U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of STANLEY B. PLOTKIN and DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Washington, DC

Docket No. 99-1838; Oral Argument Held June 14, 2000;
Issued September 28, 2000

Appearances: *E. Jason Albert, Esq.*, for appellant; *Sheldon G. Turley, Jr., Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant has established that his June 10, 1987 loss of wage-earning capacity determination should be modified.

The Office of Workers' Compensation Programs accepted that appellant sustained acute cervical and lumbar strains as a result of a September 26, 1975 slip and fall. The Office also accepted that appellant sustained cervical and thoracic strains as a result of a November 22, 1978 hit and run accident. In 1980, appellant retired from his position at the employing establishment entered law school and became a practicing attorney. On June 10, 1987 the Office determined appellant's loss of wage-earning capacity based upon the selected position of attorney on a part-time basis due to appellant's education and documented medical condition and restrictions. This is the second appeal of this case. By order dated August 3, 1995, the Board remanded the case for further proceedings to resolve a conflict in medical opinion regarding whether appellant's residuals due to his accepted cervical condition rendered him capable of working three hours per day or four hours per day.[1]

Following the Board's remand, the Office denied modification of the loss of wage-earning capacity determination on September 16, 1996, December 15, 1997, May 6, 1998 and March 11, 1999.

Once loss of wage-earning capacity is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the

[1] Docket No. 94-2283 (issued April 3, 1995).

original determination was, in fact, erroneous. The burden of proof is on the party attempting to show the award should be modified.[2]

In the present case, appellant contends that the Office's 1987 determination of wage-earning capacity was in error as it should have found that his actual earnings fairly and reasonably represented his wage-earning capacity instead of basing its wage-earning capacity determination on the earnings of a selected position. Appellant contends the record fails to establish that the selected position was being performed in such numbers within appellant's commuting area as to be considered "reasonably available," and that the Office erroneously found that appellant could work four hours a day performing the duties of a part-time attorney.[3] In denying appellant's request for modification of the loss of wage-earning capacity determination, the Office found that there was no evidence to indicate that the 1987 determination was in error as the selected position was reasonably available and appellant had not submitted sufficient medical evidence to establish a material change in his medical condition.

The Board finds that the Office properly based its 1987 loss of wage-earning determination on the selected position of a part-time attorney as opposed to appellant's actual earnings as a self-employed attorney.

Pursuant to section 8115 of the Federal Employees' Compensation Act,[4] when a claimant is no longer totally disabled but remains partially disabled, compensation for partial disability will be determined by actual earnings, if possible. 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 injured employee's wage-earning capacity, must be accepted as such measure.[5] If actual earnings do not fairly and reasonably represent wage-earning capacity, or if the claimant 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 availability of suitable employment and other factors and circumstances which may affect his wage-earning capacity in his disabled condition.[6]

The evidence in this case establishes that appellant's actual earnings as a part-time attorney in his own practice at the time of the 1987 loss of wage-earning capacity determination

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[2] *James D. Champlain*, 44 ECAB 438 (1993).

[3] The Board notes that at the time the June 10, 1987 loss of wage-earning capacity decision was issued, the medical evidence in file relating to appellant's employment-related conditions as well as his preexisting conditions established that appellant was medically able to perform the duties of a part-time attorney. A conflict in medical opinion arose thereafter, in which an impartial medical specialist found that appellant was still medically able to perform the duties of a part-time attorney. Accordingly, the original determination of June 10, 1987 was not modified.

[4] 5 U.S.C. § 8115.

[5] *Michael E. Moravec*, 46 ECAB 492 (1995); *see also Joseph Haley*, 46 ECAB 639 (1995).

[6] *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

did not fairly and reasonably represent his wage-earning capacity. Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions rather than in a make-shift position or other position at retained pay not necessarily reflective of true wage-earning capacity.[7] The record reflects that appellant's self-employment as a part-time attorney was actually "make-shift" work as he tailored his job for his particular needs. In a December 22, 1986 letter, appellant's attorney, Donald Elisburg, stated that appellant was attempting to develop a part-time practice where he could keep his own schedule and calendars, not that of an employee of a firm. In a letter dated January 10, 1986, appellant admitted that, since he began the practice of law, he was unable to work a consistent schedule and averaged fewer than four hours per day since March 1986. Inasmuch as appellant's self-employment as a part-time attorney appears to have revolved around his particular needs, appellant's actual earnings in 1985 and 1986 do not fairly and reasonably represent his wage-earning capacity. Moreover, there is no evidence at the time of the 1987 determination to contradict the Office's determination that the selected position of part-time attorney was a better indicator of appellant's wage-earning capacity. Appellant's actual earnings thus did not fairly and reasonably represent his wage-earning capacity. Accordingly, in this case, it was proper for the Office to base its June 10, 1987 wage-earning capacity determination on the earnings of a selected position and not actual earnings.

