U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DONALD W. WOODALL and TENNESSEE VALLEY AUTHORITY, HARTSVILLE NUCLEAR PLANT, Chattanooga, Tenn.

Docket No. 95-2303; Submitted on the Record;
Issued March 23, 1998

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly reduced appellant's monetary compensation under 5 U.S.C. § 8113(b) to reflect his loss of wage-earning capacity had he continued to participate in vocational rehabilitation; and (2) whether the Office properly found that the position of gate guard represented appellant's wage-earning capacity effective November 13, 1994.

The Office accepted that appellant sustained a right ankle sprain, aggravation of chronic instability of the right ankle, and a neuroma of the right ankle due to traumatic injuries on January 4 and 29, 1980, and paid him the appropriate compensation.[1]

In a work restriction evaluation dated June 16, 1992, Dr. Thomas J. Huber, a Board-certified orthopedic surgeon and appellant's attending physician, found that appellant could work for eight hours per day with continuous sitting, intermittent walking, lifting, bending, squatting, kneeling, twisting and standing for four hours per day, but no climbing. Dr. Thomas found that appellant could lift up to 75 pounds and had reached maximum medical improvement in 1980.

On July 6, 1992 an Office rehabilitation specialist referred appellant to a rehabilitation counselor for vocational rehabilitation services.[2]

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[1] This case has twice been before the Board. By decision dated November 30, 1992, Docket No. 90-409, the Board affirmed the Office's finding that appellant forfeited $10,404.77 in compensation benefits because he failed to report earnings from employment, and further affirmed the Office's finding that appellant was at fault in the creation of a $10,404.77 overpayment of compensation. By decision dated September 30, 1991, Docket No. 91-925, the Board reversed the Office's termination of appellant's, benefits, effective January 12, 1991 compensation after finding that the Office did not meet its burden of proof.

[2] The Office previously referred appellant for vocational rehabilitation in 1987 and 1988.

In an initial vocational rehabilitation report, Ms. Williams, the rehabilitation counselor, related that appellant stated that he would commute up to 20 miles to work and found a guarded probability of successful rehabilitation due to his "complaints of both physical and emotional problems other than his ankle problem."

In a report dated September 16, 1992, the Office rehabilitation specialist noted that Ms. Williams no longer accepted Office referrals and found that appellant had limited potential for rehabilitation due to his complaints.

In a work restriction evaluation dated November 25, 1992, Dr. Huber found that appellant could work for eight hours per day consistent with the limitations described in his June 16, 1992 evaluation.

In a report dated May 6, 1993, Dr. Huber found that appellant could work as long as he performed no structural climbing and had "relatively frequent breaks to get off his leg" if he were standing or walking.

By letter dated September 30, 1993, the Office referred appellant to Dr. David S. Jones, a Board-certified orthopedic surgeon, for a second opinion evaluation.

In a report dated October 26, 1993, Dr. Jones discussed appellant's history of injury and current complaints. On examination of appellant's ankle, Dr. Jones found no swelling, some diffuse tenderness on the lateral side but no "very localized tender areas which might indicate a recurrent neuroma." Dr. Jones diagnosed ligamentous instability of the ankle and found that appellant was not disabled from employment. In a work restriction evaluation accompanying his report, Dr. Jones found that appellant could work for eight hours per day continuously sitting and intermittently performing the rest of the listed activities for two hours per day.

In a supplemental report dated November 15, 1993, Dr. Jones, after reviewing the physical requirements of a diesel mechanic, the position which appellant held at the time of his injury, opined that appellant could perform the position with the exception of not walking for more than 1 hour or standing for more than 2 hours without sitting for 15 minutes.

By letter dated January 14, 1994, the Office informed appellant of his referral for vocational rehabilitation. The Office further notified appellant that he could not refuse a position because it entailed a commute to work and that if he did not cooperate with rehabilitation his compensation would be terminated or reduced.

In a vocational rehabilitation report dated February 18, 1994, the rehabilitation counselor noted that appellant did not attend his vocational evaluation appointment and rescheduled the appointment.

