, the employing establishment indicated that they did not have any work within appellant's restrictions.

Appellant underwent vocational rehabilitation and attended a training program at the Automeca Technical College for automobile mechanic from August 1994 to June 1996. Effective August 5, 1996, appellant started working at the Automeca Technical College as an instructor earning $311.65 per week. By letter dated August 14, 1996, the Office advised appellant that his actual wages would be reduced effective August 18, 1996 based on his actual earnings. Appellant was absent from work October 24 to November 13, 1996 and resigned effective November 18, 1996. By decision dated December 11, 1996, the Office determined that the position of instructor, vocational training fairly and reasonably represented appellant's wage-earning capacity and was suitable for his accepted medical condition. The Office reduced appellant's compensation effective August 18, 1996 based on the actual earnings of appellant's

position at Automeca Technical College.[1] By decision dated June 10, 1998, an Office hearing representative affirmed the Office's December 11, 1996 decision, that appellant's loss of wage-earning capacity was properly reduced based on his return to work on August 5, 1996.

The Board has duly reviewed the entire case record on appeal and finds that the Office properly determined that appellant's actual earnings fairly and reasonably represented his wage-earning capacity.

Once the Office accepts a claim, it has the burden of proving that the disability ceased or lessened in order to justify termination or modification of compensation. Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions given the nature of the employee's injuries and the degree of physical impairment, his or her usual employment, the employee's age and vocational qualifications and the availability of suitable employment.[2] Section 8115(a) of the Federal Employees' Compensation Act provides that in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his or her actual earnings if his or her actual earnings fairly and reasonably represent his or her wage-earning capacity.[3] Generally wages earned are the best measure of wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.[4] The Office's procedure manual states, "After the claimant has been working for 60 days, the [Office] will determine whether the claimant's actual earnings fairly and reasonably represent his or her [wage-earning capacity]."[5] After the Office determines that appellant's actual earnings fairly and reasonably represent his or her wage-earning capacity, application of the principles set forth in *Alfred C. Shadrick*[6] decision will result in the percentage of the employee's loss of wage-earning capacity.[7]

In the present case, appellant started working as an instructor of vocational training with the Automeca Technical College effective August 5, 1996 working eight-hour days until November 18, 1996, when he resigned. Appellant worked in this position for over 60 days prior to his absence on October 24 through November 13, 1996 and subsequent resignation. There is no evidence to reflect that there was a material change in appellant's injury-related condition which affected his on-the-job performance. Consequently, appellant's instructor position at the

[1] By letter dated February 25, 1998, the Office advised appellant that his award for permanent disability would terminate on March 20, 1998, but medical benefits would continue.

[2] *See generally* 5 U.S.C. § 8115(a), *The Law of Workmen's Compensation* § 57.22 (1989); *see also Bettye F. Wade*, 37 ECAB 556 (1986).

[3] 5 U.S.C. § 8115(a); *Clarence D. Ross*, 42 ECAB 556 (1991).

[4] *Hubert F. Myatt*, 32 ECAB 1994 (1981).

[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.804.79(c)(1) (December 1993).

[6] 5 ECAB 376 (1953).

[7] *See Hattie Drummond*, 39 ECAB 904 (1988); *Shadrick*, *supra* note 6.

Automeca Technical College was a suitable position, for which the Office could determine appellant's wage-earning capacity.

An automated CA-Form 816 indicated that appellant was earning a weekly salary of $322.00 on the date of injury. In determining appellant's loss of wage-earning capacity, the Office determined that appellant had a loss in earning capacity of $83.72 weekly, based on the difference between his weekly compensation rate of $322.00 and his adjusted earning capacity of $238.28. The Office reduced appellant's disability compensation to $254.30 every four weeks. Inasmuch as the Office properly utilized the principles set forth in *Albert C. Shadrick* to determine that appellant had a compensation rate based upon his loss of wage-earning capacity of $254.30 every four weeks, the Board concludes that the Office properly determined appellant's wage-earning capacity based upon his actual earnings on December 11, 1996.

The Board finds, however, that the issue of whether appellant established that modification of the loss of wage-earning capacity determination is not in posture for decision.

