

¹ W.S., 60 ECAB ____ (Docket No. 08-1797, issued December 23, 2008); Docket No. 97-30 (issued October 26, 1999).

gastroenteritis due to his work exposures. The Office accepted his claim for gastroenteritis, Addison's disease and chronic unrelenting hepatitis. By decision dated October 9, 1975, it reduced appellant's compensation benefits to reflect his ability to earn wages in the constructed position as a bank manager trainee. By decision dated August 24, 1995, the Office modified this decision by reducing his wage-loss benefits to zero effective August 24, 1995. It found that he had rehabilitated himself and was currently earning in excess of the pay rate for his date-of-injury job. By decision dated September 30, 1996, the Office's Branch of Hearings and Review affirmed this decision. In an October 26, 1999 decision, the Board reversed the Office's decision on the grounds that it failed to follow its procedures to modifying the original wage-earning capacity determination.²

In a letter dated September 14, 2006, the Office requested that appellant provide additional information regarding his current earnings. On September 21, 2006 appellant reported his current earnings of \$55,700.00 per year as an executive director at First Chance Center. In a memorandum dated March 9, 2007, the Office noted that a management trainee had weekly wages of \$467.10. This position required the performance of assigned duties under direction of more experienced personnel in departments such as credit, customer relations and sales to become familiar with company policies and practices. The Office proposed to reduce appellant's compensation benefits to zero on March 29, 2007 finding that he had demonstrated self-rehabilitation in his current position of executive director.

By decision dated July 9, 2007, the Office modified the October 9, 1975 wage-earning capacity determination to reflect a zero percent loss of wage-earning capacity. Appellant requested an oral hearing. In a decision dated May 13, 2008, an Office hearing representative affirmed the July 9, 2007 decision. Appellant appealed this decision to the Board. In a December 23, 2008 decision, the Board determined that appellant had been vocationally rehabilitated in his new position of executive director due to the increased responsibilities, including managerial duties of budgeting, hiring, supervision and direct access to the Board of Directors which differed significantly in duties and responsibility from the management trainee position. However, the Board found that the Office improperly compared appellant's earnings as an executive director with those of his date-of-injury position as an employing establishment volunteer rather than with his earnings in the rated position of management trainee. The Board reversed the Office's decision. The facts and circumstances of the Board's prior decision are incorporated herein by reference.

Appellant completed an Office form on March 12, 2009 and advised that he worked for the First Chance Center beginning in 1983 and was currently employed as an administrator earning approximately \$65,000.00 a year. He submitted his W-2 Form for 2008 indicating that his earnings were \$69,374.19.

The record contains a job description for a management trainee dated 1975 which includes the obligation to perform assigned duties in a business organization in order to gain knowledge and experience for promotion to a management position. A rehabilitation specialist

² Docket No. 97-30 (issued October 26, 1999).

updated this position description on April 29, 2009 and indicated that the current wages for the position were \$511.17 per week or \$26,580.84 per annum.

In a letter dated May 4, 2009, the Office proposed to modify appellant's wage-earning capacity determination of 1975 by reducing his monetary compensation to zero. It found that appellant had demonstrated self-rehabilitation in his current position of an executive director. The Office stated that the current weekly salary for the selected position of management trainee was \$511.17 per week and that appellant's current weekly pay rate was \$1,334.12 or \$69,374.19 divided by 52 weeks. It found that appellant's current wage-earning capacity was 261 percent. By decision dated June 8, 2009, the Office terminated appellant's compensation benefits effective June 8, 2009 on the grounds that he had vocationally rehabilitated himself.

Appellant requested a review of the written record on June 15, 2009. By decision dated October 14, 2009, the Office's Branch of Hearings and Review affirmed the June 8, 2009 decision. Appellant's current earnings of \$69,374.19 as an administrator were more than 25 percent greater than the current earnings for a management trainee of \$26,580.84. The hearing representative stated that as appellant's current position reflected increased duties, responsibilities and earnings then appellant was self-rehabilitated. The October 9, 1975 wage-earning capacity determination was modified to reduce appellant's compensation benefits to zero.

LEGAL PRECEDENT

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.³ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁴

An increase in pay, by itself, is not sufficient evidence that there has been a change in an employee's capacity to earn wages.⁵ Without a showing of additional qualifications obtained by appellant, it is improper to make a new loss of wage-earning capacity determination based on increased earnings.

³ W.S., *supra* note 1; W.G., 58 ECAB 243 (2006).

⁴ *Id.*

⁵ *Marie A. Gonzales*, 55 ECAB 395, 399 (2004).

With respect to modification of wage-earning capacity, the Office procedure manual provides:

“c. *Increased Earnings*. It may be appropriate to modify the [wage-earning capacity] rating on the grounds that the claimant has been vocationally rehabilitated if one of the following two circumstances applies:

(1) *The claimant is earning substantially more* in the job for which he or she was rated. This situation may occur where a claimant has returned to part-time duty with the employing agency and was rated on that basis, but later increased his or her hours to full-time work.

(2) *The claimant is employed in a new job (i.e., a job different from the job for which he or she was rated) which pays at least 25 percent more than the current pay of the job for which the claimant was rated.*

“d. *CE [claims examiner] Actions*. If these earnings have continued for at least 60 days, the CE should:

(1) *Determine the duration, exact pay, duties and responsibilities of the current job.*

(2) *Determine whether the claimant underwent training or vocational preparation to earn the current salary.*

(3) *Assess whether the actual job differs significantly in duties, responsibilities, or technical expertise from the job at which the claimant was rated.”*⁶

ANALYSIS

At oral argument before the Board, appellant contended that he was not self-rehabilitated as the capacity to earn more money in a position with more responsibilities was not self-rehabilitation, but normal maturation in employment.

As the party attempting to change appellant’s wage-earning capacity, the Office has the burden of proof to establish that the proposed change in the 1975 wage-earning capacity determination is appropriate. There are two prongs for the Office’s burden of proof: whether appellant had a new job which differs significantly in duties, responsibilities or expertise and whether this job paid 25 percent more than the current pay of the job for which he was rated. In the prior appeal, the Board found that the Office had properly determined that appellant was employed (and continues to be employed) in an administrator position which differed significantly in duties, responsibilities and technical expertise from the job in which he was rated as a management trainee. This aspect of the case was previously affirmed by the Board.

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11c. and d. (December 1995).

The Board finds that the Office properly compared the current pay rate for the selected position of management trainee of \$511.17 a week or \$26,580.84 a year with appellant's current earnings of \$69,374.19 a year. Appellant's current earnings exceed the current pay rate of his selected position of management trainee by more than 100 percent. The Board finds that the Office properly followed its procedures in determining that appellant was vocationally rehabilitated through his new job with its significant increase in duties, responsibilities and expertise and his earnings exceeding by 25 percent those of his selected position.

The Board notes that appellant's arguments on appeal address the first prong of the Office's burden of proof, whether the new position of administrator differs sufficiently from the rated position of management trainee to establish vocational rehabilitation. As noted, the Board previously ruled on this aspect of appellant's claim in its prior decision. Appellant did not submit any new evidence before the Office which would require additional findings on this issue on appeal. Therefore, the Board's prior decision remains final on this aspect of the case.

CONCLUSION

The Board finds that the Office met its burden of proof to reduce appellant's compensation benefits to zero on the grounds that he was vocationally rehabilitated.

ORDER

IT IS HEREBY ORDERED THAT the October 14, 2009 decision of Office of Workers' Compensation Programs is affirmed.

Issued: December 20, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board