United States Department of Labor
Employees' Compensation Appeals Board

FRANCIS L. ALEXANDER, JR., Appellant	)	
and	)	**Docket No. 04-1917**
	)	**Issued: May 2, 2005**
DEPARTMENT OF THE NAVY, PUGET SOUND NAVAL SHIPYARD, Bremerton, WA, Employer	)	

Appearances:
John E. Goodwin, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On July 26, 2004 appellant filed a timely appeal from a September 12, 2003 decision of a hearing representative of the Office of Workers' Compensation Programs who determined that appellant's wage-loss compensation had been based on the correct pay rate.[1] Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the September 12, 2003 Office decision.

ISSUE

The issue is whether appellant was a "learner" within the meaning of 5 U.S.C. § 8113(a) at the time he sustained an employment-related injury on June 27, 1985 such that he would be entitled to wage-loss compensation as a journeyman level shipfitter. On appeal, counsel

[1] The record also contains a decision dated July 8, 2004 in which an Office hearing representative determined that appellant was at fault in the creation of an overpayment in compensation in the amount of $1,458.76 and was not at fault in the creation of an overpayment in the amount of $726.96 which was waived. Appellant has not filed an appeal with the Board regarding this July 8, 2004 decision.

contends that appellant was not due for a step increase until July 5, 1985 because he did not begin formal classroom training until January 5, 1985 and there was no reason to believe he would not have completed the apprenticeship program.

FACTUAL HISTORY

This case has previously been before the Board.[2] By decision dated December 24, 1987, the Board reversed an Office decision which terminated appellant's compensation benefits, finding that the medical evidence relied upon by the Office was insufficient to meet its burden of proof.[3] The law and the facts as set forth in the previous Board decision and order are incorporated herein by reference.

Appellant moved from Washington State to Rhode Island in 1986. Subsequent to the Board's December 24, 1987 decision, he was returned to the periodic rolls and came under the care of Dr. John T. Brady, a Board-certified orthopedic surgeon, in New England and Dr. Robert F. Smith, also a Board-certified orthopedist, in Washington. In November 1988, appellant was referred for vocational rehabilitation in Rhode Island. The rehabilitation specialist could not locate appellant and rehabilitation efforts were not pursued. The record indicates that, although appellant's address of record remained in Rhode Island, he returned to live in Washington in 1987.

On November 22, 1995 the Office referred appellant to Dr. Alan G. Brobeck, a Board-certified orthopedic surgeon, for a second opinion evaluation and, in 1996, appellant's case was transferred to the Seattle office. In reports dated January 3 and November 14, 1996, Dr. Brobeck advised that appellant could not return to the apprentice shipfitter position but could perform eight hours of light duty daily. Dr. Smith performed nonwork-related back surgery on appellant on November 22, 1996.

In May 1997, the Office referred appellant for vocational rehabilitation. Appellant had additional knee surgery on December 8, 1997 and a second back procedure on March 25, 1998 and vocational rehabilitation was interrupted. He came under the care of Dr. Paul E. Kaplan[4] who, in a work capacity evaluation dated March 22, 2000, advised that he could work two hours per day with restrictions to his physical activity. In March 2000, vocational rehabilitation was closed.[5] On April 4, 2000 the Office referred appellant to Dr. Thomas Miskovsky, a Board-certified orthopedic surgeon, for a second opinion evaluation.

On March 17, 2000 the employing establishment furnished pay rate information to the Office and noted that, while appellant had been an apprentice at the time he was injured,

[2] On June 27, 1985 appellant, then a 28-year-old apprentice shipfitter, sustained an injury to his right knee while in the performance of his federal duties.

[3] Docket No. 87-906 (issued December 24, 1987).

[4] Dr. Kaplan's credentials could not be ascertained.

[5] A vocational rehabilitation report dated March 2, 2000, indicates that appellant was employable as a telephone solicitor.

compensation should be based on the learner's pay rate as section 8113(a) of the Federal Employees' Compensation Act[6] did not apply in his case. The employing establishment noted that appellant had not received a step increase that had been due several weeks before the injury and that he was terminated for cause, concluding that it could not be presumed that he would have progressed through the apprenticeship program had he not sustained the work injury.

In reports dated April 21, 2000, Dr. Miskovsky opined that appellant could work eight hours per day. By notice dated May 9, 2000, the Office proposed to reduce appellant's compensation, based on his ability to earn wages as a telephone solicitor.

Appellant, through counsel, disagreed with the proposed reduction. On July 11, 2000 appellant's counsel noted that section § 8113(a) of the Act applied as appellant had been in a learner's capacity when he was injured on June 27, 1985. He asked that compensation be recomputed on that basis.