The Office's procedures governing cases where the wage-earning capacity is to be determined based upon a selected position provide that an assessment shall be made of appellant's suitability for employment with due regard to medical suitability for the selected position, reasonable availability of the selected position (with note that lack of current job openings does not equate to a finding that the position was not performed in sufficient numbers to be considered reasonably available) and vocational suitability. In determining vocational suitability, a description of the position from the Department of Labor's *Dictionary of Occupational Titles*, (DOT) the duties and physical requirement of the position and pay ranges in the relevant geographical area must be provided.[8]

In this case, the Office found that appellant was vocationally qualified and physically capable of performing the selected position of part-time attorney for 20 hours a week. Regarding the reasonable availability of the selected position, the Office obtained the November 17, 1986 report from the vocational rehabilitation counselor, which indicated that there were significant numbers of workers performing the selected position of Attorney, DOT No. 110.107-010, at an entry-level, on a part-time basis of 20 hours per week, in Montgomery County, Maryland. The counselor had contacted the Montgomery County Division of Employment and Training and the Woman's Bar Association (WBA), which indicated that positions were available for part-time attorneys in appellant's commuting area. The State Employment Service was also contacted and agreed that the position of part-time attorney was considered reasonably available as the job was being performed in sufficient numbers. It was noted that the Montgomery County State

[7] *Michael E. Moravec, supra* note 5; *see also Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8 (December 1993).

Employment Service indicated that the average yearly salary of a first-year lawyer was $27,000.00 in upper Montgomery County. The Office based appellant's loss of wage-earning capacity on the 1986 salary average of $13,500.00 as the selected position was part time. A Form CA-66 listed the job description, physical demands and working conditions. As the availability of these positions within appellant's commuting area was verified, the Office properly ascertained the reasonable availability of the selected position.

The Board notes that the Office properly found that the selected position was within appellant's medical restrictions. In its June 10, 1987 loss of wage-earning capacity decision, the Office found that the position of part-time attorney was medically suitable for appellant. A conflict of medical opinion arose as to whether appellant could work three or four hours a day in a sedentary position. In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[9] In this case, finding that a conflict of medical opinion existed, the Office referred appellant to Dr. John T. Stinson, a Board-certified orthopedic surgeon, to provide an impartial evaluation. In comprehensive reports dated October 23 and December 19, 1995, Dr. Stinson detailed appellant's factual and medical history and reported findings on examination. He opined that appellant had some residuals of his work-related injuries as Dr. Stinson noted myofascial pain syndrome in the thoracic spine area. He noted that this diagnosis was based only on appellant's subjective complaints as it was not possible to find any objective pathology for that condition. Dr. Stinson further opined that appellant was physically able to perform sedentary work for four or more hours a day. He noted that appellant was trained as an attorney and that there was no reason why he could not sit at a desk and perform sedentary work. The medical evidence from Dr. Stinson establishes that the selected position was within appellant's medical restrictions. The Office, therefore, met its burden of proof to establish that the selected position was within appellant's medical restrictions.

The Board further finds that the Office properly followed its established procedures for determining appellant's wage-earning capacity.[10]

In support of his contention that the Office's wage-earning capacity determination was erroneous, appellant first argued that the Office failed to base the loss of wage-earning capacity determination on his actual earnings in 1985 and 1986. As previously stated, wages actually earned are the best measure of a wage-earning capacity in the absence of evidence showing that they do not fairly and reasonably represent his wage-earning capacity. In this case, there is evidence that appellant's self-employment as a part-time attorney was specifically tailored to his needs and thus did not fairly and reasonably represent his wage-earning capacity in the open market. Appellant has not presented any evidence to overcome the Office's determination that basing his wage-earning capacity determination on the earnings of a selected position was erroneous. Wage-earning capacity means the ability of the injured employee to earn wages,

[9] *See Kathryn Haggerty*, 45 ECAB 383 (1994); *Edward E. Wright*, 43 ECAB 702 (1992).

