

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MERLE J. MARCEAU and DEPARTMENT OF THE INTERIOR,
BUREAU OF INDIAN AFFAIRS, Browning, MT

*Docket No. 00-1995; Submitted on the Record;
Issued November 1, 2001*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly determined appellant's wage-earning capacity in the position of alcohol and drug abuse counselor.

On September 4, 1984 appellant, then a 31-year-old firefighter, sustained injury to his right knee while in the performance of duty. His claim was accepted for right knee effusion and an aggravation of preexisting osteochondritis.¹ Appellant stopped work and received continuation of pay and was placed on the periodic rolls as of October 20, 1984.

Appellant was treated by Dr. James D. Hinde, a Board-certified specialist in physical medicine and rehabilitation. Appellant underwent arthroscopic examination at a Veterans Administration Hospital on February 20, 1987, following which Dr. Hinde reported findings of severe degenerative changes of the surface of the medial femoral condyle and minor irregularities of the medial tibial articular surface. Dr. Hinde noted that there appeared to be a transverse tear of the anterior horn of the medial meniscus, but not to the degree that necessitated arthroscopic repair. He noted that no operative intervention in the form of curettage was necessary and no free articular body was noted. Dr. Hinde stated that appellant's knee was such that it was unlikely he would be able to participate in heavy activities as in the past, especially those requiring climbing, walking on rough terrain or repetitive stooping.

In a July 28, 1987 report, Dr. Hinde provided a functional capacity evaluation, in which he noted that appellant had no limitations with respect to his upper extremities. The right knee was found to have a surgical scar with no effusion and was stable to AP, varus and valgus stress. The patella was reported as quite mobile and there was patellofemoral crepitus with patellar tracting and compression. Grinding and compression maneuvers produced no intra-articular

¹ Appellant sustained a prior right knee injury in 1972 while in the military and received a 10 percent disability rating.

catching. Dr. Hinde reported that appellant was doing relatively well since surgery, but had occasional buckling of the right knee. He found that appellant could work eight hours a day in a sedentary position, and completed an OWCP work restriction evaluation in which he specified limitations to the right knee.²

In an October 25, 1988 report, Dr. Hinde reiterated appellant's functional capacity evaluation. On January 25, 1989 Dr. Hinde reported that appellant had reached maximum medical improvement with a 20 percent impairment of the right knee for arthritis. On March 7, 1989 appellant received a schedule award for 20 percent impairment of his right knee.

The record reflects that appellant relocated from Montana to Washington State. Thereafter, appellant came under treatment by Dr. John A. Stevens, a Board-certified orthopedic surgeon. In a May 25, 1990 report, Dr. Stevens reviewed appellant's history of injury and medical treatment. He noted that both of appellant's knees revealed a palpable medial femoral condylar spurring with full range of motion and no laxity. With standing there was no significant varus and full extension and flexion. Squat and rising to 100 degrees produced some grinding in both knees. Dr. Stevens diagnosed bilateral degenerative and post-traumatic arthrosis of both knees, primarily of the medial compartment.

Upon recommendation by Dr. Stevens, a magnetic resonance imaging (MRI) scan was obtained on June 11, 1990. The scan reported osteochondritis of the medial femoral condyle, possible loose bodies in the far posterior joint space and along the outer margin of the medial tibial plateau, a possible small tear in the posterior horn, an intact horn of the medial meniscus, no tear of the lateral meniscus, intact anterior and posterior cruciate ligaments, evidence of some fluid in the knee joint space, no evidence of a popliteal cyst, and a small marrow defect in the anterior aspect of the medial tibial plateau. On June 15, 1990 a bone scan was performed, which showed mild increased activity along the medial joint line of the left knee but no abnormal activity of the right knee. The left knee was considered more abnormal than on the right, with a distribution that suggested degenerative joint disease. Following review of the diagnostic studies on June 20, 1990, Dr. Stevens noted that appellant could not return to his former work as a firefighter on rough terrain. On July 9, 1990 he completed an OWCP-5 work restriction evaluation, noting appellant was capable of working for eight hours a day subject to physical limitations on the use of the right knee.

