U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EDWARD W. HYTHOLT and U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Petaluma, CA

Docket No. 00-389; Submitted on the Record;
Issued January 16, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, VALERIE D. EVANS-HARRELL

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's wage-earning capacity was represented by the selected position of a user support analyst.

The Office accepted that appellant sustained a lumbosacral sprain and aggravation of lumbar disc displacement in the performance of duty on May 2, 1995. In a letter dated June 2, 1999, the Office notified appellant that it proposed to reduce his compensation to reflect his wage-earning capacity in the selected position of user support analyst. The memorandum accompanying the notice stated that appellant had completed vocational computer training.

On June 25, 1999 the Office received a June 14, 1999 letter from a corporate officer of the computer training institute, stating that appellant had completed only 289 of the total 480 hours offered. On July 7, 1999 the Office received a letter from appellant, referring to the June 14, 1999 letter and the limited training he had received. He also resubmitted the June 14, 1999 letter.

By decision dated July 8, 1999, the Office reduced appellant's compensation based on wage-earning capacity as a user support analyst. The accompanying memorandum, dated July 7, 1999, stated that appellant had not responded to the notice of proposed reduction.

The Board has reviewed the record and finds that the Office did not properly consider all the evidence submitted.

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.[1]

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

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 availability of suitable employment and other factors and circumstances which may affect his wage-earning capacity in his disabled condition.[2]

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.[3] 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.[4]

It is well established that, "since the Board's jurisdiction of a case is limited to reviewing evidence which was before the Office at the time of its final decision, it is necessary that the Office review all evidence submitted by a claimant and received by the Office prior to issuance of its final decision. As the Board's decisions are final as to the subject matter appealed, it is critical that all the evidence relevant to that subject matter which was properly submitted to the Office prior to the time of issuance of its final decision be addressed by the Office."[5]

Appellant in this case submitted relevant evidence prior to the July 8, 1999 final decision. On July 7, 1999 the Office received a letter from appellant arguing that he did not have sufficient training for the position and a letter from the training institute regarding appellant's status. The Office did not consider this evidence, stating in the memorandum accompanying the July 8, 1999 decision that no response had been received. It is particularly important that the Office consider all the evidence in a situation involving the reduction or termination of compensation.[6] Accordingly, the Board finds that the Office did not meet its burden of proof in reducing appellant's compensation in this case.

The decision of the Office of Workers' Compensation Programs dated July 8, 1999 is reversed.

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

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

[4] 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.403.

[5] *William A. Couch*, 41 ECAB 548 (1990); *see also Linda Johnson*, 45 ECAB 439 (1994).

[6] *See Patsy R. Tatum*, 44 ECAB 490 (1993) (termination based on refusal of suitable work).

Dated, Washington, DC
January 16, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Valerie D. Evans-Harrell
Alternate Member