U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ALBERT L. TEESATESKIE and DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, Gatlinburg, Tenn.

*Docket No. 97-952; Submitted on the Record;*
*Issued January 21, 1999*

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DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation, effective November 10, 1996, based on his capacity to perform the duties of the selected position of security guard.

The Board has reviewed the case record and finds that the Office properly reduced appellant's compensation on the basis that he was capable of earning the wages of a security guard.

Under the Federal Employees' Compensation Act,[1] once the Office has accepted a claim and paid compensation benefits, it has the burden of proof to establish that an employee's disability has ceased or lessened, thus justifying termination or modification of those benefits.[2] 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 the loss of wage-earning capacity.[3]

Wage-earning capacity is the measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[4] Section 8106(a)[5] of the Act provides for compensation for the loss of wage-earning capacity during an employee's disability by paying

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[1] 5 U.S.C. §§ 8101-8193.

[2] *James B. Christenson*, 47 ECAB 775 (1996); *Wilson L. Clow, Jr.*, 44 ECAB 157, 170 (1992).

[3] 20 C.F.R. § 10.303(a); *Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

[4] *Dennis D. Owen*, 44 ECAB 475, 479 (1993); *Hattie Drummond*, 39 ECAB 904, 907 (1988).

[5] 5 U.S.C. § 8106(a).

the difference between his monthly pay and his monthly wage-earning capacity after the beginning of the partial disability.[6]

Section 8115 provides that the wage-earning capacity of an employee is determined by his actual earnings if these fairly and reasonably represent his or her wage-earning capacity.[7] If the actual earnings do not fairly and reasonably represent the employee's wage-earning capacity, or if the employee has no actual wages, wage-earning capacity is determined by considering the nature of the injury, the degree of physical impairment, the employee's usual employment, age, and qualifications for other employment, the availability of suitable employment, and other factors and circumstances which may affect his wage-earning capacity in his disabled condition.[8] A job in the position selected for determining wage-earning capacity must be reasonably available in the general labor market in the commuting area in which the employee lives.[9]

In this case, appellant, then a 35-year-old motor vehicle operator, filed a notice of traumatic injury on August 22, 1985 claiming that he injured his left knee while cutting a pine tree off a road bank. The Office accepted the claim for internal derangement and permanent aggravation of osteoarthritis of the left knee, and paid appropriate compensation.[10]

Following two surgeries and extensive physical therapy, the Office referred appellant for vocational rehabilitation on September 9, 1993.[11] After more than two years of educational retraining, appellant was unable to qualify for a medical technician's position, and the rehabilitation counselor developed a job placement plan.

On June 16, 1996 the Office informed appellant that the selected positions of security guard and power-press tender had been found to be suitable and within his physician limitations, that the Office had determined that appellant had a wage-earning capacity of $16,000.00 per year, and that at the end of the rehabilitation program, the Office would "in all likelihood" reduce his compensation, whether he was actually employed or not.

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[6] An employee's wage-earning capacity in terms of percentage is obtained by dividing the pay rate of the selected position by the current pay rate for the date-of-injury job; the wage-earning capacity in terms of dollars is computed by multiplying the pay rate for compensation purposes, as defined at 20 C.F.R. § 10.5(a)(20), by the percentage of wage-earning capacity and subtracting the result from the pay rate for compensation purposes to obtain the employee's loss of wage-earning capacity. 20 C.F.R. § 10.303(b).

[7] 5 U.S.C. § 8115(a); *Lawrence D. Price*, 47 ECAB 120 (1995).

[8] *Mary Jo Colvert*, 45 ECAB 575, 579 (1994); *Samuel J. Chavez*, 44 ECAB 431, 436 (1993).

[9] *Barbara J. Hines*, 37 ECAB 445, 450 (1986).

[10] Appellant returned to work on October 7, 1985 but filed notices of recurrence of disability on February 28, 1986 and September 19, 1991. The employing establishment terminated appellant on November 28, 1992 because he was unable to perform his job duties.

[11] Appellant received two schedule awards for 16 percent permanent impairment of his left leg. The awards ran from October 6, 1987 through April 4, 1988 and February 6 to June 6, 1994.