On March 17, 1992 Dr. Hinde examined appellant. His physical findings noted appellant's knees were bilaterally lax with anterior drawer and stable with posterior drawer and with varus and valgus stress. Crepitus was noted with flexion and extension of the knees with no significant patellofemoral crepitus noted. There was some effusion of the left knee with none on the right. Appellant denied discomfort on palpation of the medial or lateral joint lines. Strength was reported as good in the quadriceps and hamstrings. Dr. Hinde completed an OWCP-5 work restriction evaluation, in which he reiterated that appellant could work for eight hours a day at sedentary work. He repeated appellant's physical limitations on the use of the right knee, noting appellant had reached maximum medical improvement three to four years prior.

² Appellant was referred for vocational rehabilitation on September 14, 1987; however, this effort was unsuccessful and the file was subsequently closed.

Appellant was referred to vocational rehabilitation and entered an alcohol treatment program through the Department of Veterans Affairs. Following completion of the treatment program, appellant requested training as an alcohol and drug rehabilitation counselor. The Office approved appellant's training at a two-year academic program at Clark College commencing September 19, 1994.³ He successfully completed the program, graduating with an associate of applied science degree in chemical dependence on June 13, 1996. By letter dated July 23, 1996, appellant advised the Office that he had enrolled at Marylhurst College to pursue a bachelor's degree in social science with an emphasis in chemical dependency counseling.⁴

On June 18, 1996 appellant underwent further examination of his right knee by Dr. D. Christopher Hikes of the Portland Joint Reconstruction Clinic. Physical examination revealed full extension, flexion to bring the heel within six inches of the buttocks, knee stability anteriorly and posteriorly with a slight anterior laxity and solid stop. Dr. Hikes reported mild crepitation with flexion and extension, with slight effusion of the right knee. The doctor noted that appellant took Advil for pain and remained available for sedentary work. He further noted that appellant was attending school to become an alcohol and drug rehabilitation counselor and recommended he continue his studies.

By report dated April 30, 1998, an Office rehabilitation specialist noted that appellant's file had been closed effective December 9, 1996, at which time the employing establishment noted that it was unable to develop a job offer suitable with appellant's physical limitations. The rehabilitation specialist recommended that the Office proceed with a loss of wage-earning capacity rating based on the position of an alcohol and drug counselor.⁵ The rehabilitation counselor noted that appellant had completed a two-year training program which qualified him for placement as an entry-level alcohol and drug counselor. The counselor noted that appellant elected to pursue further education rather than participate in job placement. The position was sedentary and did not exceed the physical limitations imposed by Dr. Stevens. The rehabilitation counselor contacted the state employment offices in Oregon and Washington and performed a labor market research report which determined the position was performed in sufficient numbers so as to be reasonably available to appellant at a weekly wage rate of \$348.40 or \$8.71 an hour. The physical demands of the job were listed as sedentary with occasional lifting up to 10 pounds, no climbing, kneeling, crouching, crawling and occasional stooping, reaching and handling. The job was primarily performed in climate controlled environments. Applying the *Shadrick*⁶ formula, the Office determined that appellant's earnings as an alcohol and drug counselor would exceed the current pay rate for the firefighter position he held when injured; therefore, he had no loss of wage-earning capacity.

³ In a July 6, 1994 report, Dr. Stevens noted appellant's physical capacity to work full time, with limitations on standing, walking, kneeling and crawling.

⁴ The record reflects that appellant applied for and received benefits through the Department of Veterans Affairs to pay for his tuition and expenses at Marylhurst College.

⁵ *Dictionary of Occupational Titles*, No. 045.107-058.

⁶ *Albert C. Shadrick*, 5 ECAB 376 (1953).

