U. S. DEPARTMENT OF LABOR

# Employees' Compensation Appeals Board

---

In the Matter of ANDREW S. PHILPOTT and DEPARTMENT OF COMMERCE, NATIONAL OCEANIC & ATMOSPHERIC ADMINISTRATION, Seattle, WA

*Docket No. 99-2003; Submitted on the Record;*
*Issued June 20, 2001*

---

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that the position of loan officer represented appellant's wage-earning capacity effective August 31, 1998, the date it reduced his monetary compensation benefits; and (2) whether the Office properly determined the period of appellant's schedule award for a 21 percent impairment of his right foot.

The Office accepted that on May 29, 1987 appellant, then a 33-year-old fisherman, sustained five metatarsal fractures when a hatch slammed closed on his right foot. In June 1987 he underwent right foot surgical debridement with fixation. Thereafter appellant was placed on the periodic rolls for receipt of compensation for temporary total disability.

On March 25, 1998 Dr. Gerald Baker, a Board-certified orthopedic surgeon, opined that appellant's foot would continue to gradually improve and that he was able to perform some type of work with limited standing and walking.

On March 30, 1989 Dr. William Keener, a Board-certified orthopedic surgeon opined that appellant was able to work for eight hours per day with restrictions.

On August 16, 1990 Dr. T. James Miller, a podiatrist, reported that appellant was able to work for eight hours per day in a sedentary job. He reiterated this opinion on February 22, 1993 and again on April 18, 1996.

While receiving wage-loss compensation for temporary total disability appellant enrolled at Stanford University and completed a bachelor's degree in political science with a minor in economics in 1994. Thereafter he scored in the 94th percentile on the standardized law school admissions test and was accepted by several law schools.

After graduating from Stanford University, appellant chose to relocate to rural Wyoming. Nearby towns included Sheridan, WY and Buffalo, WY.

On August 6, 1997 Dr. Maurice Brown, a Board-certified orthopedic surgeon, performed a second opinion examination, reported findings of weakness with full extension, minimal sensory loss which was not likely to be of clinical significance and intrinsic atrophy. He noted that appellant had not experienced any significant change in right foot symptoms for the previous six to seven years and that his only complaint was mild occasional mid foot pain and he opined that appellant was disabled from work as a fisherman but was able to work for eight hours per day with limitations on prolonged standing and climbing.[1]

Appellant was referred for vocational rehabilitation services on August 28, 1997 and was referred to a rehabilitation counselor on February 19, 1998. By letter dated May 18, 1998, appellant advised the rehabilitation counselor that he had decided that it was in his "rehabilitative best interests to move to a more populated area where opportunities are more plentiful and attractive" and relocating to Charlottesville, VA to attend the University of Virginia School of Law.[2] Appellant relocated to Virginia and enrolled at the University of Virginia School of Law in Charlottesville.

In a June 9, 1998 closing report, the rehabilitation counselor noted appellant's extensive employment history,[3] reviewed his medical restrictions and physical limitations and detailed three hypothetical positions for which appellant could vocationally qualify, which were within his physical restrictions and which were being performed in sufficient numbers so as to be considered reasonably available within appellant's Wyoming commuting area. These three sedentary/light-duty selected positions included the following: claims adjuster, property and casualty; loan officer; and stock broker and that all had generally the same specific vocational preparation requirements for proficient performance: *i.e.,* "The specific vocational preparation (SVP) required is two years up to four years. This minimum job requirement is typically met by a person possessing a minimum of a four-year college degree." The rehabilitation counselor noted that appellant possessed a four-year degree in political science and economics from Stanford University. The rehabilitation counselor also indicated that a labor market study revealed that the position of loan officer was being performed in sufficient numbers within appellant's Wyoming commuting area so as to be considered reasonably available. Specifically, he indicated that there presently existed 11½ full-time loan officer positions being performed in Buffalo, WY and an additional 19 full-time loan officers employed in Sheridan, WY. The vocational rehabilitation counselor determined from labor market research that the starting salary of a loan officer ranged from $275.00 to $320.00 per week or $21,000.00 to $30,000.00 per year.

