U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARTIN FREDENBERG and DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, Neopit, Wis.

Docket No. 95-3070; Submitted on the Record;
Issued July 14, 1999

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, based on his physical capacity to perform the duties of a shuttle bus driver.

On December 12, 1990 appellant, then a 31-year-old laborer, filed a notice of traumatic injury claiming that, while cutting down trees, he sustained a concussion and fractured his right collar bone and two vertebrae when a dead tree fell on him. The Office accepted his claim and paid appropriate compensation.

On July 31, 1992 appellant was referred for vocational rehabilitation, following a work capacity evaluation. Subsequently, a rehabilitation counselor recommended a vocational adjustment program for appellant in anticipation of retraining in June 1993, noting that his attending physician, Dr. Scott G. Powley, Board-certified in physical medicine and rehabilitation, had stated that appellant would not ever return to a manual labor type job.

The rehabilitation counselor continued to work with appellant and Dr. Powley through 1993 and into early 1994 when the Office directed the rehabilitation counselor to close the file after he reported that appellant had failed to comply with the terms of the job search agreement he had signed.[1]

On May 2, 1994 the Office issued a notice of proposed reduction of compensation. The Office provided appellant with 30 days to respond and warned him that the Office would reduce

[1] 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 which correspond to job numbers from the *Dictionary of Occupational Titles*.

his compensation to reflect what probably would have been his wage-earning capacity if he had cooperated with vocational rehabilitation.

On June 1, 1994 the Office issued a formal rating of wage-earning capacity and reduced appellant's compensation on the grounds that he was medically capable of performing the duties of a shuttle bus driver and was thus no longer totally disabled for work due to the effects of his December 11, 1990 injuries.[2]

On July 14, 1994 appellant's attorney responded to the "proposal" to reduce appellant's wage-loss compensation. She stated that appellant was looking for employment but had not been able to find any job that he could do, that the Oneida tribe had a waiting list of 3,000 people, that the rehabilitation counselor said it would be "more economically feasible" if appellant found a job rather than waste any more time on schooling, and "did [appellant] an injustice" because he was willing to be retrained for bookkeeping and computers, that appellant was still disabled and could do only light or sedentary work, that his refusal to cooperate with rehabilitation efforts was "a total falsehood," and that he did all he was required to do in keeping the job search log sheet.

On January 26, 1995 appellant's attorney requested "the necessary paperwork to recommence" his claim. On May 25, 1995 appellant's new attorney requested reconsideration and submitted new medical evidence. On August 28, 1995 the Office denied appellant's request on the grounds that the medical evidence was insufficient to warrant modification of its prior decision.

The Board finds that the Office properly determined that appellant had no loss of wage-earning capacity on the grounds that the earnings of the selected position of shuttle bus driver fairly and reasonably represented his wage-earning capacity.

Under the Federal Employees' Compensation Act,[3] 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.[4] 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.[5]

Wage-earning capacity is the measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[6] Section 8106(a)[7] of the Act provides for

[2] The position involved driving a shuttle bus to and from hotels and casinos, greeting the patrons as they board, operating a radio to a dispatcher, and keeping a record of trips.

[3] 5 U.S.C. §§ 8101-8193.

[4] *James B. Christenson*, 47 ECAB 775, 778 (1996); *Wilson L. Clow, Jr.*, 44 ECAB 157, 170 (1992).

[5] 20 C.F.R. § 10.303(a); *Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

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

[7] 5 U.S.C. § 8106(a).

compensation for the loss of wage-earning capacity during an employee's disability by paying the difference between his monthly pay and his monthly wage-earning capacity after the beginning of the partial disability.[8]

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.[9] 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.[10] 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.[11]

Here, after appellant demonstrated a lack of cooperation with job placement efforts, the Office ordered the rehabilitation counselor to close the file and provide information for a loss of wage-earning capacity determination. The record reflects detailed documentation from the rehabilitation counselor regarding the wide variety of positions for which appellant was vocationally qualified and physically capable of doing, based on the restrictions imposed on him by Dr. Powley, which were essentially sedentary work with a lifting limit of 20 pounds and intermittent sitting, walking, squatting, kneeling and standing.

From August 1993 through April 1994 appellant was listed on the rolls of the Oneida Career Development Center, which provided such job listings as receptionist, payroll clerk and administrative assistant as well as vehicle drivers and security personnel. The rehabilitation counselor conducted a labor market survey based on appellant's medical restrictions and the availability of positions in his geographic area. 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. As the rehabilitation counselor explained, because of the burgeoning growth of the casino business, there was practically zero percent unemployment among the Indian tribes.

While appellant stated that 3,000 people were waiting for such jobs, he provided no documentary evidence that potential jobs were unavailable in his immediate commuting area.[12]

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[8] 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).

