United States Department of Labor
Employees' Compensation Appeals Board

ROBERT B. CHADA, Appellant	)	
and	)	**Docket No. 03-1587**
	)	**Issued: September 9, 2004**
DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, Pablo, MT, Employer	)	

Appearances:
Darrell S. Worm, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On June 9, 2003 appellant, through his attorney, filed a timely appeal from the Office of Workers' Compensation Programs' merit decisions dated December 30, 2002, which reduced his compensation benefits based on his actual earnings as a research assistant and May 16, 2003, which denied modification of the wage-earning capacity determination. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issues are: (1) whether the Office properly determined appellant's wage-earning capacity based on his actual earnings as a research assistant; and (2) whether the Office properly denied modification of the wage-earning capacity determination.

FACTUAL HISTORY

On August 20, 1987 appellant, then a 42-year-old lineman, working 8 hours a day, 5 days a week, filed a traumatic injury claim alleging that he injured his legs when he became tangled in

a wire. The Office accepted his claim for a right knee sprain and left thigh contusion. On November 19, 1987 the Office entered him on the periodic rolls.

In a report dated March 3, 1988, appellant's attending physician, Dr. R.A. Sterling, a Board-certified orthopedic surgeon, stated that appellant could return to a light-duty position. The Office referred him for vocational rehabilitation services on October 27, 1988. The vocational rehabilitation counselor recommended that appellant's compensation benefits be based on his capacity to earn wages as an electronic assembler on July 20, 1990.

By decision dated December 17, 1990, the Office denied appellant's claim for a low back injury resulting from the August 20, 1987 employment injury. In a separate letter of the same date, the Office proposed to reduce his compensation benefits based on his capacity to earn wages as an electronics assembler. Appellant requested an oral hearing and by decision dated January 13, 1992, the hearing representative affirmed the Office's December 17, 1990 decision.

Following the hearing representative's decision, the Office again referred appellant for vocational rehabilitation services. On January 6, 1993 the rehabilitation counselor determined that appellant could not perform the duties of an electronic assembler due to his physical and emotional conditions.

On December 21, 1993 the Office proposed to terminate appellant's compensation benefits finding that he had no disability causally related to his accepted employment injuries. The Office finalized this proposal in a decision dated January 20, 1994. He requested reconsideration on February 24, 1994. By decision dated May 17, 1994, the Office denied modification of the January 20, 1994 decision. Appellant requested review by the Board and, in a decision dated October 25, 1996, the Board found that the Office did not meet its burden of proof to terminate appellant's compensation benefits.[1]

Appellant elected to receive compensation benefits and, on August 4, 1997 the Office reentered him on the periodic rolls. Appellant participated in vocational rehabilitation services beginning on February 6, 1998. On October 1, 1998 appellant obtained commission-based employment as a brand inspector for the state of Montana. The Office determined that his actual earnings in this position did not represent his wage-earning capacity.

By decision dated December 28, 2001, the Office suspended appellant's compensation benefits effective January 14, 2002, for failure to complete requested EN1032 forms.

On January 11, 2002 appellant completed a Form EN1032 indicating that he had no earnings from employment during the 15-month time period covered by the form. In a letter dated February 21, 2002, the Office informed appellant that it had received wage and tax statements indicating that he had received salary during the period covered by the January 11, 2002 form and asked that he explain the discrepancy. On the same date the Office asked that Summit Research Studies, Inc., provide information regarding his employment.

[1] Docket No. 94-2537 (issued October 25, 1996).

In a statement received by the Office on March 8, 2002, appellant responded that beginning in 1998 he subleased property to Summit Research Studies, Inc. at cost. He stated, "At certain intervals for the past couple of years I was involved in the Summit Research study when a study was available…. These studies varied from a week to two or three months depending on the type of study they were." Appellant acknowledged leasing equipment and land to Summit Research Studies, Inc. as well as purchasing horses to resell to Summit Research Studies, Inc. for use in the studies. He stated that he was a "learner study helper" for four to five studies during the past two years. Appellant asserted that the studies were for brief periods and that, over the prior year, there had been only one study for three to four months. He stated that the owner of Summit Research Studies, Inc. retired and wintered in Mexico.

Appellant also submitted his 1998 tax return and his wage and tax statements from 2000 and 2001. He earned $6,611.00 from Summit Research Studies, Inc. in 2001 and $10,071.50 in 2000.

On December 30, 2002 the Office advised appellant that it proposed to reduce his compensation benefits. The Office stated: "The evidence of record shows that you have rehabilitated yourself and your compensation should be based on a wage-earning capacity amount of $165.02 per week." The Office found that the wage and tax statements and social security information established that appellant earned a total of $25,742.50 from Summit Research Studies, Inc. during 1999, 2000 and 2001 as a research assistant.[2] The Office deemed appellant rehabilitated.

On January 23, 2003 appellant, through his attorney, alleged that his position with Summit Research Studies, Inc. did not represent his wage-earning capacity as the employment was not competitive but instead was rental payment for the use of equipment and land and was due to appellant's friendship with the owner. He stated that his principle duty was to monitor the animals and their condition. Appellant also operated equipment and vehicles rented to Summit Research Studies, Inc. He further alleged that the research company was no longer in business.