[1] He also noted that workers' compensation had put appellant through Stanford University, that he had received a degree in political science in 1994 and that he had been accepted by 10 law schools.

[2] On March 28, 1998 appellant had advised the rehabilitative counselor that he felt that his rehabilitation goals could be met by participation in law school training and he enclosed a pamphlet from the University of Virginia.

[3] Appellant worked as an oil well logger (onsite geologist) in 1972 through 73, as a staff assistant (intern) to U.S. State Senator Gail McGee of Wyoming in 1974, as a working crew foreman on the Trans-Alaskan Pipeline in 1975 through 78, as a uranium solution mine technician in 1977, as an oil well logger in Wyoming in 1980 through 1981, as a grade surveyor and heavy equipment oiler/operator in 1984 through 1985, as a working construction foreman in 1985 and finally as an ocean research vessel crewman in 1986 through 1987.

A wage-earning capacity determination based upon a constructed position was recommended due to appellant's failure to follow through with the vocational rehabilitation program in which he was enrolled in Wyoming.

In a report dated July 10, 1998, Dr. Michael J. Kovac, Jr., a Board-certified orthopedic surgeon, extensively reviewed appellant's history of injury and treatment, described his complete physical examination results and answered the questions posed by the Office, noting that appellant's "only disabling residuals include subjective complaint of mild pain with prolonged standing and objective findings of weakness with full extension." Dr. Kovac opined that appellant was disabled from working as an ordinary fisherman; he completed a work restriction evaluation and opined, as explained in an extremely detailed analysis of appellant's deficits, that based upon the American Medical Association, *Guides to the Evaluation of Permanent Impairment* appellant had a 21 percent permanent impairment of his right foot. Dr. Kovac opined that, as the medical evidence of record indicated that appellant's right foot condition had been static for the preceding six or seven years and that only medical maintenance care had been given since August 16, 1990, appellant had reached maximum medical improvement at some point between his January 23, 1989 and August 16, 1990 medical examinations.[4]

By notice dated July 31, 1998, the Office advised appellant that it proposed to reduce his monetary wage-loss compensation benefits to reflect his wage-earning capacity in the constructed position of loan officer. The Office found that the medical evidence of record, beginning as early as 1989, reflected that appellant was only partially disabled and could work sedentary duty eight hours per day. It reviewed the selected position of loan officer, determined that these duties were within his physical restrictions and that he met its vocational preparation requirements. The Office further determined that labor market research revealed that the position was being performed in sufficient numbers in appellant's commuting area so as to be considered reasonably available. The Office advised appellant that if he disagreed with the proposed action, he could submit additional evidence or argument relevant to his capacity to earn the wages of a loan officer, within 30 days of the date of the notice.

On August 3, 1998 an Office medical adviser determined that, based upon Dr. Kovac's second opinion report and the Fourth Edition of the A.M.A., *Guides*, the medical evidence of record revealed that appellant had a 21 percent permanent impairment of his right foot. He further determined that the evidence of record established that the date appellant had reached maximum medical improvement occurred in March 1990.

By decision dated August 31, 1998, the Office granted appellant a schedule award for a 21 percent permanent impairment of his right foot for the period March 1 to December 27, 1990 for a total award of 43.05 weeks of compensation. The Office noted that "the date of maximum medical improvement is determined solely on the basis of the medical evidence and this date determines the date that the schedule award begins. It also results in a conversion of a period paid for temporary total disability into payment for schedule award."

[4] Dr. Kovac indicated that as of January 23, 1989, 20 months post accident, appellant's clinical condition had not yet stabilized, but as of August 16, 1990, 39 months post accident, the record indicated that it had so stabilized.

Also by decision dated August 31, 1998, the Office finalized the proposed reduction of compensation to reflect appellant's wage-earning capacity. It noted that no argument or evidence had been submitted in response to the notice of proposed termination.