[9] 5 U.S.C. § 8115(a); *Lawrence D. Price*, 47 ECAB 120, 121 (1995).

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

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

[12] *See Dorothy Lams*, 47 ECAB 584, 587 (1996) (finding that appellant failed to submit evidence specifically

In fact, appellant did not respond to the Office's notice of proposed reduction of compensation within the 30 days allotted.

The Office used the information provided by the rehabilitation counselor concerning the prevailing wage rate in the area for shuttle bus drivers and found that the selected position was sedentary in nature, involving sitting and occasional walking and standing, with minimal physical requirements and no lifting of more than 10 pounds. The Office stated that appellant's pay rate when injured on December 11, 1990 was $280.00 per week and the current pay rate for his job and step was $320.00.

The Office found that appellant was capable of earning $319.60 per week in the selected position, based on a labor market survey showing the wages of a driver-amusement at $7.99 an hour (DOT No. 919-683-030, *Dictionary of Occupational Titles*). Thus, the Office properly followed its established procedures[13] for determining appellant's wage-earning capacity.[14] Accordingly, the Board finds that the Office has met its burden of justifying a reduction in appellant's disability compensation.

The Board also finds that the Office properly denied modification of its June 1, 1994 decision.

Section 8128(a) of the Act[15] provides for review of an award for or against payment of compensation. Section 10.138(b)(1) of the Office's federal regulations provides, in pertinent part, that a claimant may obtain review of the merits of his or her claim by written request to the Office identifying the decision and the specific issues within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should be changed.[16]

Appellant, in his May 25, 1995 request for reconsideration, was questioning the correctness of the Office's wage-earning capacity determination on June 1, 1994. Appellant's request for reconsideration was not presented as one in which a claimant contends that his condition had worsened.

In its August 28, 1995 decision, the Office reviewed this evidence under section 8128 to determine whether it was sufficient to warrant modification of its prior June 1, 1994 decision.[17]

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showing the unavailability of the selected position in his immediate labor market).

[13] 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: Determining Wage-Earning Capacity*, Chapter 2.814.8 (December 1993).

[14] *See Phillip S. Deering*, 47 ECAB 692, 698 (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).

[15] 5 U.S.C. § 8128(a).

[16] *Vicente P. Taimanglo*, 45 ECAB 504, 507 (1994).

[17] The Office cited the standards for modification of a wage-earning capacity determination, but did not discuss their applicability.

The Office stated in its memorandum that the issue was "whether the evidence submitted is sufficient to warrant modification of the prior decision under 5 U.S.C. [§] 8128." The Office recognized that appellant "disagreed with the [June 1, 1994] decision and submitted a request for reconsideration through his attorney." The Office stated in its August 28, 1995 decision that "[t]he case had been reviewed on its merits under Title 5, U.S. Code 8128 in relation to the application." and found it insufficient to warrant modification of its prior decision. Accordingly, the Board has jurisdiction of the merits of the case including the June 1, 1994 decision of the Office.[18]

The Board finds that Dr. Powley's three reports dated February 20, May 5 and 9, 1995 are insufficient to establish that the Office's June 1, 1994 wage-earning capacity determination was incorrect. While Dr. Powley reported a thorough physical examination on February 20, 1995, stated that appellant had continued chronic back pain and "global back dysfunction," and opined that appellant needed job retraining, he again concluded that appellant was capable of a sedentary type job.

On May 5, 1995 Dr. Powley stated that appellant had experienced severe muscle spasms secondary to his work-related injury but did not address the issue of whether appellant had the physical capacity to perform the duties of the selected position of shuttle bus driver. On May 9, 1995 Dr. Powley stated that appellant had a 30 percent permanent disability and requested information on retraining or settlement of appellant's case. Neither of these letters discussed the physical requirements of the selected position of shuttle bus driver.[19] Accordingly, the Board finds that the Office properly declined to modify its prior decision.[20]

[18] *See Alton L. Vann*, 48 ECAB ___ (Docket No. 96-158, issued December 31, 1996) (remanding the case because the Office failed to consider new and relevant evidence showing that some of appellant's essential expenses had increased, thus requiring a reassessment of the amount deducted from his continuing compensation to recover an overpayment).

[19] *See Joseph M. Popp*, 48 ECAB ___ (Docket No. 95-352, issued August 14, 1997) (finding that reports from appellant's physician failed to provide any rationale explaining why the work-related back injury prevented appellant from performing lawn service work).

[20] *See Paul Kovash*, 49 ECAB ___ (Docket No. 96-2354, issued February 23, 1998) (noting that if the Office should determine that the new evidence submitted in support of reconsideration lacks substantive probative value it may deny modification of its prior decision after reviewing the case on the merits).

The August 28, 1995 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
July 14, 1999

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member