The Office found that a conflict was created between the opinions of Dr. Kaplan and Dr. Miskovsky regarding appellant's wage-earning capacity. On July 13, 2000 the Office referred appellant to Dr. Irving Tobin, a Board-certified orthopedic surgeon, for an impartial evaluation. On August 1, 2000 reports Dr. Tobin advised that appellant could work eight hours per day as a telemarketer. By decision dated August 17, 2000, the Office finalized the proposed reduction of compensation. On August 21 and 28, 2000 appellant and his attorney requested a hearing that was held on January 18, 2001. At the hearing counsel argued that appellant also had a preexisting psychological condition that precluded work as a telephone solicitor. Appellant testified that he was an apprentice shipfitter when injured and that he had never received a decision indicating that section 8113 of the Act did not apply to his case. He stated that he was not terminated for cause but because he was injured and could not work. Counsel argued that because appellant was previously diagnosed with paranoid schizophrenia, he was incapable of working as a telephone solicitor. He also requested that the Office issue a decision regarding the applicability of section 8113(a) to appellant's case.

By decision dated March 21, 2001 and finalized March 23, 2001, an Office hearing representative remanded the case to the Office for appellant to undergo psychiatric evaluation. In reports dated May 4, 2001, Dr. Larry S. Bornstein, Board-certified in psychiatry, advised that appellant had untreated schizophrenia and could not work. On May 15, 2001 the Office informed appellant that the August 17, 2000 wage-earning capacity decision was set aside. In a decision dated June 25, 2001, the Office approved an attorney's fee in the amount of $800.00. On July 3, 2001 appellant requested a hearing of the June 25, 2001 decision, that was held on January 8, 2002. Appellant did not appear at the hearing where his attorney argued that the Office improperly reduced his fee request and reiterated his argument that section 8113(a) of the Act applied to appellant's case. A former employing establishment employee, Leslie Dean Carter, testified regarding the apprenticeship program at the employing establishment.

By decision dated February 28, 2002, an Office hearing representative reversed the June 25, 2001 decision and awarded an attorney's fee in the amount of $1,300.00. The hearing representative noted that the Office could choose to develop the evidence regarding the

[6] 5 U.S.C. §§ 8101-8193.

applicability of section 8113(a) of the Act. Appellant thereafter came under the care of Dr. Robert G. Billow, an osteopathic physician, Board-certified in pain management and rehabilitation medicine.

In a decision dated September 12, 2002, the Office found that the date-of-injury pay rate upon which compensation had been paid was the correct pay rate in this case. The Office noted that appellant had not received a step increase when due and that his annual review, held a few weeks prior to the employment injury, did not result in a pay increase because his work performance did not justify progression through the apprentice program. It further noted that appellant was terminated for cause, concluding that these events severed any expectation of progressing to the journeyman shipfitter level.

On September 17, 2002 appellant, through counsel, requested a hearing that was held on June 17, 2003. He argued that section 8113(a) was applicable in this case and that appellant had not been separated for cause but was separated because he could not physically perform the job. Appellant testified that he did not receive the step level increase from apprentice one to apprentice two because he was hurt before he had been employed for one year. Appellant also testified that he had some trouble in apprentice school, but that there was no evidence in the record to indicate that he was dismissed from the program. Until he was injured, appellant was physically capable of performing the job as apprentice. He stated that he was terminated because he could not do the physical work. Appellant testified that the apprenticeship program was three-quarters work and one-quarter school. Appellant's attorney stated that appellant had been on probation but got off, but appellant testified that the last quarter he was in school, he was placed on probation for one class and that had he returned to school after the injury, appellant would have one quarter in which to improve the grade. He stated that, if he had not passed the class at that time, he would have been "canned."

Subsequent to the hearing, in a July 15, 2003 letter, Gloria Dumas, injury compensation administrator at the employing establishment, noted that the apprentice program as it existed when appellant was injured had been replaced by a career ladder arrangement but that, when appellant was hired, an apprentice was eligible for a promotion, or step increase, every six months until journeyman status had been reached. She stated that the complete process took approximately four years and that promotions were based on attendance, participation in on-the-job training and completion of academic studies required for the trade. Ms. Dumas noted that appellant was hired as a first step apprentice shipfitter on October 2, 1984 and should have been eligible for promotion to the second step six months after his hire, or on or about April 2, 1985 and every six months thereafter through eight steps of apprenticeship. Appellant was not promoted six months after entering the program or at any time thereafter and was discharged from federal service on August 9, 1985. She stated that there was no record in appellant's office personnel file to show why he did not timely receive the promotion to the second step but that "most usually" apprentices were placed on probation if there was a deficiency in attendance, on-the-job training or failure of one or more of the academic courses required of the apprentices, noting that promotions were delayed until the apprentice came into compliance with the program. She concluded by noting that appellant was not injured until June 27, 1985, more than two months after the promotion to second step was due and, his lack of promotion could not have been related to the injury.

Ms. Dumas enclosed an employing establishment letter dated August 6, 1985, notifying appellant that he was being terminated for cause for the reason that he did not keep his shop advised as to the reasons for his absence. Appellant was informed that he could appeal the decision to the Merit Systems Protection Board. A Form 50, Notification of Personnel Action, was also enclosed and showed that appellant was discharged during the probationary period, effective August 9, 1985. A service record Form 7, also enclosed, noted that appellant was hired as a career conditional shipfitter apprentice on October 2, 1984 and was discharged during the probationary period on August 8, 1985. In a June 4, 1986 letter, the employing establishment informed appellant that as he had been discharged during a one-year probationary period, he was not entitled to restoration of duty.