By notice of proposed reduction dated April 13, 1999, the Office advised appellant of its proposal to reduce his compensation on the basis that he was no longer totally disabled and had the ability to earn the wages of an alcohol and drug counselor. The Office allotted appellant 30 days in which to submit additional evidence pertaining to his wage-earning capacity.

In a response received on April 21, 1999, appellant noted that funding for his education had been continued and that he had recently been accepted into a Master's Program in Counseling Psychology specializing in treatment of addictions. He noted that he would remain in the graduate program until June 2001. He stated that, while he could probably find work as a counselor in the Portland, Oregon area, his preference was to continue his studies in order to return to Montana to work with the Blackfoot and Pikanii tribes. Appellant contended that, if he were relegated to work the lower levels and pay scales in the field of alcohol and drug rehabilitation, it would not maximize and efficiently utilize his training and academic preparations.

By decision order dated May 17, 1999, the Office finalized the loss of wage-earning capacity determination. It found that appellant was not totally disabled and had the capacity to perform the duties of an alcohol and drug abuse counselor.

On May 31, 1999 appellant requested a hearing before an Office hearing representative.

On June 10, 1999 the Office received a May 20, 1999 report from Dr. Hikes, in which he noted that appellant continued to be a full-time student in the Master's program. He stated that appellant discussed the proposed loss of wage-earning capacity at length, noting:

“[The Office] would like him to start work as an alcohol and drug rehabilitation counselor for which he received initial training at Clark Community College. Since that time in his education, he has gone on to receive his Bachelor's Degree in Social Science at Marylhurst and is presently enrolled in Lewis and Clark College in the Master's Program. I would agree with the assessment of the Department of Labor that [appellant] certainly is available for the type of work he has received training for and his rehabilitation program has been long and arduous as outlined in the letter from [the Office claims examiner]. The facts would clearly come down on the side of the Department of Labor and [appellant] should seek employment at that capacity.”

Looking beyond these facts, Dr. Hikes noted that he was greatly impressed by appellant's studies and proposed that some compensation package be arranged whereby appellant could finish the Master's program and return to his native Montana to work in the capacity of running a drug and alcohol program.

A hearing was held on November 18, 1999 at which appellant appeared and testified. By decision dated February 3, 2000, the Office hearing representative affirmed the May 17, 1999 wage-earning capacity determination.

Disability is not synonymous with physical impairment, which may or may not result in an incapacity to earn wages. An employee who has a physical impairment causally related to his or her federal employment, but who nonetheless has the capacity to earn the wages he or she was

receiving at the time of injury, has no disability as that term is used under the Federal Employees' Compensation Act and is not entitled to compensation for loss of wage-earning capacity.⁷ When, however, the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his or her employment, the employee is entitled to compensation for any loss of wage-earning capacity resulting from the employment injury.

When the Office makes a determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by the Office or to an Office wage-earning capacity specialist for selection of a position listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open labor market, that fits the employee's capabilities with regard to the employee's physical limitations, education, age, and prior work experience.⁸ Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service.

Wage-earning capacity is a measure of an employee's ability to earn wages in the open labor market under normal employment conditions given the nature of the employee's injury and the degree of physical impairment, his or her usual employment, the employee's age and vocational qualifications, and the availability of suitable employment.⁹ 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 an employee lives.

The Board finds that the Office properly determined that the position of alcohol and drug abuse counselor represents appellant's wage-earning capacity.