By decision dated February 7, 2003, the Office finalized the wage-earning capacity determination finding that appellant had the capacity to earn $165.02 per week.

Appellant, through his attorney, requested reconsideration on March 17, 2003. He submitted a statement from Robert Syvrud, owner of Summit Research Studies, Inc. asserting that appellant performed little or no actual services for the firm, that a substantial amount of the compensation he received was for the use of his equipment and land and that his main duty was to monitor horses and see that they were cared for properly. Appellant submitted an affidavit containing the same information.

[2] In addition to the amounts earned in 2000 and 2001, included in the record, the Office determined that appellant earned $9,060.00 in 1999. The Office combined the total earnings from 1999, 2000 and 2001 to total the sum of $25,752.50 and then divided this amount by 156 weeks (52 weeks for each of the 3 years) to find an earning capacity of $165.02 per week. However, the record does not contain any document supporting appellant's earnings in 1999.

By decision dated May 16, 2003, the Office denied modification of the February 7, 2003 wage-earning capacity determination.[3]

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[4] Section 8115 of the Federal Employees' Compensation Act,[5] titled "Determination of wage-earning capacity," states in pertinent part:

> "(1) In determining compensation for partial disability, … the wage-earning capacity of an employee is determined by his actual earnings if his earnings fairly and reasonably represent his wage-earning capacity…."

Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.[6] The Office's procedure manual provides that actual earnings fairly and reasonably represent the wage-earning capacity if the appointment and tour of duty are at least equivalent to those of the job held on the date of injury. Reemployment may not be considered suitable when the job is part time (unless the claimant was a part-time worker at the time of the injury) or sporadic in nature, the job is seasonal or the job is temporary.[7]

The Office's procedure manual further provide that a retroactive determination may be made where the claimant has worked in the position for at least 60 days, the employment fairly and reasonably represents wage-earning capacity and the work stoppage did not occur because of any change in the claimant's injury-related condition affecting his ability to work.[8] The Board has concurred that the Office may perform a retroactive wage-earning capacity determination in accord with its procedures.[9]

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[3] Appellant's attorney filed the appeal in this case on June 9, 2003. However, the appeal papers did not include a signed attorney authorization from appellant. By order dated January 30, 2004, the Board dismissed the appeal on these grounds. In a February 10, 2004 petition for reconsideration, his attorney submitted a signed authorization. By order dated May 14, 2004, the Board granted the petition for reconsideration and reinstated the appeal.

[4] *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

[5] 5 U.S.C. § 8115.

[6] *Elbert Hicks*, 49 ECAB 283, 284 (1998).

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

[8] *Id.* at 7.e. (May 1997).

[9] *Tamra McCauley*, 51 ECAB 375, 376 (2000).

ANALYSIS

In this case, appellant was working in a full-time position as a lineman at the time his injury occurred. There is nothing in the record to suggest that his employment as a lineman was temporary, part time or seasonal. After several failed vocational rehabilitation attempts, appellant began leasing property to Summit Research Studies, Inc. in 1998 and participating in research studies for some time thereafter.[10] The evidence of record is scant regarding the nature and extent of his "employment" with Summit Research. Appellant alleged that the studies in which he participated were sporadic in nature. He stated that the studies lasted from a few weeks to a few months at a time. There is also a suggestion in the record that the studies were seasonal as appellant indicated that Mr. Syvrud, the owner of Summit Research Studies, Inc. wintered in Mexico. He stated that at the time the Office proposed to reduce his compensation benefits there were no further studies planned. Further, the Board has held that there is a distinction between income received from investment and earnings record from performing work. The formal is not considered to be evidence of a claimant's ability to work and earn wages, but a return on investment.[11] In this case, it is not clear the extent to which appellant may have received income from the rental of his property from earnings he may have received from his work. The Office has not submitted evidence establishing that appellant's employment with Summit Research Studies, Inc. was full time and permanent.[12] The Office has not established that his employment with Summit Research Studies was of the equivalent appointment and tour of duty of his date-of-injury position. The Office failed to properly determine appellant's wage-earning capacity.[13]

CONCLUSION

The Board finds that the Office improperly determined appellant's wage-earning capacity based on his actual earnings as a research assistant. Therefore, the Office did not meet its burden of proof to establish appellant's wage-earning capacity position.

[10] As noted previously, there is no documentation in the record to support the Office's contention that appellant had earnings as a result of salary from Summit Research Studies, Inc., in 1999.

[11] *See Gregg B. Manston*, 45 ECAB 344, 353 (1994).

[12] *James B. McCarten*, Docket No. 03-1271 (issued October 28, 2003).

[13] Due to the disposition of this issue, it is not necessary for the Board to address the second issue of whether the Office properly denied modification of the wage-earning capacity determination.

ORDER

IT IS HEREBY ORDERED THAT the May 16, 2003 and December 30, 2002 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: September 9, 2004
Washington, DC

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member