By letter dated September 4, 1998, the Office acknowledged receipt of a voice-mail message from appellant in which he claimed that he did not receive a copy of the notice of proposed termination; however, the Office noted that he admitted receiving a copy of the final decision which had been identically addressed and mailed as the proposed notice had been. The Office advised that the mailbox presumption was therefore applicable in appellant's case.

By letter dated September 29, 1998, appellant requested a review of the written record and argued that positions for loan officers were not reasonably available in the Sheridan/Buffalo, WY area. He argued that his education in economics was not the appropriate background for a loan officer, that such positions required specialized training which he did not possess, that he interviewed many bank officers and determined that there were currently no actual openings for loan officers in the area and that the loan officers working in his area had generally worked their way up from teller positions or commercial or agricultural lending positions within the organization. Appellant also argued that the Office should support his self-rehabilitative efforts in pursuing a law degree.

By letter dated September 30, 1998, appellant also disagreed with the "retroactive" payment of his schedule award.

A review of the written record was conducted and by decision dated May 4, 1999 the hearing representative affirmed both of the decisions, finding that the position of loan officer fairly and reasonably represented appellant's wage-earning capacity and that the period of the schedule award was appropriately determined based upon the date of appellant's maximum medical improvement. The hearing representative also found that appellant had submitted no medical evidence establishing any greater permanent impairment than that determined by Dr. Kovac.

Appellant appealed, seeking continued compensation for temporary total disability as tuition assistance during the completion of his law degree, arguing that the future he envisioned for himself included his job with the employing establishment as a vehicle which would provide the financial resources to facilitate his eventual law school attendance. He also argued that retroactive application of the period of his schedule award was fundamentally unfair.

The Board finds that the Office properly determined that the position of loan officer represented appellant's wage-earning capacity effective August 31, 1998, the date it reduced his monetary compensation benefits.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[5]

[5] *Bettye F. Wade*, 37 ECAB 556 (1986); *Harold S. McGough*, 36 ECAB 332 (1984).

Under section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity or if the employee has no actual earnings his wage-earning capacity is determined with due regard to the nature of his injury, his degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect his wage-earning capacity in his partially disabled condition.[6]

Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions given the nature of the employee's injuries and the degree of physical impairment, his or her usual employment, the employee's age and vocational qualifications and the availability of suitable employment.[7] Accordingly, the evidence must establish that jobs in the position selected for determining wage-earning capacity are reasonably available in the general labor market in the commuting area in which the employee lives. In determining an employee's wage-earning capacity, the job selected must be one reasonably available in the general labor market in appellant's commuting area.[8] The Office may not select a makeshift or odd lot position or one not reasonably available on the open labor market.[9]

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by the Office for rehabilitation services and for identification of a position available in the open labor market that fits the employee's capabilities with regard to physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service.

In circumstances where rehabilitation efforts do not succeed, Office procedures instruct the rehabilitation officer to submit a final report summarizing why placement efforts were not successful and containing relevant information sufficient to allow the Office to perform a constructed wage-earning capacity determination.[10]

---

[6] *See Pope D. Cox*, 39 ECAB 143 (1988); 5 U.S.C. § 8115(a).

[7] *See generally*, 5 U.S.C. § 8115(a); A. Larson *The Law of Workers' Compensation* § 57.22 (1989); *see also Bettye F. Wade, supra* note 5.

[8] *See Richard Alexander*, 48 ECAB 432 (1997); *Albert L. Poe*, 37 ECAB 684 (1986).

[9] *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

[10] *Samuel J. Chavez*, 44 ECAB 431 (1993); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.11 (November 1996).

Further, in some situations where vocational rehabilitation efforts do not succeed, the claimant's wage-earning capacity may be determined on the basis of a position deemed suitable but not actually held.[11] The test in this case is whether the claimant's wage-earning capacity based on the selected job appears reasonable giving due regard to the factors specified in 5 U.S.C. § 8115.

In the present case, the Office received information from multiple physicians who found that appellant was not totally disabled from his 1987 right foot fractures as early as 1989 and had the capacity to work eight hours per day with restrictions only on prolonged standing and walking. Vocational rehabilitation was started in 1997 and continued until May 18, 1998, when appellant advised the counselor that he was moving from the area. At that point vocational rehabilitation services were terminated and appellant's wage-earning capacity in a constructed position was calculated.