The record indicates that appellant underwent an extensive vocational evaluation on March 1, 1994. Based on appellant's vocational interests and the results of aptitude tests, the vocational evaluator identified, *inter alia*, the positions of timekeeper, gate guard, small products assembler and electronics inspector as appropriate reemployment possibilities for appellant.

In a vocational rehabilitation report dated May 31, 1994, the rehabilitation counselor "initiated telephonic contacts for a Labor Market Survey to determine the availability of appropriate employment opportunities for [appellant] in a commuting range from his home…" The rehabilitation counselor focused on the positions of timekeeper, gate guard, small products assembler and electronics inspector. The rehabilitation counselor noted that positions were not available with the employing establishment due to budget reductions. The rehabilitation counselor found that positions for a gate guard were available but that applicants needed 30 to 60 days of training. The rehabilitation counselor further found that positions for a small products assembler were currently available with salaries for new employees between $5.00 and $6.65 per hour. The rehabilitation counselor stated, "Results of the survey indicate that sufficient employment opportunities exist within [appellant's] geographical area to warrant job search activities leading to placement." The rehabilitation counselor further indicated that he would request approval from the Office for a training program to qualify appellant to work as a gate guard.

The rehabilitation counselor prepared a job placement/training plan form for appellant to sign indicating his agreement to participate in job seeking activities. The rehabilitation counselor noted on the form that the Office had approved training for appellant as a gate guard. He noted that a gate guard received average wages of $7.61 per hour. He further stated that he conducted a Labor Market Survey and determined that positions of gate guard, small products assembler and electronics assembler, as identified in the Department of Labor's *Dictionary of Occupational Titles*, were available in sufficient numbers in appellant's geographical area to warrant placement efforts.

In a vocational rehabilitation report dated August 23, 1994, the rehabilitation counselor stated that he had attempted to set up an appointment for appellant to sign the job placement/training plan but that appellant told him he was going on a trip and would telephone him upon his return. The rehabilitation counselor stated that when he did not hear from appellant he again tried to phone him but was unsuccessful.

In a report dated August 30, 1994, the Office rehabilitation specialist noted that the rehabilitation counselor had identified positions available in appellant's commuting area and that he had "good prospects for obtaining employment at entry level wages." The rehabilitation specialist noted that appellant had received the job placement/training plan but refused to search for a job.

By letter dated September 6, 1994, the Office advised appellant that his compensation would be reduced based upon what he probably could have earned had he not refused vocational rehabilitation unless within 30 days he cooperated with vocational rehabilitation or established good cause for failing to cooperate.

In a letter received by the Office on September 16, 1994, appellant stated that he did not know if he could perform or would like the jobs proposed by the rehabilitation counselor and that he could not survive earning minimum wage. Appellant proposed that he receive training as a housing contractor.

By decision dated November 5, 1994, the Office found that appellant failed to cooperate with vocational rehabilitation. The Office noted that the rehabilitation specialist had found that appellant could have obtained employment as a gate guard had he cooperated with vocational rehabilitation.

By decision dated November 8, 1994, the Office reduced appellant's compensation to reflect his wage-earning capacity as a gate guard. The Office, in its decision, provided the job title and job description of a gate guard and noted that the position was within appellant's physical limitations.

The Board finds that the Office properly reduced appellant's monetary compensation under section 8113(b) of the Federal Employees' Compensation Act.

Section 8113(b) of the Act provides as follows:

> "If an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed under section 8104 of this title, the Secretary, on review under section 8128 of this title and after finding that in the absence of the failure the wage-earning capacity of the individual would probably have substantially increased, may reduce prospectively the monetary compensation of the individual in accordance with what would probably have been his wage-earning capacity in the absence of the failure, until the individual in good faith complies with the direction of the Secretary."[3]

Section 10.124(f) of Title 20 of the Code of Federal Regulations, the implementing regulations of 5 U.S.C. § 8113(b), further provides in pertinent part:

> "Pursuant to 5 U.S.C. § 8104(a), the Office may direct a permanently disabled employee to undergo vocational rehabilitation. If an employee without good cause fails or refuses to apply for, undergo, participate in, or continue participation in a vocational rehabilitation effort when so directed, the Office will, in accordance with 5 U.S.C. § 8113(b), reduce prospectively the employee's monetary compensation based on what would probably have been the employee's wage-earning capacity had there not been such failure or refusal."