In a letter dated August 27, 2003, counsel argued that Ms. Dumas merely speculated that appellant might not have completed the apprenticeship program had he not been injured. He claimed that, although appellant was hired on October 2, 1984, he did not begin the apprenticeship program until January 1985, with formal classes, and thus would not have been entitled to a step increase until July 1985, after he was injured on June 27, 1985. He stated that the employing establishment was aware that appellant was hospitalized having surgery on August 4, 1985 and thus the termination for cause was not proper.

By decision dated September 12, 2003, an Office hearing representative determined that appellant was not entitled to receive compensation as a journeyman shipfitter, noting that the evidence did not show that there was a reasonable expectation that appellant would have succeeded in completing the apprenticeship program, but for the employment injury. Based on appellant's testimony, it was found that he would probably have been terminated if his grades did not improve and, as he was on probation at the time of the employment injury, there was not a reasonable likelihood that he would have succeeded to the journeyman level. The hearing representative noted that the reasons appellant was terminated were not relevant to the instant claim.

LEGAL PRECEDENT

Section 8113(a) of the Act states:

> "If an individual (1) was a minor or employed in a learner's capacity at the time of injury; and (2) was not physically or mentally handicapped before the injury; the Secretary of Labor, on review under section 8128 of this title after the time the wage-earning capacity of the individual would probably have increased but for the injury, shall recompute prospectively the monetary compensation payable for disability on the basis of an assumed monthly pay corresponding to the probable increased wage-earning capacity."[7]

[7] 5 U.S.C. § 8113(a).

FECA Program Memorandum No. 122 provides that the compensation rate of a learner should be adjusted if the pay rate increased as a result of a change in his or her learner's status, which would have brought him or her either: (1) to a new level within; or (2) to completion of the learner's program.[8]

The Board has delineated the circumstances under which an employee will be considered to be employed in a learner's capacity at the time of his or her injury. These include whether the employee was in a formal training program, whether the job classification described an "in-training" or learning position, whether the position held was one in which the employee could have remained for the rest of his life and whether any advancement would have been contingent upon ability, past experience or other qualifications.[9]

ANALYSIS

The Board finds appellant was hired as a first step apprentice shipfitter on October 2, 1984. He was in a learner's capacity as defined by section 8113(a) of the Act at the time he was injured on June 27, 1985.[10] The record, however, does not establish that, but for the injury, appellant would have progressed to the journeyman level of shipfitter.

The Board notes that Ms. Dumas, injury compensation administrator at the employing establishment, advised that any promotion to the next step level within the apprenticeship program, which would have been due at about six months from the date appellant was hired, would have been based on merit with regard to the appraisal system in place for the shipfitter apprentice program. This encompassed regular attendance, successful achievement in on-the-job training and achieving passing grades in the required academic courses. The record establishes that promotions to the next level were based on merit and were not automatically given.[11] Appellant testified at the June 27, 2003 hearing that he had been placed on probation for one class during the last quarter he was in school and that had he returned to school after the injury, he would have one quarter in which to improve the grade. Contrary to appellant's assertion, there is no evidence of record to support his contention that the program did not formally begin until January 1985 when he began classes. Ms. Dumas stated that promotions in the apprenticeship program were made every six months and that, as appellant was hired on October 2, 1984, he should have been promoted on or about April 2, 1985. This was not done. The record supports that appellant was terminated because he did not keep the employing establishment informed regarding his absences and not, as he testified, because he could no longer physically perform his job duties due to the employment injury. The Board finds that the circumstances in this case do not establish that appellant was entitled to an increase in the monthly pay upon which his compensation for loss of wage-earning capacity was based due to

[8] FECA Program Memorandum No. 122, issued May 19, 1970; *see Hayden C. Ross*, 55 ECAB ____ (Docket No. 04-136, issued April 7, 2004); *Mary K. Rietz*, 49 ECAB 613 (1998).

[9] *Hayden C. Ross*, *id.*; *Henry M. Van Sant*, 49 ECAB 593 (1998).

[10] 5 U.S.C. § 8113(a)(1).

[11] *See Henry M. Van Sant, supra* note 9.

any work-related disability as defined in section 8113(a)(2) of the Act.[12] Given that appellant was on probation at the time of the June 27, 1985 employment injury, there was not a reasonable likelihood that he would have completed the apprenticeship program but for the June 27, 1985 injury and succeeded to the journeyman level.[13]

CONCLUSION

The Board finds that appellant is not entitled to wage-loss compensation as a journeyman level shipfitter.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 12, 2003 be affirmed.

Issued: May 2, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[12] 5 U.S.C. § 8113(a)(2).

[13] *Id.*; *Hayden C. Ross, supra* note 8.