

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JIMMY M. ROBERTS and DEPARTMENT OF THE AIR FORCE,
AIR FORCE SYSTEMS COMMAND, HILL AIR FORCE BASE, UT

*Docket No. 97-2127; Submitted on the Record;
Issued July 23, 1999*

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant was not entitled to vocational rehabilitation services.

The Board has duly reviewed the case on appeal and finds that the Office properly determined that appellant was not entitled to vocational rehabilitation services.

This case has previously been on appeal before the Board on three occasions. On March 2, 1992 the Board dismissed appellant's appeal and remanded the case for the Office to issue a final decision.¹ By decision dated March 10, 1994, the Board found that the Office had properly denied appellant's request for vocational rehabilitation services.² In a decision dated January 22, 1997, the Board found that the Office had improperly found appellant's request for reconsideration was untimely filed and remanded for the Office to review the evidence and issue an appropriate decision.³ The facts and circumstances of the Board's prior decisions are incorporated herein by reference.

Following the Board's March 10, 1994 decision, appellant requested reconsideration on October 31, 1994 and submitted evidence supporting that he returned to work at the employing establishment in positions other than his date-of-injury position of automotive mechanic. By decision dated November 21, 1994, the Office found that appellant's claim was not timely filed and did not establish error on the part of the Office. Following the Board's January 22, 1997 decision, the Office reopened appellant's claim for vocational rehabilitation services for review

¹ Docket No. 92-88.

² Docket Nos. 92-1758, 92-1973, 92-1974, 92-1975. The Board also remanded the case for further development of certain expenses and affirmed the Office's decisions regarding appellant's claim for a schedule award and wage-loss compensation as well as denial of expenses for photocopying and postage.

³ Docket No. 95-980.

of the merits and by decision dated February 26, 1997 modified its October 1, 1991 decision finding that appellant had not returned to his date-of-injury position with the employing establishment. However, the Office concluded that appellant was reemployed with the employing establishment and was not entitled to further rehabilitation services.

Section 8104 of the Federal Employees' Compensation Act provides, "The Secretary of Labor may direct a permanently disabled individual whose disability is compensable under this subchapter to undergo vocational rehabilitation."⁴ The foregoing provision vests the Office with the discretionary power to determine whether vocational rehabilitation services would be necessary or beneficial.⁵ The Board has held that a decision of the Office invoking its discretionary powers pursuant to section 8104 will not be disturbed unless it is clearly in error.⁶

To be eligible for rehabilitation benefits, there must be a showing that there has been an impairment in an employee's wage-earning capacity.⁷ Wages actually earned are the best measure of 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.⁸ In this case, the evidence does not establish that appellant sustained a loss of wage-earning capacity as a result of his accepted employment injuries. Appellant returned to work at the employing establishment on July 17, 1989 and received retained pay.⁹ The evidence that appellant submitted with his reconsideration request does not establish that appellant sustained a loss of wages as a result of his accepted employment injury nor does it establish that his wages at the employing establishment do not fairly and reasonably represent his wage-earning capacity.

As there is no evidence establishing that appellant sustained an employment-related loss of wage-earning capacity, the Office properly determined that appellant was not entitled to vocational rehabilitation benefits under section 8104.

⁴ 5 U.S.C. § 8104(a).

⁵ *Joseph D. Hale, Jr.*, 40 ECAB 610, 616 (1989).

⁶ *Richard T. Devito*, 39 ECAB 668, 674 (1988).

⁷ *Id.*

⁸ *Dennis E. Maddy*, 47 ECAB 259, 262 (1995).

⁹ Appellant filed several claims for compensation requesting the difference in pay between his current position and his date-of-injury position with cost of living increases. The Office issued a decision on August 22, 1995 and denied appellant's claims as an employee reemployed with retained pay is not entitled to compensation for loss of future step increases and partial cost-of-living adjustments when retained pay is compared to the current pay rate of the date-of-injury position. As this decision was issued more than one year prior to appellant's appeal to the Board on May 21, 1997, the Board lacks jurisdiction to review the decision on appeal. 20 C.F.R. § 501.3(d)(2).

The decision of the Office of Workers' Compensation Programs dated February 26, 1997 is hereby affirmed.

Dated, Washington, D.C.
July 23, 1999

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member