

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES R. PANCRATZ and DEPARTMENT OF JUSTICE,
U.S. BORDER PATROL, Port Huron, Mich.

*Docket No. 96-843; Submitted on the Record;
Issued August 10, 1998*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation benefits, effective January 7, 1996, based on his capacity to perform the duties of a protective-signal operator.

This is the second appeal to the Board filed by appellant in this case. The Office had initially determined, by decisions dated June 17, 1987 and February 23, 1987, that residuals of appellant's June 18, 1981 pulled groin area and low back strain and lumbar disc protrusion, lumbar area had resolved and therefore he was no longer entitled to continuing compensation benefits. On appeal, the Board reversed this decision, finding that there was an unresolved conflict in the medical opinion evidence.¹ The Board instructed that on remand the Office should refer appellant along with the medical record and a statement of accepted facts to an independent medical examiner for resolution of the conflict in the medical opinion evidence. The history of the case is contained in the Board's prior decision and is incorporated herein by reference.

By notice of proposed reduction of compensation dated September 20, 1995, the Office of Workers' Compensation Programs found that appellant's compensation should be reduced to reflect the position of protective-signal operator in the Port Huron-Detroit commuting area. The Office found that suitable jobs were not available in the Upper Peninsula region where appellant resides. The Office found that no data was available on the labor market for job for the Port Huron area, where appellant resided at the time of his injury, so the Office decided to use the Detroit area to determine job availability. Thus, based upon the medical reports and the labor market survey for the Port Huron/Detroit area, the position of protective-signal operator was identified as being medically suitable and readily available in appellant's commuting area.

¹ Docket No. 87-1957 (issued October 31, 1988).

In a letter dated September 27, 1995, appellant appealed the proposed reduction of compensation. Appellant argued that the labor market survey listing Detroit was inaccurate as he had lived in Port Huron at the time of injury and now lives in Channing, Michigan, which is 500 miles from Detroit. Appellant also disagreed with that he was capable of performing the selected position of protective-signal operator.

In an undated work restriction evaluation (Form OWCP-5),² Dr. Sidney C. Walker, appellant's treating physician, indicated that appellant could work 8 hours per day with restrictions. Dr. Walker recommended no lifting over 20 pounds and that he can work a sedentary position.

In a report dated November 1, 1991, Dr. Walker indicated that appellant's symptoms of pain are "accentuated significantly by exertional activities such walking or attempting to run, also by prolonged sitting, whether it be in a chair or when sitting in a vehicle.

In a report dated June 12, 1992, Dr. Oswald V. Clark, a Board-certified orthopedic surgeon, based upon a physical examination, review of the medical record, objective evidence and history of injury, opined that appellant was capable of performing sedentary work as long he could get up and move around.

In a May 15, 1995 report, the rehabilitation counselor identified the positions of protective-signal; Operator and process Server using the Detroit Metro area. The rehabilitation counselor noted that while most of the positions were part time, full time was also available.

On September 20, 1995, the Office issued a notice of proposed reduction of compensation advising appellant that it proposed to reduce his compensation on the grounds that he had the capacity to earn wages as protective-signal operator at the rate of \$9.40 per hour.

In a letter dated September 28, 1995, Dr. J.L. Loewen, appellant's treating physician, stated that appellant "is having difficulty with low back pain which is aggravated while sitting any length of time" and opined that driving any length or distance does appear to aggravate his back pain."

By decision dated December 15, 1995, the Office reduced appellant's compensation based on his capacity to earn wages as a protective-signal operator at \$9.40 per hour.

The Board finds that the Office did not properly reduce appellant's compensation.

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 of benefits.³

² The form was noted as received by the Office on October 18, 1990.

³ *James B. Christenson*, 47 ECAB ____ (Docket No. 95-1106, issued September 5, 1996); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); *David W. Green*, 43 ECAB 883 (1992); *Harold S. McGough*, 36 ECAB 332 (1984).

Under section 8115(a) of the Federal Employees' Compensation Act, wage earning is determined by the actual wages received by an employee if the earnings fairly and reasonably represent the employee's wage-earning capacity.⁴ If the actual earnings do not fairly and reasonably represent the employee's wage-earning capacity, or if the employee has no actual wages, the wage-earning capacity is determined with regard to the nature of the injury, the degree of physical impairment, the employee's usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect his or her wage-earning capacity in his or her disabled condition.⁵ Where vocational rehabilitation is unsuccessful, the rehabilitation counselor will prepare a final report which lists two or three jobs which are medically and vocationally suitable for the employee and proceed with information from a labor market survey to determine the availability and wage rate of the position.⁶

The Board finds that Office properly determined that employment in the Upper Peninsula, where appellant currently resides, is scarce and thus an isolated region.⁷ The Board finds, however, that it was improper for the Office to select positions in the Detroit area rather than Port Huron, the area appellant resided at the time of his injury. The Board notes that the Office indicated that it was selecting positions in the Port Huron/Detroit area, but a review of the record indicates that the rehabilitation counselor used the Detroit area to determine positions available. that Port Huron is approximately 57 to 58 miles from Detroit. This is not within commuting distance.

⁴ 5 USC § 8115(a).

⁵ *Id.*; See *Mary J. Calvert*, 45 ECAB 575 (1994); *Samuel J. Chavez*, 44 ECAB 431 (1993); *Keith Hanselman*, 42 ECAB 680 (1991).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.814.8 (December 1993).

⁷ *Lloyd R. Allen*, 24 ECAB 112 (1972); *Sidney Kawalick*, 19 ECAB 272 (1968); *Robert A. Campbell*, 14 ECAB 113 (1962)

The decision of the Office of Workers' Compensation Programs dated September 20, 1995 is reversed.

Dated, Washington, D.C.
August 10, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member