Appellant attended the early stages of vocational rehabilitation by meeting with his rehabilitation counselor and participating in an extensive vocational evaluation. The rehabilitation counselor identified positions available within appellant's physical limitations and aptitude which were also available within his commuting area. The rehabilitation counselor developed a job/training and placement plan and requested that appellant sign the plan indicating that he agreed to participate in training and job seeking. Appellant, however, refused to sign the job plan and agreement.

[3] 5 U.S.C. § 8113(b).

The question presented, therefore, is whether appellant had "good cause" for failing to continue participation in vocational rehabilitation efforts. Appellant generally stated that he was unsure whether he could perform the positions of gate guard or parts assembler; however, the medical evidence establishes that the positions were within appellant's physical capability. Appellant also expressed concern that he would not receive enough money if he took one of the listed positions; however, the Office indicated that it had explained to appellant that he would be compensated for any loss of wage-earning capacity in accordance with a standard formula. Thus, there is no evidence that appellant's failure to continue with vocational rehabilitation was with "good cause." The Office, therefore, properly reduced appellant's compensation in accordance with section 8113(b) as appellant's wage-earning capacity would have increased if he had participated in vocational rehabilitation and as he did not provide good cause for failing to cooperate with rehabilitation efforts.[4]

The Board further finds that the Office properly determined that the position of gate guard represented appellant's wage-earning capacity effective November 13, 1994.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.[5] If an employee's disability is no longer total, but the employee remains partially disabled, the Office may reduce compensation benefits by determining the employee's wage-earning capacity.[6]

Under section 8115(a) of the Act,[7] wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, his degree of physical impairment, his usual employment, his age, his qualifications, and other factors and circumstances which may affect his wage-earning capacity in his disabled condition.[8]

The Office properly found that appellant was no longer totally disabled for work due to his January 1980 employment injuries. Appellant's attending physician, Dr. Huber, a Board-certified orthopedic surgeon, found that appellant could work for eight hours per day with continuous sitting, intermittent walking, lifting, bending, squatting, kneeling, twisting and standing for four hours per day, but no climbing. Dr. Thomas found that appellant could lift up to 75 pounds and had reached maximum medical improvement in 1980. Dr. Jones, a Board-certified orthopedic surgeon and Office referral physician, found that appellant could work for 8 hours per day continuously sitting and intermittently standing, lifting up to 20 pounds, bending, squatting, kneeling, twisting and climbing for 2 hours per day.

[4] *Hattie Drummond*, 39 ECAB 904 (1988).

[5] *Betty F. Wade*, 37 ECAB 556 (1986).

[6] 20 C.F.R. § 10.303(a).

[7] 5 U.S.C. §§ 8101-8193.

[8] *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

Following established procedures, the Office referred the case record to a vocational rehabilitation counselor, who selected positions listed in the Department of Labor's *Dictionary of Occupational Titles* to fit appellant's capabilities. The Office authorized training for appellant as a gate guard. The rehabilitation counselor prepared a job training and placement plan; however, appellant refused to sign the plan or to continue with vocational rehabilitation. The counselor performed a labor market survey and determined the prevailing wage rate and the availability in the open labor market of the position. The Office therefore found that, although appellant did not reach the goal of job placement, had he been successful he would have been capable of earning wages as a gate guard and, accordingly, reduced his compensation in accordance with the formula set forth in the *Shadrick*[9] decision.

The decisions of the Office of Workers' Compensation Programs dated November 8 and 5, 1994 are hereby affirmed.

Dated, Washington, D.C.
March 23, 1998

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

[9] *Albert C. Shadrick*, 5 ECAB 376 (1953).