U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT H. CARR and DEPARTMENT OF THE ARMY,
RED RIVER ARMY DEPOT, Texarkana, Tex.

Docket No. 97-1957; Submitted on the Record;
Issued June 7, 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 disability compensation on the grounds that he had a wage-earning capacity as a general clerk.

The Board has carefully considered the record evidence and finds that the Office met its burden of proof in modifying appellant's compensation on the grounds that he was physically capable of earning the wages of a general clerk.

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 the difference between his monthly pay and his monthly wage-earning capacity after the

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[1] 5 U.S.C. §§ 8101-8193.

[2] *James B. Christenson*, 47 ECAB 775, 778 (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).

beginning of the partial disability.[6] The employee's wage-earning capacity after a work injury must be determined, even though for any reason he actually earns nothing or fails to exercise the capacity he has to earn wages.[7]

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.[8] 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.[9] 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.[10]

In this case, appellant's notice of occupational disease, filed on March 12, 1990, was accepted by the Office for bilateral bunions after initial denials of the claim on June 26 and September 17, 1990 were reversed on October 4, 1991. Appellant was terminated by the employing establishment on October 4, 1990 because he could no longer perform his duties as a mobile equipment mechanic/helper. Appellant had foot surgery in September 1989 and April 1992 and underwent extensive vocational rehabilitation and training over the next few years.

In an October 12, 1995 memorandum to the file, the Office detailed its unsuccessful efforts to obtain a job offer from the employing establishment, which was being reorganized and reduced in size. The rehabilitation counselor concentrated her efforts on finding a new placement for appellant.

On May 21, 1996 the Office issued a notice of proposed reduction of compensation on the grounds that appellant had the capacity to earn $170.00 a week as a general clerk. The Office noted that appellant had performed the duties of an administrative/medical records clerk while in the United States Air Force.

On June 21, 1996 the Office made the reduction final. Appellant requested reconsideration on the grounds that the employing establishment discriminated against him because other injured workers had been rehired. Appellant added that he had cooperated fully in

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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] *Donald Johnson*, 44 ECAB 540, 549 (1993).

[8] 5 U.S.C. § 8115(a); *Lawrence D. Price*, 47 ECAB 120, 121 (1995).

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

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

the job search and submitted an August 1, 1996 report from his treating physician, Dr. Charles O. Fuselier, a podiatrist. On April 24, 1997 the Office denied appellant's request on the grounds that the evidence submitted in support of reconsideration was insufficient to warrant modification of its prior decision.

The Board finds that the medical evidence establishes that appellant is capable of performing the duties of the selected position of general clerk. Dr. Fuselier completed a work evaluation form on March 28, 1995, stating that appellant was capable of continuous sitting, intermittent walking, bending, squatting, twisting and standing for up to 2 hours and intermittent climbing and kneeling, with lifting up to 75 pounds on occasion and restrictions on using his feet for repetitive movements or pedal control operations.

Both Dr. Fuselier and Dr. Robert E. Holladay, a Board-certified orthopedic surgeon, to whom the Office had referred appellant for a second opinion evaluation, agreed that appellant could work eight hours a day but had to avoid prolonged standing and walking because of his foot condition. The physical requirements of the clerk's position, which is sedentary, included lifting no more than 20 pounds and no climbing, stooping, kneeling, squatting or crawling. Therefore, the duties of this job fell within appellant's restrictions.

The Board also finds that the selected position fairly and reasonably represents appellant's wage-earning capacity. After placement efforts with the employing establishment ultimately proved fruitless, the rehabilitation counselor[11] identified the general clerk position, listed in the Department of Labor's *Dictionary of Occupational Titles*, as vocationally suitable for appellant, noting the similarities between a clerk's duties, such as writing, typing correspondence, sorting and filing, answering the telephone and proofreading, and the administrative and clerical work appellant performed for four years in the Air Force. In addition, appellant completed remedial training in written and verbal skills while in rehabilitation. Therefore, the position of general clerk is vocationally suitable.

The Board also finds that the selected position of general clerk was reasonably available in appellant's geographic area within a reasonable commuting distance. Appellant is a long-term resident of Texarkana and the rehabilitation counselor identified 51 job openings in the area, as confirmed by the state employment agency. Appellant's own log of his job search efforts and the rehabilitation counselor's reports show the wide variety of clerical positions available. While appellant may have been unsuccessful in being selected, there is no evidence in the record that jobs were not reasonably available within his commuting area.[12]

Appellant argued on reconsideration that the employing establishment discriminated against him because it had rehired other injured workers but did not find a job for him.

[11] 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.

[12] *See Dorothy Lams*, 47 ECAB 584, 587 (1996) (finding that appellant failed to submit evidence specifically showing the unavailability of the selected position in his immediate labor market).

Appellant also argued that the Office should not reduce his benefits because he had tried his best to find work.

As the Office pointed out, it has no jurisdiction in personnel matters between appellant and the employing establishment. The Office explained that the employing establishment was being downsized and, despite the rehabilitation counselor's diligent efforts, was unlikely to provide a job offer to appellant because it had to accommodate several hundred employees involved in a reduction-in-force.

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.[13] Unsuccessful efforts do not entitle a claimant to continuing disability compensation.

Further, the issue of appellant's wage-earning capacity is not determined by his present employment status. The fact that he cooperated fully in the rehabilitation counselor's extensive job search does not impact on the fact that he has both the vocational qualifications and the physical ability to perform the duties of the clerk position.

Moreover, the Office used the financial information provided by the rehabilitation counselor concerning the prevailing wage rate for office manager in the area and properly followed its established procedures[14] for determining appellant's wage-earning capacity.[15] Accordingly, the Board finds that the Office has met its burden of justifying a reduction in appellant's compensation for total disability.

[13] *Samuel J. Chavez*, *supra* note 9.

[14] 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).

[15] *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).

The April 27, 1997 and June 21, 1996 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.
June 7, 1999

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member