On September 13, 1996 the Office issued a notice of proposed reduction of compensation, permitting appellant 30 days in which to submit additional evidence or argument on why his benefits should not be reduced in accordance with his wage-earning capacity. Appellant disagreed with the Office's action, stating that no security or manufacturing jobs were available in his area and that he was not qualified physically or by training to be a security guard. The Office issued a final reduction of compensation on November 4, 1996.

The Board finds that the medical evidence establishes that appellant is capable of performing the duties of the selected position of security guard. In response to the Office's request to review the descriptions of the two selected positions, Dr. Walton W. Curl, a Board-certified orthopedic surgeon and appellant's treating physician, stated in an April 12, 1996 letter that appellant was "physically capable of performing the two proposed job goals," with a lifting restriction of 10 to 25 pounds. As early as September 9, 1993, Dr. Curl completed a disability form indicating that appellant had reached maximum medical improvement and could work eight hours a day with no climbing, stooping or bending and no walking over rough ground.

Appellant argued that he could not pass the physical for such a position, which also required firearms training. However, the record contains no evidence that a physical examination is necessary, and the rehabilitation counselor indicated that he had contacted three area security companies, all of which hired unarmed guards. Therefore, the Board rejects appellant's arguments.

The Board also finds that the selected position fairly and reasonably represents appellant's wage-earning capacity. After appellant proved unable to complete his course work at a community college to qualify for placement as a medical technician,[12] the rehabilitation counselor[13] identified the security guard position, listed in the Department of Labor's *Dictionary of Occupational Titles*, as vocationally suitable for appellant, noting that this position required only a general education diploma (GED), which appellant had, and on-the-job training. The rehabilitation counselor reported that appellant had experience in supervising, inventory control, scheduling and instructing. Further, she thoroughly investigated job opportunities at federal, state and local agencies to take advantage of any hiring preference because of appellant's status as a Native American.

The Board also finds that the selected position of security guard was reasonably available in appellant's geographic area within a reasonable commuting distance. The record reveals that appellant lived in a rural area but a labor market survey taken from October 28, 1993 through March 4, 1994 showed numerous potential employers in the surrounding counties. Subsequently, aggressive placement efforts were directed at private companies during January

[12] Appellant was forced to withdraw from the program after difficulties with a required course. However, he was highly praised for his efforts and "admirable perseverance" and college personnel recommended him "for employment in responsible positions."

[13] The Office's procedures regarding vocational rehabilitation emphasize returning partially disabled employees to suitable work. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Vocational Rehabilitation Services*, Chapter 2.813 (December 1993). If vocational rehabilitation is unsuccessful, the rehabilitation counselor will prepare a final report listing two or three jobs which are medically and vocationally suitable.

and February 1996, and the rehabilitation counselor indicated that appellant was cooperating fully in seeking employment. While appellant may have been unsuccessful in being selected and argued that he lived in an "economically depressed" area, there is no evidence in the record that jobs were not reasonably available within his commuting area.[14]

The Office provides vocational rehabilitation to disabled claimants but is not an employment agency; while the Office is obligated by the statute to assist claimants under the Act to return to work, a claimant has the duty to seek and obtain suitable employment.[15] Unsuccessful efforts do not entitle a claimant to continuing disability compensation.[16]

Moreover, the Office used the financial information provided by the rehabilitation counselor concerning the prevailing wage rate for security guard in the area and properly followed its established procedures[17] for determining appellant's wage-earning capacity.[18] Accordingly, the Board finds that the Office has met its burden of justifying a reduction in appellant's compensation for total disability.

[14] *See Dorothy Lams*, 47 ECAB 584 (1996) (finding that appellant failed to submit evidence specifically showing the unavailability of the selected position in his immediate labor market).

[15] *Samuel J. Chavez*, *supra* note 8.

[16] *See Rosa M. Garcia*, 48 ECAB ___ (Docket No. 95-2413, issued January 7, 1998) (finding that appellant's repeated failure to obtain a position as a social worker despite going to interviews and sending out resumes did not establish that suitable work for appellant was unavailable).

[17] The Office's procedures governing the determination of wage-earning capacity based upon a selected position are set forth in Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.814.8 (December 1993).

[18] *See Phillip S. Deering*, 47 ECAB 692 (1996) (finding that the Office properly applied the principles set forth in *Albert C. Shadrick*, 5 ECAB 376 (1953), for determining appellant's loss of wage-earning capacity).

The November 4, 1996 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
January 21, 1999

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member