U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM J. MUNDY, JR. and DEPARTMENT OF THE INTERIOR, NATIONAL PARKS SERVICE, YOSEMITE NATIONAL PARK, CA

Docket No. 01-1323; Submitted on the Record;
Issued May 5, 2003

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's actual earnings as a part-time editorial assistant fairly and reasonably represented his wage-earning capacity.

On August 31, 1989 appellant, then a 46-year-old archeologist, filed a traumatic injury claim alleging that on August 29, 1989 he bruised the arch of his right foot while descending a slope on a 13-mile hike in the backcountry. He was a temporary full-time employee on the date of injury.

By letter dated September 15, 1992, the Office accepted appellant's claim for bilateral plantar fascia strains and authorized foot surgery.

Based on a July 8, 1998 report of Dr. Belyn Schwartz, a Board-certified physiatrist and appellant's treating physician, finding that appellant could work four hours a day with certain physical restrictions, the Office referred appellant to a vocational rehabilitation counselor.

The vocational rehabilitation counselor identified several positions including, the position of research associate, as being within appellant's physical limitations and vocational skills. In a January 6, 1999 report, the vocational rehabilitation counselor stated that although appellant was unsuccessful in obtaining employment as a research associate, he was qualified for this position and the position was located within his commuting area.

By decision dated February 23, 1999, the Office reduced appellant's compensation on the grounds that the selected position of research associate represented his wage-earning capacity. In a March 13, 1999 letter, appellant requested reconsideration.

In a March 23, 1999 letter, appellant notified the Office that he had begun working as an editorial assistant for the employing establishment's Bandelier National Monument on March 22, 1999. Appellant stated that the position was temporary, not to exceed 30 days, which

would expire on April 20, 1999. He also stated that he would be telecommuting from his home on a 15 hour a week schedule.

In a June 14, 1999 decision, the Office denied appellant's request for modification based on a merit review of the claim. Appellant requested reconsideration in an August 20, 1999 letter.

By decision dated October 13, 1999, the Office denied appellant's request for a merit review of his claim on the grounds that he failed to submit new and relevant evidence and legal arguments. In letters dated January 12 and February 17, 2000, appellant requested reconsideration.

In a March 16, 2000 decision, the Office denied appellant's request for modification. By letters dated June 7 and 9, 2000, appellant requested reconsideration.

By decision dated July 10, 2000, the Office reversed its February 23, 1999 decision based on a merit review of the claim. In so doing, the Office found that appellant had been working in a telecommuting editorial assistant position for four hours a day since March 22, 1999 and that this position was approved by Dr. Schwartz[1] and his vocational rehabilitation counselor.[2] The Office then found that appellant's actual earnings in the telecommuting position more accurately reflected his wage-earning capacity and adjusted his compensation based on this finding.

The Office finalized its July 10, 2000 decision on September 8, 2000.

The Board finds that the Office improperly determined that appellant's actual earnings as a part-time editorial assistant fairly and reasonably represented his wage-earning capacity.

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury, it has the burden of justifying a subsequent reduction of compensation benefits.[3]

Section 8115(a) of the Federal Employees' Compensation Act provides that the wage-earning capacity of an employee is determined by actual earnings if actual earnings fairly and

[1] In a January 20, 2000 report, Dr. Schwartz noted her previous opinion that appellant could work four hours a day in a sedentary position and stated that she wished to amend this opinion based on her examination of appellant over the last two years and a review of multiple records. Dr. Schwartz opined that appellant's work restrictions should be modified to include sedentary work at home, limited walking for limited distances, *i.e.*, from room to room, walking or standing on padded surfaces only, no stair climbing, no carrying more than 20 pounds for only very short distances and no participation in activities that required walking, standing or other contact with hard surfaces outside the home due to the risk of reinjury. Dr. Schwartz further opined that the present telecommuting computer job fell within her newly described medical restrictions.

[2] In a March 9, 1999 letter, the vocational rehabilitation counselor stated that appellant was permanently disabled due to his accepted employment-related condition of bilateral plantar fascitis. She further stated that based on her review of the job description for the position of editorial assistant, appellant could perform the duties of this position. She also stated that appellant was physically able to perform the sedentary part-time work without hazard to himself or others with or without reasonable accommodations, which may include telecommuting pursuant to the Rehabilitation Act Amendments of 1998.

[3] *Gregory A. Compton*, 45 ECAB 154 (1993).

reasonably represent his wage-earning capacity.[4] 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]

The Office's procedure manual provides in relevant part as follows:

> "*Factors Considered*. To determine whether the claimant's work fairly and reasonably represents his or her WEC [wage-earning capacity], the CE [claims examiner] should consider whether the kind of appointment and tour of duty … are at least equivalent to those of the job held on date of injury. Unless they are, the [claims examiner] may not consider the work suitable.
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> "For instance, reemployment of a temporary or casual worker in another temporary or casual (USPS) [U.S. Postal Service] position is proper, as long as it will last at least 90 days and reemployment of a term or transitional [U.S. Postal Service] worker in another term or transitional position is likewise acceptable. However, the reemployment may not be considered suitable when:
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> > (1) *The job is part-time* (unless the claimant was a part-time worker at the time of injury) or sporadic in nature;
> >
> > (2) *The job is seasonal* in an area where year-round employment is available. If an employee obtains seasonal work voluntarily in an area where year-round work is generally performed, the [claims examiner] should carefully determine whether such work is truly representative of the claimant's [wage-earning capacity]; or
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> > (3) *The job is temporary* where the claimant's previous job was permanent."[6]

In this case, the record indicates that appellant returned to temporary part-time work as an editorial assistant on March 22, 1999 at $12.94 an hour or $258.80 a week, which was approved by Dr. Schwartz, his treating physician and his vocational rehabilitation counselor. Based on this evidence, the Office concluded that appellant's wages of $258.80 a week fairly and reasonably represented his wage-earning capacity. As noted above, wages earned are generally the best measure of wage-earning capacity. However, in concluding that the position of editorial assistant represented appellant's wage-earning capacity, the Office neglected to consider that the position was a part-time position. Although appellant's date-of-injury position was temporary, he worked on a full-time schedule. Inasmuch as appellant's date-of-injury position was full time,

[4] 5 U.S.C. § 8115(a).

[5] *Dennis E. Middy*, 47 ECAB 259 (1995); *Don J. Mazurka*, 46 ECAB 447 (1995).

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7.a (July 1997).

the Office erred in concluding that his part-time position as an editorial assistant fairly and reasonably represented his wage-earning capacity.

The Office's determination that appellant had wages of $258.80 a week as a part-time editorial assistant was based on the erroneous conclusion that he worked part time in his position as an archaeologist on the date of his injury.

The September 8 and July 10, 2000 decisions of the Office of Workers' Compensation Programs are hereby reversed.

Dated, Washington, DC
May 5, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member