U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES R. ROGERSON and DEPARTMENT OF DEFENSE,
Fort Bliss, Tex.

Docket No. 97-740; Submitted on the Record;
Issued February 22, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation effective August 18, 1996 based upon his ability to perform the position of computer network technician, which it found fairly and reasonably represented appellant's wage-earning capacity.

On April 19, 1991 appellant sustained injury to his back, which the Office accepted as lumbar strain. Appellant was placed on the periodic roll, and by report dated November 4, 1992, appellant's treating physician, Dr. James Boone, a Board-certified orthopedic surgeon, opined that he would be unable to return to work as a plumber. An Office second opinion examiner, Dr. David L. Lewis, a Board-certified orthopedic surgeon, opined, however, that appellant could return to work with restrictions on lengths of time spent sitting, walking, standing and lifting. Thereafter, appellant was referred to another second opinion medical examiner for evaluation. By report dated September 23, 1993, Dr. John M.H. Allen, a Board-certified orthopedic surgeon, opined that appellant could work eight hours per day with length of time restrictions on sitting, standing, walking and with lifting limits. Dr. Allen opined that appellant would probably improve to about a medium demand capability.

Thereafter rehabilitation efforts were begun. Appellant was enrolled in an Associates of Applied Science (A.A.) degree program at El Paso Community College concentrating in computer technology. Dr. Boone opined that the training program was suitable both vocationally and medically for appellant. On August 8, 1995 the vocational counselor advised the Office that appellant had completed his A.A degree and was pursuing jobs as a computer technician. Thereafter placement efforts were undertaken. Appellant submitted multiple September 1995 job applications to a variety of companies in the El Paso area but got no job offers. The rehabilitation counselor provided several job leads for appellant in October 1995 and contacted multiple employers on her own trying to find appellant a position. The case was then reviewed and referred for the assisted reemployment program including the Office's wage-

subsidy program. It was noted that at the end of 90 days, if the counselor was not able to locate a qualified employer, appellant's rehabilitation file would be closed.

During November 1995 the rehabilitation counselor contacted over 50 potential employers on appellant's behalf, attempting to secure him a position. During December 1995 she contacted 60 potential employers. In January 1996 thirty-six potential employers were contacted.

In March 1996 the rehabilitation counselor wrote eight letters to potential employers attempting to secure appellant a position.

By report dated May 10, 1996, Dr. Boone confirmed that appellant could return to limited-duty type work.

On May 13, 1996 the rehabilitation counselor wrote the Office, providing a current labor market survey with salary range for people with appellant's training and qualifications. The counselor found that the average monthly salary for employees with appellant's credentials was $1,230.00. She based this on positive contact with 13 area employers.

In a May 22, 1996 vocational rehabilitation report, the counselor indicated that appellant's case was being closed, that multiple job advertisements for computer operators and technicians in both the newspaper and the mail had been identified to appellant, that multiple job applications had been filed, and that they were awaiting responses. The counselor noted that the rehabilitation specialist concluded that he could not justify holding appellant's case open any longer, and instructed the counselor to close it.[1] The counselor indicated that she did a labor market survey for the position of computer operator and found that the average salary for the area was more than $1,000.00 per month. She noted that the selected positions for appellant were computer network technician and computer peripheral equipment operator, and noted that the evidence demonstrated that these positions were being performed in the El Paso area in sufficient numbers so as to be declared reasonably available.

On July 16, 1996 the Office issued appellant a notice of proposed reduction of compensation finding that the factual and medical evidence of record established that he was no longer totally disabled. The Office advised that appellant was found to be partially disabled with the capacity to earn wages as a computer peripheral equipment operator at the rate of $250.00 per week. The Office included copies of medical reports from Drs. Boone, Lewis and Allen all supporting that appellant could work limited duty, which the Department of Labor's *Dictionary of Occupational Titles* physical job descriptions supported that computer peripheral equipment operator/computer network technician were. The Office noted the rehabilitation efforts which were undertaken for appellant and the job placement services that were provided to appellant; it noted that competition for these jobs was keen but that they were certainly being performed in the El Paso area in sufficient numbers so as to be declared reasonably available. It noted the

[1] The specialist found that the training program had been completed, that extensive placement with new employer services had been provided and was extended to include offering wage subsidy to prospective employers, that despite these efforts appellant had not secured employment, and that further placement services were no longer justifiable, such that the case was being closed.

entry level salary for the position in that area was $250.00 per week. The Office found that the weight, and the entirety of the medical evidence supported that appellant could perform light-type work, which the position of computer peripheral equipment operator was, and that such a position fairly and reasonably represented appellant's wage-earning capacity, and it calculated appellant's loss of wage-earning capacity on that basis.

