U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT A. JOHNSON, JR. and U.S. POSTAL SERVICE, POST OFFICE, Richmond, Va.

Docket No. 96-445; Submitted on the Record;
Issued May 6, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined appellant's wage-earning capacity pursuant to 5 U.S.C. § 8115(a).

This is the fifth appeal in this case. The facts and background of the case are set forth in the Board's decisions issued in Docket No. 89-1418 (issued July 26, 1990). On March 12, 1985 the Board issued an order granting remand[1] so that the Office could issue a *de novo* merit decision concerning the loss of wage-earning capacity and overpayment determinations. In a decision dated July 26, 1990, the Board affirmed in part, set aside in part and remanded the case for further action consistent with its opinion.[2] The Board found that appellant received an overpayment of compensation, but remanded the case for the Office to clearly state the period of overpayment and to recalculate the amount of the overpayment for that period.

On November 4, 1991 the Board issued an order[3] granting remand and canceling oral argument so that the Office could recalculate the overpayment and issue a *de novo* decision with regard to the overpayment of compensation received by appellant. On October 12, 1993 the Board issued an order[4] granting remand and canceling oral argument so that the Office could recalculate the overpayments and issue a *de novo* decision to reconsider its July 18, 1986 loss of wage-earning capacity determination and to recalculate the overpayment of compensation received by appellant.

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[1] Docket No. 85-353.

[2] Docket No. 89-1418.

[3] Docket No. 91-642.

[4] Docket No. 93-1189.

In a June 5, 1979 work tolerance limitations report, Dr. V.R. May, Jr., a treating Board-certified orthopedic surgeon, indicated that appellant's work restrictions included sedentary lifting of 0 to 10 pounds, no stooping or repeated bending. Dr. May also indicated that appellant could return to work 8 hours per day with the restrictions.

Appellant was assigned to Joseph H. Rose, certified rehabilitation counselor, for further vocational rehabilitation services. In a report dated August 5, 1981, the counselor found that the position of probation officer was within appellant's vocational, educational and medical restrictions. The counselor also found that positions were available within appellant's commuting area. The probation officer position (Department of Labor's *Dictionary of Occupational Titles* No. 195.167.034) was sedentary and required appellant to talk and hear and is indoors. The maximum lifting was 10 pounds. The position description stated:

> "Engages in activities related to probation of juvenile or adult offenders. Determines which juvenile cases fall within jurisdiction of court and which should be adjusted informally or referred to other agencies. May release children to parents or authorized detention pending preliminary hearing. Conducts prehearing or presentence investigation of adults and juveniles by interviewing offender, family, and others concerned. Prepares social history for court. Interprets findings and suggests plan and treatment. Arranges for placement or clinical services if ordered by court and works with offender on probation according to treatment plan toward discharge from probation. Evaluates probationer's progress on a follow-up basis. Secures remedial action if necessary, by court. May specialize in working with either juvenile or adult offenders, or both. May be administratively attached to court or separate agency serving court, Usually required to have knowledge and skill in casework methods acquired through degree program at school of social work."

In a letter dated February 10, 1982, Dr. May, stated:

> "As far as correctional work is concerned I do not feel you were qualified basen on your medical background in reference to your back to do work which would cause you to have to do any man handling or physical restraint. As far as the location of this work is concerned, it is perfectly all right for you to assume this work on a sedentary basis"

The case was referred to the Office medical adviser who opined on May 4, 1985 that appellant was capable of performing the position of probation officer as "no streuous or heavy lifting activities" are involved.

In a letter dated April 24, 1989, Dr. May opined:

> "I have received your letter of March 15, 1989 and I noticed that you had an acute flare up of the lower back and left leg pain in May, 1988. I am sorry that you had this but I remember treating you in the early 1970's and it was my opinion that because your x-ray did show you to have some narrowing at the L5-S1 level that

you probably should not do a lot of standing, stooping or bending which would be required of you as a correctional officer."

By decision dated August 24, 1995, the Office reviewed the merits of the claim and denied modification on the grounds that the evidence was insufficient to warrant modification. The Office found that appellant's part-time work as a supervisor security clerk for the Internal Revenue Service did not fairly represent his earning capacity as he had been provided vocational training and was a college graduate. The Office also noted that appellant had received a B.S. degree in Administration of Justice and Public Safety with a concentration in Police Planning and Management. The Office found that the selected position of probation officer represented appellant's wage-earning capacity based upon his qualifications and physical capabilities. The Office found that the evidence of record supported the position of probation officer as there were jobs available within appellant's commuting area. The Office also found that appellant was capable of performing the position of probation officer based upon the medical evidence of record which included the requirements for a probation officer.

