U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM O. BAKER and TENNESSEE VALLEY AUTHORITY, SHAWNEE STEAM PLANT, Chattanooga, Tenn.

Docket No. 96-610; Submitted on the Record;
Issued June 12, 1998

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly determined that the position of construction supervisor fairly and reasonably represented appellant's wage-earning capacity, and reduced his compensation accordingly.

On September 17, 1986 the Office accepted that appellant, an iron worker, sustained right lumbar radiculitis and a ruptured L4-5 lumbar disc in the performance of duty, causally related to factors of his federal employment. On September 22, 1986 the Office accepted that appellant underwent a lumbar laminectomy with removal of the affected disc, and that on October 31, 1986 appellant underwent another laminectomy for a recurrent disc rupture. Thereafter, in 1988 the Office referred appellant for vocational rehabilitation. Appellant's vocational rehabilitation included the completion of his B.S. degree in construction technology, which was awarded in 1994. On December 19, 1991 appellant's treating physician opined that he was capable of performing mild to moderate work.

Thereafter the rehabilitation counselor identified multiple employers for appellant to contact regarding reemployment. By report dated November 2, 1994, the rehabilitation counselor noted that appellant was being very passive in his job search and that appellant's attitude appeared poor. By report dated March 27, 1995, the rehabilitation counselor provided appellant an extensive list of employers to be contacted, and noted that he was not actively pursuing job search efforts. On May 11, 1995 the rehabilitation counselor recommended that appellant's case be closed because of his passive pursuit of job openings and because appellant lacked motivation in the job seeking area.

Thereafter the Office determined that the appellant was only partially disabled, and it selected several positions for which he was physically and vocationally qualified. A loss of wage-earning capacity determination was recommended. The Office chose the position of construction superintendent, based upon the rehabilitation counselor's recommendation, upon which to base appellant's loss of wage-earning capacity. The physical requirements of the job

were classified as light, with a maximum lifting limit of 20 pounds, and required reaching, handling, fingering, talking and hearing. The rehabilitation counselor submitted a report to the Office indicating that the position of construction superintendent was performed in sufficient numbers and was considered to be reasonably available in appellant's commuting area, as evidenced by the multiple job advertisements cited, and was within appellant's vocational and medical limitations.

On July 15, 1995 the Office issued appellant a notice of proposed reduction of compensation finding that appellant had graduated from an accredited university with a 4-year degree, that he was in a new employer placement program from June 30, 1994 through May 30, 1995 without success, and that he could medically and vocationally perform the position of construction superintendent which was performed in sufficient numbers and was reasonably available in appellant's commuting area. The Office specifically found that the physical requirements of the position were within appellant's work restrictions as outlined by his treating surgeon from March 1993 to January 1995, that there had been no other evidence submitted that indicated that appellant was not medically qualified for the proposed position, and that vocationally appellant had an earning capacity of an entry level construction superintendent.

By letter dated July 28, 1995, appellant strongly disagreed with the Office's proposed compensation reduction stating that he had sent out over 50 resumes without responses or positive results, that he was 48 years old, and that he thought he might be able to work as a welder and union foreman.

On October 20, 1995 the Office finalized appellant's wage-earning capacity determination finding that he had the capacity to earn wages as a construction superintendent. The Office found that appellant had failed to provide any factual or medical evidence to demonstrate that the proposed position was not vocationally or medically suitable.

The Board finds that the Office properly reduced appellant's compensation benefits based upon his capacity to earn wages as a construction superintendent.

Where an employee sustains an injury-related impairment that prohibits him from returning to the employment held at the time of injury, or from earning equivalent wages, but that does not render him totally disabled for all gainful employment, the employee is considered partially disabled and is entitled to compensation for loss of wage-earning capacity as provided under 5 U.S.C. § 8115.[1] If the actual earnings of an employee do not fairly and reasonably represent his wage-earning capacity, or if the employee has no actual earnings, as in this case, his wage-earning capacity as appears reasonable under the circumstances is determined with due regard to the nature of the injury; the degree of physical impairment; his usual employment; his age; qualifications for other employment; the availability of suitable employment; and other factors or circumstances which may affect wage-earning capacity in his partially disabled condition.[2]

[1] *Domenick Pezzetti*, 45 ECAB 787 (1994).

[2] *Alfred R. Hafer*, 46 ECAB 553 (1995).

Upon finding that appellant had no actual earnings, and that his rehabilitation case had been closed, the Office reviewed the rehabilitation counselor's report and concurred that he had properly selected the position of construction superintendent from the *Dictionary of Occupational Titles* and found that appellant possessed the necessary education and experience, and that the duties of the position were within his medical restrictions. The Office properly found that the rehabilitation counselor also found that the position of construction superintendent was performed in sufficient numbers in appellant's geographical area so as to be considered reasonably available, as evidence by several classified advertisements for such a position. Appellant, however, objected to the selection of the position of construction superintendent not because he felt that he was not medically or vocationally qualified for the position but because he had sent out numerous resumes without receiving any positive responses and because he was 49 years old. However, no further elaboration was provided.

The Office is not obligated to actually secure a job for a claimant. The Board has held that lack of current job openings does not equate with a finding that the position was not performed in sufficient numbers to be considered reasonably available.[3] In the instant case the Office determined that the selected position was reasonably available within appellant's commuting area, and that it was appropriate for appellant's partially disabled status. Further, the Office found appellant failed to articulate why his age of 49 years would restrict his ability to perform the selected position. Mere perceptions that appellant would not be hired for the selected position because of his age are not a basis for finding that the selected position does not represent appellant's wage-earning capacity.[4]

As there was no evidence submitted that the position of construction superintendent was not reasonably available or that it was not within the physical restrictions placed upon appellant, and as appellant was clearly vocationally qualified for the position, the Board finds that it fairly and reasonably represented appellant's wage-earning capacity, and that his compensation was properly adjusted as a result.

[3] *Id.*

[4] *See Samuel J. Chavez*, 44 ECAB 431 (1993). The fact that a claimant has been unsuccessful in obtaining jobs in the selected position did not establish that the work was unavailable or unsuitable.

Accordingly, the decision of the Office of Workers' Compensation Programs dated October 20, 1995 is hereby affirmed.

Dated, Washington, D.C.
June 12, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member