By letter dated July 23, 1996, appellant objected to the proposed reduction in his compensation arguing that the job market was very low and arguing that a reduction in pay was not justified as he was not injured on a job as a computer operator.

By letter received on August 12, 1996, appellant argued that he did not understand the reduction of compensation based upon an imaginary job.

By decision dated August 16, 1996, the Office finalized its reduction of compensation to reflect appellant's capacity to earn wages as a computer operator. The Office advised that in some situations vocational rehabilitation efforts do not succeed, and a claimant's wage-earning capacity must be determined on the basis of a position deemed suitable but not actually held. The Office also noted that the employing establishment could not rehire appellant as it had no work that he could perform given his job restrictions. The Office reduced appellant's compensation effective August 18, 1996.

By letter received on September 16, 1996, appellant requested reconsideration arguing that a new magnetic resonance imaging (MRI) scan now showed a small herniation at L5-S1. He alleged that his back condition had progressed and prevented him from working. Attached were a September 6, 1996 MRI report showing disc herniations at L3-4 and L5-S1 and degenerative disc disease from L3-S1, and a September 9, 1996 report from Dr. Boone stating the same as his May 10, 1996 report.

By decision dated September 30, 1996, the Office denied modification of the August 16, 1996 decision. The Office noted that Dr. Boone stated that appellant could perform light-duty work, that the position of computer network technician was classified as light duty, and that Dr. Boone did not relate the new small disc herniation to appellant's lumbar strain work injury.

The Board finds that the Office properly determined that the position of computer network technician fairly and reasonably represented appellant's wage-earning capacity effective August 18, 1996.

An injured employee who is unable to return to the position held at the time of injury (or to earn equivalent wages) but who is not totally disabled for all gainful employment is entitled to compensation computed on loss of wage-earning capacity.[2]

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. It the actual earnings of an employee do not fairly and

[2] *Alfred R. Hafer*, 46 ECAB 553 (1995); 20 C.F.R. § 10.303(a).

reasonably represent his wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity as appears reasonable under the circumstances is determined with due regard to the nature of the injury; his degree if physical impairment; his usual employment; his age; his qualifications for other employment; the availability of suitable employment; and other factors or circumstances which may affect his wage-earning capacity in his disabled condition.[3]

In the present case, the Office determined that appellant had no actual earnings and thereafter determined that the position of computer network technician represented his wage-earning capacity.

In accordance with Office procedures, the Office selected the position of computer network technician from the Department of Labor's *Dictionary of Occupational Titles* for which appellant possessed the necessary education and experience, as stated in the position description and the duties of which were within his medical restrictions.[4]

Appellant alleged that the position of computer network technician was not actually available because no one was hiring him, and that his back was worsening such that he could not work.

Regarding the reasonable availability of the selected position, the Office confirmed by the large numbers of contacts made by the rehabilitation counselor confirming the existence of such positions, by the labor market survey conducted by the counselor to determine the local business average salary for such positions, and by the numbers of advertisements for such positions in print and in the mail, that the numbers of computer network technician positions was great, such that it was considered to be reasonably available in appellant's commuting area. The Board notes that the Office is not obligated to actually secure a job for appellant. The Board has also previously found that a lack of current job openings does not equate to a finding that the position was not performed in sufficient numbers to be considered reasonably available.[5] The Office must only provide evidence that the selected position is performed in sufficient numbers in the geographical area to be considered reasonably available. The Office met its burden in this case.

Regarding appellant's physical ability to perform the selected position, the Board notes that appellant has submitted medical evidence of a new lumbar disc herniation, which developed subsequent to the employment injury. A condition which develops following an employment injury but not a consequence or a residual of the accepted employment injury is not, however, to be considered in determining wage-earning capacity.[6] Accordingly, appellant's new disc herniation does not factor in to his physical ability to perform the position of computer network technician.

[3] 5 U.S.C. § 8115(a).

[4] *See supra* note 2; *see also Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

[5] *See supra* note 2 and 4.

[6] *See Harold D. Synder*, 38 ECAB 763 (1987).

As appellant had presented no evidence that the Office's wage-earning capacity determination was in error, such determination must be affirmed.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated September 30 and August 16, 1996 are hereby affirmed.

Dated, Washington, D.C.
February 22, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member