[10] *See Phillip S. Deering*, 47 ECAB 692, 698 (1996) (finds that the Office properly applied the principles set forth in *Albert C. Shadrick*, 5 ECAB 376 (1953), for determining appellant's loss of wage-earning capacity).

taking into consideration the effects caused by the employee's impaired physical condition due to the employment injury and should not be confused with wages received or actual earnings.[11]

Appellant next argued that the Office erroneously found that the position of part-time attorney was reasonably available in 1986. Appellant's attorney argues that quantitative evidence is required to support a finding that a selected position is available and cites to *Levester Lyons*[12] in support of his contention. Regarding reasonable availability of selected positions, the Board has noted that where there is probative evidence of record regarding reasonable availability, such as from a state employment agency, this evidence will not be contradicted by evidence such as lack of current referrals for the selected position.[13] In *Lyons*, the Board found that there was no factual evidence regarding the number of the selected positions being performed in appellant's geographical area, there was evidence of high unemployment and the positions within the selected field in appellant's geographical area were being eliminated. Although exact numbers of part-time attorney positions in appellant's area were not given, unlike the factual situation in *Lyons*, the Office rehabilitation specialist documented in her November 17, 1986 report and the December 2, 1986 Form CA-66 the source of the data reviewed regarding the number of part-time attorney positions being performed within appellant's commuting area at that time. The rehabilitation specialist further contacted the State Employment Service with the data she had obtained from the university and WBA and indicated that the State Employment Service considered the information to be such that the selected position was being performed in sufficient numbers in appellant's commuting area. Accordingly, "quantitative evidence" of the type discussed in *Lyons* is not dispositive in this case.

Appellant also submitted two letters in support of his contention that the selected position was not reasonably available at the time of the Office's determination. In a December 15, 1998 letter, Lenore Schneiderman, President, WBA Montgomery County Chapter indicated that, while she was not involved with the WBA in 1986, she spoke to several members who were active at that time regarding the Department of Labor's memorandum of November 17, 1986 regarding the WBA's expertise in the area of part-time employment. She noted that the November 17, 1986 memorandum referred to seminars the WBA may have held concerning part-time employment as well as discussions with a representative from the WBA and indicated that she was not aware of this. She further indicated that none of the individuals with whom she had spoken regarding this matter recalled such seminars nor did any one recall speaking to any government officials. Ms. Schneiderman also indicated that the Montgomery County Chapter does not collect statistics on members who work on a part-time basis.

In a December 16, 1998 letter, Dolores Paunil of the State of Maryland, Department of Labor, Licensing and Regulation stated that she did not remember being asked by anyone in 1986 or 1991 about the availability of part-time work as a lawyer. She further indicated that she did not have copies of any progress reports dating back that far to verify any contacts.

[11] *See Donald Johnson*, 44 ECAB 540 (1993).

[12] Docket No. 95-334 (issued January 22, 1997).

[13] *Carol Letcher*, 46 ECAB 452 (1995).

Ms. Paunil further indicated that she did not remember talking with anyone from the Department of Labor or completing any DOL forms. She also stated that her office does not collect or estimate statistics on part-time employment or job openings for any occupation or industry.

These letters, however, are insufficient to warrant modification of the Office's loss of wage-earning capacity determination. Ms. Schneiderman merely offered her opinion based on conversations with several members who were active during 1986 as she, herself, was not involved with the WBA in 1986. Accordingly, Ms. Schneiderman's opinion has little probative value as she does not have any personal knowledge concerning the dealings of the WBA in 1986. Likewise, the fact that Ms. Paunil does not remember completing any DOL forms or having any contact with the DOL does not establish that there was no contact from the Office. Moreover, Ms. Paunil failed to offer any comprehensive information sufficient to overturn the Office's decision that the position of part-time attorney working 20 hours a week was reasonably available.

Lastly, appellant asserts that the Office erroneously found that appellant could work four hours a day as a part-time attorney and takes issue with Dr. Stinson's medical reports. As previously noted, Dr. Stinson's medical reports are entitled to special weight accorded to reports of an impartial medical examiner and the Office properly relied on his opinion to resolve the conflict in medical evidence that had arisen in this case. Appellant bears the burden to show a material change in the nature and extent of his injury-related conditions.[14] Appellant, however, has not submitted sufficient medical evidence to overcome the weight properly accorded to Dr. Stinson's impartial opinion or to create a new conflict with it.

The Board finds that appellant has not met any of the requirements for modification of the wage-earning capacity determination in this case.[15]

[14] *Sue A. Sedgwick*, 45 ECAB 211 (1993).

[15] *Id.*

The decision of the Office of Workers' Compensation Programs dated March 11, 1999 is affirmed.

Dated, Washington, DC
September 28, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member