U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DARWIN A. DRAKE and DEPARTMENT OF THE NAVY, MARE ISLAND NAVAL SHIPYARD, Vallejo, CA

Docket No. 00-2534; Submitted on the Record;
Issued March 19, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, COLLEEN DUFFY KIKO, DAVID S. GERSON

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

On July 27, 1982 appellant, then a 26-year-old apprentice welder, slipped while connecting oxyacetylene gauges and twisted his right knee. He returned to light-duty work on July 28, 1982 and worked intermittently until December 12, 1982. Appellant returned on December 13, 1982, stopped work again on March 8, 1983 and returned to work on May 16, 1983. He stopped working again on July 10, 1985 and subsequently worked for the U.S. Postal Service for approximately two months. Appellant returned to work at the employing establishment as a clerk on June 27, 1988 but subsequently left the employing establishment and began working as a mechanic in private industry.

The Office accepted appellant's claim for right knee strain and arthritis of the right knee. Appellant underwent several operations on his right knee, beginning with a November 16, 1982 operation to remove plica. He underwent arthroscopic surgery on April 8, 1983, July 10, 1985 and September 20, 1994. Appellant had surgery in December 1986, which consisted of a lateral release portion of a Marquet procedure. On September 22, 1995 he underwent a right knee patellectomy. On August 12, 1998 appellant underwent surgery for removal of a plica and scar tissue.

The Office paid temporary total disability compensation for the periods appellant did not work. In a March 15, 1990 decision, the Office issued a schedule award for a 25 percent permanent impairment of the right leg.

In a February 29, 2000 decision, the Office found that appellant could perform the duties of an investigator. The Office further found that, as the current wages of an investigator exceeded the current wages of appellant's former position, appellant did not have a loss of wage-earning capacity and therefore was no longer entitled to compensation. In a letter received by the Office on March 31, 2000, appellant requested a hearing before an Office hearing

representative. In a May 30, 2000 decision, the Office denied appellant's request for a hearing as untimely and further found that his case could equally be well addressed by the submission of new evidence and a request for reconsideration. Appellant subsequently requested reconsideration. In a July 10, 2000 merit decision, the Office denied appellant's request for modification of the prior decision.

The Board finds that the Office improperly determined that appellant had no loss of 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, based on the nature of the employee's injuries and the degree of physical impairment, employment, age, vocational qualifications and the availability of suitable employment.[1] Accordingly, the evidence must establish that jobs in the position selected for determining wage-earning capacity are reasonably available in the general labor market in the commuting area in which the employee lives. In determining an employee's wage-earning capacity, the Office may not select a makeshift or odd lot position or one not reasonably available on the open labor market.[2]

In this case, the Office determined that appellant could perform the duties of an investigator.[3] The position of investigator is a sedentary position, requiring appellant to lift up to 10 pounds occasionally. The position requires six months to one year of vocational preparation. A vocational rehabilitation specialist indicated that the job of an investigator would involve mostly sitting with some walking and infrequent lifting. In a January 29, 1999 report, Dr. Eric Bugna, a Board-certified orthopedic surgeon, indicated that appellant had no limitations in sitting, reaching, reaching above his shoulder, twisting, operating a motor vehicle or performing repetitive motions with his hands. Dr. Bugna reported that appellant could walk and stand up to four hours a day. He noted that appellant could push and pull up to 20 pounds and could lift up to 30 pounds. Dr. Bugna indicated that appellant could not squat, kneel or climb. He concluded that appellant could work eight hours a day if these limitations were met. Dr. Bugna concluded that appellant could perform the duties of an investigator. His report showed that appellant had the physical capacity to perform the duties of an investigator.

Appellant contended that he did not have the vocational background or training to be an investigator. However, in a November 3, 1997 report, a vocational rehabilitation consultant reported that an interview with appellant showed that, from 1972 to 1975, he was a firefighter with the Air Force, which included inspection work, including arson investigations. From 1975 to 1980 he service as a military policeman, performing accident investigations as part of his duties. The consultant indicated that when appellant began working as a clerk at the employing establishment, he worked in the investigators' office, but eventually became an investigator. At this time, he learned to take fingerprints and perform background checks and received other training in investigation. The Office provided vocational rehabilitation benefits for appellant to

[1] *See generally*, 5 U.S.C. § 8115(a).

[2] *Phillip S. Deering*, 47 ECAB 692 (1998).

[3] Department of Labor, *Dictionary of Occupational Titles*, DOT No. 241.267-030 (Rev. 4th ed. 1991).

receive additional training in a 12-week training course as an investigator, which appellant completed. The evidence of record therefore shows that appellant had the vocational preparation to perform the duties of an investigator.

Appellant contended that the job was not reasonably available within his commuting area. A rehabilitation counselor reported on September 14, 1999 that a market survey showed the job was performed in sufficient numbers so as to be reasonably available within appellant's commuting area. Appellant contended that he was unable to find employment in the field and submitted a job advertisement that required a college degree and one year of experience for a position as an investigator. However, one job advertisement showing vocational preparation that appellant did not have is insufficient by itself to show that the job was not reasonably available within appellant's commuting area. In addition, the record shows that appellant was able to obtain employment as an independent investigator, receiving $150.00 for each result. The fact that appellant was unsuccessful in obtaining full-time employment in the selected position in the commuting area does not establish that the position is unavailable in the area.[4]

The record shows that the current pay of appellant's former position was $538.40 a week. The Office, in its decision, stated that appellant would receive $673.00 a week in the position. However, a rehabilitation counselor stated that the pay for position within appellant's commuting area ranged from $500.00 to $600.00 a week. The counselor selected one employer to report that the weekly wage was $575.00 a week. Neither the Office nor the rehabilitation counselor explained how it determined the wages for the position of investigator for the purposes of calculating appellant's loss of wage-earning capacity. The Office did not make a specific determination, based on fact finding, of what would be the typical starting salary for an investigator within appellant's commuting area. Since the rehabilitation counselor stated that the salaries ranged as low as $500.00, there exists some room to determine that appellant still has some loss of wage-earning capacity due to the effects of his employment injury. The case must therefore be remanded for further development on the issue of what the beginning salary for an investigator would be in appellant's commuting area. After further development as it may find necessary, the Office should issue a *de novo* decision on whether appellant has a loss of wage-earning capacity.

[4] *Rosa M. Garcia*, 49 ECAB 272 (1998).

The decisions of the Office of Workers' Compensation Programs dated July 10, May 14 and February 29, 2000 are hereby set aside and the case remanded for further action as set forth in this decision.

Dated, Washington, DC
March 19, 2002

Michael J. Walsh
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member