By report dated June 9, 1998, appellant's rehabilitation counselor identified loan officer as a position appropriate for appellant's partially disabled condition, appropriate for his vocational preparation and was being performed in sufficient numbers within appellant's commuting area so as to support the conclusion that it was reasonably available.

On June 9, 1998 the rehabilitation counselor closed appellant's case finding that the vocational rehabilitation efforts were not successful in returning appellant to gainful employment and the Office proposed reduction of his compensation based upon his ability to earn wages as a loan officer. Appellant was given 30 days within which to respond to the notice of proposed reduction of compensation, however, no response was forthcoming.

A loss of wage-earning capacity determination was therefore properly calculated, based upon appellant's ability to perform the constructed position of loan officer, as such position was within appellant's medical restrictions, was within his vocational and educational qualifications and was reasonably available within appellant's commuting area as verified by a Wyoming labor market survey which identified over 30 full-time loan officer positions currently being performed in his area.

The Board finds that the Office considered the proper factors such as availability of suitable employment, appellant's physical limitations and his usual employment, age, qualifications and training, in determining that the position of loan officer represented appellant's wage-earning capacity. The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of loan officer and that such a position was reasonably available within the general labor market of appellant's commuting area. Therefore, the Office properly determined that the position of loan officer reflected appellant's wage-earning capacity effective August 31, 1998.[12]

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.814.8 (November 2000).

[12] The Board notes that FECA benefits are compensation for wage loss and are not intended as a tuition assistance program to enable an appellant to obtain a desired advanced professional degree.

The Board further finds that the Office's determination of the period of appellant's schedule award was correct as determined.

It is well established that a claimant is not entitled to dual workers' compensation benefits for the same injury. A claimant may not receive compensation for temporary total disability or compensation based on a loss of wage-earning capacity and a schedule award covering the same period of time. As *Larson* notes: "It goes without saying that, when the statute provides parallel remedies for the same injury, it is not intended that a claimant should have both." With respect to the Act, the Board has held that an employee cannot concurrently receive compensation under a schedule award and compensation for disability for work.[13]

Moreover, a schedule award is not payable until maximum medical improvement of the claimant's condition has been reached. Maximum medical improvement means that the physical condition of the injured member of the body has stabilized and will not improve further.[14] Where the medical evidence of record clearly and convincingly establishes that maximum medical improvement has been reached at a specific point in the past and where appellant's rights under 5 U.S.C. § 8116(a) have been fully protected, a retroactive determination of the period of the schedule award is appropriate.[15]

The period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of his employment injury. Maximum medical improvement means that the physical condition of the injured body member has stabilized and will not improve further. Such a determination is not based on surmise or prediction of what may happen in the future. A schedule award is appropriate where the physical condition has stabilized, despite the possibility of an eventual change in the degree of functional impairment in the injured body member.[16]

Appellant was notified of this policy in the August 31, 1998 schedule award decision. He, further, has provided no medical evidence establishing that his partially disabled condition was not stabilized as of March 1990, as the medical evidence of record reports that appellant had experienced no significant change in his right foot condition since before August 16, 1990 or over the six to seven years preceding Dr. Brown's August 6, 1997 report.

Therefore, the Board finds that the period of the schedule award granted appellant was proper under the facts and circumstances of this case.

[13] *See Orlando Vivens*, 42 ECAB 303 (1991); *Eugenia L. Smith*, 41 ECAB 409 (1990).

[14] *Id.*

[15] *See Asline Johnson*, 42 ECAB 619 (1991); *David R. Broge*, 40 ECAB 1098 (1989).

[16] *See James Kennedy, Jr.*, 40 ECAB 620 (1989).

Accordingly, the decisions of the Office of Workers' Compensation Programs dated May 4, 1999 and August 31, 1998 are hereby affirmed.

Dated, Washington, DC
June 20, 2001

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member