Once loss of wage-earning capacity is determined, a modification of such determination is not warranted unless there is material change in the nature and extent of the injury-related condition, the employee has been retrained, or the original determination was in fact erroneous. The burden of proof is on the party seeking modification of the award.[8]

Appellant contended that the instructor position at the Automeca Technical College was supposed to be a 4-hour day part-time job, but was actually a 12-hour day full-time job. Appellant contended that he was unable to perform the job as an instructor and submitted a February 11, 1997 report from Dr. Sein. In his report, Dr. Sein reported that appellant came to his office on October 11, 1996 complaining of low back pain related to work activities as an instructor of auto transmissions and auto mechanic. Appellant related that he had to be in prolonged standing and bending positions with his morning and afternoon classes and had to drive back and forth to his house for a prolonged period. He provided the results of his examination and noted that the November 14, 1996 electromyogram (EMG)/nerve conduction velocity study revealed a left L5 lumbar radiculopathy. Dr. Sein provided a diagnosis of left L5 lumbar radiculopathy, lumbar HNP L4-5 and lumbar spinal stenosis. He recommended rest from work activities as an auto mechanic to avoid bending positions, but that appellant could continue work as an auto transmission instructor. Dr. Sein further related that appellant had a functional capacity evaluation in which work restrictions were given, but as they were not followed, appellant reinjured his stable lesion.

Although the Office hearing representative noted this report and appellant's contentions, she found that appellant failed to meet his burden of proof that there was a material change in his injury-related condition such that he was unable to perform the duties of the job.[9] This finding, however, is not consistent with the type of duties appellant testified he was required to perform. Appellant testified that he had medical limitations in the bending, squatting and twisting

[8] *Don J. Mazuek*, 46 ECAB 447 (1995); *see also Odessa C. Moore*, 46 ECAB 681 (1995).

[9] The Board notes that as the November 14, 1996 EMG study revealed a left L5 radiculopathy, this condition pertains to a different leg from the accepted condition of a right lumbar radiculopathy L4-5.

positions, but that these positions were required in his instructor job. The record reveals that the July 27, 1993 functional capacity evaluation contained various limitations in movements appellant could perform. In the most recent OWCP-5 form on file dated February 23, 1996, Dr. Sein restricted appellant to working a six-hour day with limitations. There is no job description on file in which to access the job duties appellant was required to perform and compare it to his medical restrictions. Inasmuch as his opined in his February 11, 1997 report that appellant reinjured himself due to the failure to follow work restrictions and that appellant could only work as an auto transmission instructor and not do auto mechanic work, Dr. Sein's opinion constitutes medical evidence which contradicts the Office hearing representative's assessment that appellant was able to perform the duties of his job as the record is not clear whether his instructor position consists of auto mechanic work.

Thus, while the report by Dr. Sein is not sufficient to establish that modification of the loss of wage-earning capacity determination is warranted due to a material change in appellant's condition, the Board finds that this report, given the absence of evidence to the contrary and the lack of a job description, is sufficient to require further development of the evidence. It is well established that proceedings under the Act are not adversarial in nature, [10] and while the claimant has the burden to establish entitlement to compensation, the Office shares the responsibility in the development of the evidence.[11] The Office has the obligation to see that justice is done.[12]

In the present case, there was an uncontroverted inference of a material change in the nature or extent of appellant's medical condition in that he developed a left L5 radiculopathy. Although the Board notes that this condition is on a different side from appellant's accepted right-sided conditions, the Office should request further information from appellant's treating physician regarding how this change impacts appellant's disability and medical condition. On remand, the Office should further develop the evidence as appropriate. After such development as the Office deems necessary, a *de novo* decision shall be issued.

[10] 20 C.F.R. § 10.11(b); *see also John J. Carlone*, 41 ECAB 354 (1989).

[11] *Dorothy L. Sidwell*, 36 ECAB 699 (1985).

[12] *William J. Cantrell*, 34 ECAB 1233 (1983).

The decision of the Office of Workers' Compensation Programs dated June 10, 1998 is affirmed in part, set aside in part and this case is remanded for further proceedings consistent with this decision.

Dated, Washington, D.C.
August 28, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Valerie D. Evans-Harrell
Alternate Member