Appellant sustained a knee injury while in the performance of his duties as a firefighter on September 4, 1984. His claim was accepted for right knee effusion and aggravation of a preexisting osteochondritis condition. Appellant received medical treatment from numerous physicians, who found that residuals from appellant's accepted injury did not preclude his return to work in a sedentary position. Dr. Hinde reported in 1987 that, although appellant could not return to work as a firefighter on rough terrain, arthroscopic evaluation of the knee did not reveal findings that necessitated surgical repair. In a July 28, 1987 functional capacity evaluation, he noted that appellant could work for eight hours a day in a sedentary position subject to limitations on the use of the right knee. These findings were repeated in subsequent medical reports submitted by Dr. Hinde in 1989 and 1992. Appellant also underwent evaluation by Dr. Stevens, who provided reports noting that additional diagnostic testing was performed in 1990 consisting of an MRI and bone scan. After reviewing the results of such testing, Dr. Stevens also found that appellant had the capacity to work for eight hours a day subject to physical restrictions on the use of his right knee. Similarly, the 1996 and 1999 reports of Dr. Hikes also found appellant capable of performing sedentary full-time employment. The

⁷ *Lyle E. Dayberry*, 49 ECAB 369 (1998).

⁸ *Richard Alexander*, 48 ECAB 432 (1997).

⁹ *Dennis D. Owen*, 44 ECAB 475 (1993).

Board finds that the clear weight of medical evidence in this case establishes that appellant has the physical capacity to perform the duties of the selected position of alcohol and drug abuse counselor, a sedentary position conforming with the physical limitations noted by his attending physicians.

The evidence of record also supports the Office's determination that the position of alcohol and drug rehabilitation counselor conforms to appellant's age, educational background and work experience. Appellant received initial training in the field of alcohol and substance abuse counseling and in 1996 completed a two-year degree program from Clark College. Moreover, the appellant continued his educational pursuits in the field and completed a Bachelor's Degree in Social Sciences at Marylhurst University. His testimony at the hearing below commented upon his activities and educational pursuits, demonstrating his abilities on his own behalf in completing the academic requirements of his chosen field. Appellant is to be greatly commended for his efforts and his desire to return to Montana to work as a counselor and role model for his people. While appellant contends that the selected position would not maximize and fully utilize his skills, the Board notes that the determination of an employee's wage-earning capacity is not contingent upon such factors or the pursuit of higher education.¹⁰

In *Gene M. Frodsham*,¹¹ the employee sustained the loss of his right arm above the wrist, the loss of fingers of his left hand and a bilateral hearing loss as the result of an explosion. He received payment of appropriate compensation benefits and underwent vocational rehabilitation, completing training as an elementary school teacher. The employee advanced in his profession until he stopped work to return to college and obtain a Master's Degree in Educational Administration so as to qualify for better teaching positions. The Board noted that a position in the teaching profession to which he was rehabilitated was available to the employee. He terminated his employment, not due to any injury-related physical impairment or inaptitude to perform the duties required of his profession, but solely to further his education. While the employee's attendance at graduate school for the purpose of increasing his earnings or wage-earning capacity was admirable and commendable, the Board found it did not constitute "further rehabilitation" within the meaning of the Act so as to afford a basis for payment of further compensation while undergoing training nor raise an inference or constitute a showing of impairment of the capacity to earn wages.

Similarly, the record demonstrates appellant's aptitude in the selected position of alcohol and drug counselor. For this reason, the Office properly adjusted appellant's wage-loss benefits as he has the capacity to earn the wages exceeding those he was receiving at the time of his injury. The selected position is consistent with his education, medical restrictions, age and degree of physical impairment. The report of the Office rehabilitation specialist confirmed that the position was reasonably available in appellant's commuting area. Appellant's desire for

¹⁰ The statutory factors by which the Office determines wage-earning capacity in a constructed position are set forth at 5 U.S.C. § 8115(a)(1)-(7). The multitude of factors give due regard to the nature of injury, degree of physical impairment, usual employment, age, qualifications for other employment, availability of suitable employment and other factors or circumstances which affect the employee's capacity for employment. See *Fred N. Nelson*, 6 ECAB 455 (1954).

¹¹ 9 ECAB 313 (1957).

employment in Montana does not preclude the Office from making a wage-earning capacity determination based on the evidence of record.

The February 3, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
November 1, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member