U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TIMOTHY HELGERSON and DEPARTMENT OF THE AIR FORCE, CLEAR AIR FORCE STATION, Alas.

Docket No. 95-2276; Submitted on the Record;
Issued May 12, 1998

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation benefits to reflect his wage-earning capacity based on his actual earnings as an alarm room operator.

After a thorough review of the case, the Board finds that the Office properly determined appellant's wage-earning capacity based on his actual earnings as an alarm room operator.

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction in such benefits.[1] The Board finds that the Office met its burden of proof in this case.

Section 8115(a) of the Federal Employees' Compensation Act provides in pertinent part as follows: "In determining compensation for partial disability ... the wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity." Generally, the Board has held, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.[2] Finally, application of the principles set forth in *Albert C. Shadrick*[3] will result in the percentage of the employee's loss of wage-earning capacity.

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[1] *Carla Letcher*, 46 ECAB 452 (1995).

[2] *Hubert F. Myatt*, 32 ECAB 1994 (1981); *Lee R. Sires*, 23 ECAB 12 (1971).

[3] 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.303.

The Office accepted that appellant, then a 36-year-old firefighter, sustained a lumbar strain with right sciatica and a herniated L5-S1 disc on August 8, 1993. He underwent a lumbar laminotomy to repair an extruded L5-S1 disc on May 16, 1994.

In August 16, 1994 reports, Dr. Timothy Harbst, an attending Board-certified physiatrist, noted that appellant could sit for 1 hour at a time up to 4 hours per day, stand or walk for 2 hours at a time up to 6 hours a day, lift up to 35 pounds and occasionally bend, twist, squat, crawl or climb. He indicated that appellant could work eight hours per day but had not reached maximum medical improvement.

On August 24, 1994 appellant returned to a 40-hour per week light-duty position at the employing establishment as an alarm room operator. His duties, to be performed while sitting or standing, consisted of answering a telephone, taking messages and obtaining a four-pound book from a shelf. Appellant was also given two 15 minute breaks and a lunch break. He received benefits for loss of wage-earning capacity.[4]

On September 1, 1994 Dr. John W. Joosse, a Board-certified orthopedic surgeon and second opinion physician, diagnosed a recurrent herniated nucleus pulposus and on October 6, 1994 performed a re-exploration of the L5-S1 disc space, with multiple large disc fragment retrieval and disc space evacuation. He released appellant to light duty as of October 31, 1994, with lifting limited to 20 pounds, no bending, stooping or twisting and standing, walking and stair climbing limited to 2 hours per day.[5]

Appellant returned to the light-duty position in the alarm room on November 7, 1994. The record indicates that appellant was required to have a security clearance in order to hold this position. However, on April 4, 1994, the employing establishment proposed revocation of appellant's security clearance due to weapons offenses at the employing establishment on October 30, 1990, and June 9, 1991 and June 11, 1993 arrests for DWI (driving while intoxicated), assault and "misconduct with a controlled substance." Appellant's security clearance was revoked on September 2, 1994 and a notice of proposed removal prepared on October 17, 1994.[6] A "decision to remove letter" was issued on November 14, 1994 and appellant was removed from federal employment effective November 18, 1994.

[4] On August 24, 1994 the employing establishment sent a light-duty position description to the Office and to appellant, in the alarm room. Eight hour duty shift, sitting or standing, lunch break, two 15 minute breaks, answering the phone, take messages, dispatch equipment over a PA system, obtain books from shelves. The Office sent appellant an August 25, 1994 letter advising him that he had 30 days in which to accept the position or submit reasons for refusing it, and of the penalty provision under section 8106(c)(2) of the Act for refusing to accept an offer of suitable work.

[5] Dr. Joosse submitted periodic reports from November 28, 1994 through March 6, 1995 finding appellant fit for light to medium duty with restrictions, indicating that he reached maximum medical improvement in February 1995.

[6] In a November 9, 1994 letter, the employing establishment notified appellant that his removal was fully supported by the evidence.

In a January 4, 1995 letter, the employing establishment noted that as appellant "could have continued, but for his loss of security clearance, performing [the alarm room] duties until maximum medical recovery."[7]

In a February 10, 1995 letter, the Office noted that after appellant returned to limited duty in November 1994, he was paid compensation for his wage loss of 72 hours per week as a firefighter and was "not considered totally disabled" because the "limited-duty position would have continued had [he] not been released for cause."

By decision dated April 17, 1995, the Office found that the light-duty position of alarm room operator, with wages of $370.94 per week, fairly and reasonably represented appellant's wage-earning capacity. The Office noted that the position, begun on November 7, 1994, was within his medical restrictions and "would still be available to [him] if [he] had not been released for cause." The Office found no medical evidence indicating appellant was terminated or stopped work due to his physical condition and that, therefore, he "had no disability within the meaning of the Act" as of November 7, 1994. The Office computed that appellant's adjusted earning capacity per week was $368.02, with a weekly pay rate of $736.04, resulting in a $368.02 loss of wage-earning capacity per week. Compensation began on November 7, 1994 at the new rate of $1008.00 every four weeks.[8]

With regard to appellant's physical restrictions, the record contains an October 31, 1994 report from Dr. Joosse releasing appellant to light duty as of that day, with lifting limited to 20 pounds, no bending, stooping or twisting, and standing, walking and stair climbing limited to 2 hours per day. The Board finds that the Office properly relied on Dr. Joosse's October 31, 1994 report as the weight of the medical evidence. The job description for the alarm room operator position indicates that it is a sedentary position with a maximum of ten pounds lifting. There is no indication that the selected position is outside the restrictions set forth by Dr. Joosse.

Appellant was medically able to perform the light-duty position of alarm room operator at the time of his termination from federal employment on November 18, 1994. The Board notes that Dr. Joosse submitted medical reports from October 31, 1994 through March 6, 1995 finding that appellant continued to be medically fit for light to medium duty with restrictions well within the alarm room operator job description. The position was still open and available to him. There is no indication that he was terminated from the employing establishment or stopped work due to his accepted lumbar condition. The evidence establishes that appellant was removed from the employing establishment effective November 28, 1994 for cause, as his required security clearance was revoked due to his own misconduct.

[7] In a January 10, 1995 letter, appellant asserted that the security clearance issue was actually a fraudulent attempt by the employing establishment to remove him on medical grounds. He continued to file periodic claims for continuing compensation.

[8] The record indicates that following the Office's April 17, 1995 decision, the Office issued a preliminary notice of overpayment of compensation on May 4, 1995. As the final decision, if any, regarding the alleged overpayment is not of record, the overpayment issue is not before the Board on the present appeal.

The Office properly found that appellant was no longer totally disabled as a result of his August 8, 1993 lumbar injury and it followed established procedures for determining appellant's employment-related loss of wage-earning capacity. The Board therefore finds that the Office has met its burden of justifying a reduction in appellant's compensation for total disability.

The decision of the Office of Workers' Compensation Programs dated April 17, 1995 is hereby affirmed.

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

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member