The Board finds that the Office properly determined appellant's wage-earning capacity under 5 U.S.C. § 8115.

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 of benefits.[5]

Under section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity.[6] 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, the availability of suitable employment, and other factors and circumstances which may affect his wage-earning capacity in his disabled condition.[7] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal circumstances.[8] The job selected for determining wage-earning capacity must be a job reasonable available in the general labor market in the commuting area in which the employee lives.[9]

In the present case, the Office determined that the appellant's actual wages as temporary supervisor security clerk with the Internal Revenue Service did not fairly and reasonably

[5] *James B. Christenson*, 47 ECAB ___ (Docket No. 95-1106, issued September 5, 1996); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); *David W. Green*, 43 ECAB 883 (1992); *Harold S. McGough*, 36 ECAB 332 (1984).

[6] 5 U.S.C. § 8115(a).

[7] *Id.*; *see Mary J. Calvert*, 45 ECAB 575 (1994); *Samuel J. Chavez*, 44 ECAB 431 (1993); *Keith Hanselman*, 42 ECAB 680 (1991).

[8] *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

[9] *Id.*

represent his wage-earning capacity. The Office thereafter determined that the position of "probation officer" represented his wage-earning capacity.

The Office properly determined that the position of probation officer represented appellant's wage-earning capacity in that it considered the appropriate factors, such as availability of suitable employment and appellant's physical limitations, usual employment, age and employment qualifications, in reaching this determination.[10] When the Office makes a medical 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 that employee's capabilities with regard to his physical limitations, education, age and prior experience. 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. Finally, application of the principles set forth in the *Shadrick* decision will result in the percentage of employee's loss of wage-earning capacity.[11]

In the present case, appellant's medical restrictions were set forth by Dr. May in his June 5, 1979 work tolerance limitations report. In the report, Dr. May indicated that appellant could return to work 8 hours per day, but that he could not lift more than 10 pounds, and could not stoop or bend. In a letter dated February 10, 1982, Dr. May opined that appellant could not perform correctional work which required man handling or physical restraint. Dr. May also indicated that appellant could perform this work on a sedentary basis. In a report dated April 24, 1989, Dr. May again reiterated that appellant could not perform any position that required "a lot of standing, stooping or bending." The Office medical adviser concluded that the position of probation officer was within appellant's medical restrictions. There is no indication that the selected position of probation officer is outside these restrictions as the position is sedentary.

The Office identified the position of probation officer as listed by the rehabilitation counselor as being most consistent with appellant's background and medical limitations. The Office used the information provided by the rehabilitation counselor regarding the prevailing wage rate and job availability in the area for a probation officer. On appeal, appellant contends that the position of probation officer was neither available nor offered to him during the period May 1978 to October 1979. No evidence was cited by appellant that specifically addressed the availability of

[10] *See Clayton Varner*, 37 ECAB 248, 256 (1985).

[11] *See Dennis D. Owen*, 44 ECAB 475 (1993); *Wilson L. Clow, Jr., supra* note 5; *Albert C. Shadrick*, 5 ECAB 376 (1953); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8 (December 1993).

the selected position.[12] The Board finds that the Office properly concluded that the position was reasonably based on the reports of the rehabilitation counselor.[13]

The record indicates that the position of probation officer was within appellant's physical limitations and vocational ability, and was reasonably available in the labor market. Under 5 U.S.C. § 8115, the Office properly determined that appellant's wage-earning capacity was represented by the position of probation officer.

The decision of the Office of Workers' Compensation Programs dated August 24, 1995 is hereby affirmed.

Dated, Washington, D.C.
May 6, 1998

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[12] *Cf. Carla Letcher*, 46 ECAB 452 (1995) (where appellant submitted evidence from the state employment agency as to lack of openings for the specific position selected).

[13] The Board also notes that the unsuccessful efforts of a claimant to obtain a job in the selected position does not establish that the position is unavailable; *see Samuel J. Chavez*, 44 ECAB 431 (1993).