U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM BROWN and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Lyons, NJ

Docket No. 99-2444; Submitted on the Record; Issued June 6, 2001

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT, A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation to reflect his wage-earning capacity in the selected position of electronics mechanic apprentice.

On December 17, 1984 appellant, then a 31-year-old housekeeping aide, filed a claim alleging that, on December 12, 1984, he injured his low back in the performance of duty. The Office accepted his claim for a low back strain and later expanded this to include a herniated disc. Appellant returned to a light-duty position.

On February 25, 1985 appellant filed a claim for recurrence of disability alleging that he experienced severe back pain, which was attributed to his work-related injury of December 12, 1984. The Office accepted appellant's claim for recurrence and appropriate compensation was paid.

On July 30, 1987 appellant filed a claim for recurrence of disability alleging that on January 13, 1987 he was unable to perform his housekeeping duties as his back condition worsened. In a decision dated November 13, 1987, the Office denied appellant's claim for a recurrence as the evidence submitted did not establish that the current condition was causally related to appellant's accepted employment-related injury of December 12, 1984. By decision dated June 9, 1989, the Office vacated the decision dated November 13, 1987 and issued a *de novo* decision accepting appellant's claim for recurrence of disability.

Subsequently, appellant filed several notice of recurrence of disability claim forms.[1] In a decision dated December 13, 1990, the Office accepted appellant's claim for recurrence for a

[1] The recurrence of disability claim forms filed by appellant were dated: September 1, 1989; January 24 and September 6, 1990.

herniated disc at L4-5. The employing establishment was unable to provide modified employment. Appellant received periodic compensation payments for temporary total disability.

The Office referred appellant for an evaluation with Dr. G. Bissram, a Board-certified orthopedic surgeon. In a report dated March 6, 1995, he noted appellant's history of injury. Dr. Bissram diagnosed chronic lower back pain secondary to a herniated disc at the L4-5 level. He stated:

> "This patient should be limit the following activities: kneeling, squatting, bending, lifting and climbing. The patient should lift no more than 25 pounds for 3 to 4 hours per day and for about 20 to 30 minutes per hour. Patient may work four to six hours per day."

Dr. Bissram indicated these restrictions would most likely be permanent. He further noted that appellant's obesity was a medical factor which needed to be considered in the identification of a position for appellant. Dr. Bissram noted appellant reached maximum medical improvement prior to being seen by him.

Appellant subsequently began vocational rehabilitation. The rehabilitation specialist, in a job analysis summary dated December 19, 1995, determined that the position of electronic mechanic apprentice was within appellant's physical limitations and was available in suitable numbers to make it reasonably available to appellant within his commuting area. The rehabilitation department provided appellant with an assistive device, a hoist/lift table, to ensure appellant's light restrictions would be accommodated.

On December 19, 1995 appellant signed a training agreement for the position of electronics mechanic apprentice. The training period began December 11, 1995 through November 1996. The initial training period was extended in order to maximize appellant's training exposure because he was working six hours per day instead of eight hours per day in order to comply with Dr. Bissram's employment restrictions.

In a letter dated January 9, 1996, the Office notified appellant that the job and training plan were suitable to appellant's work limitations. The Office indicated that, upon completion of the training, appellant would have a wage-earning capacity of $210.00 per week, which was based upon appellant's ability to perform this position for six hours per day at $7.00 per hour. The on-the-job training ended on November 30, 1996.

The rehabilitation counselor noted that appellant successfully completed his on-the-job training on November 30, 1996 and was offered employment with Paul's TV and VCR Repair starting in January 1997. He indicated a hoist/lift table had been provided by the Office to assist appellant in working on television sets.

The record contains an Office memorandum dated March 9, 1999, indicating that the Office considered using a constructed wage-earning capacity evaluation in appellant's case, however, the physical requirements of the Department of Labor's *Dictionary of Occupational Titles* were significantly higher than the requirements of appellant's assisted reemployment job with Paul's TV and VCR repair. The Office indicated that appellant successfully worked the assisted reemployment position for greater than 60 days and that the Office would pursue a

retroactive wage-earning determination that appellant's employment with Paul's TV and VCR repair "fairly and reasonably represented his WEC [wage-earning capacity]."

In a notice of proposed reduction of compensation dated April 8, 1999, the Office advised appellant that it proposed to reduce his compensation for wage loss because the evidence of record established that the selected position of electronics mechanic apprentice fairly and reasonably represents his wage-earning capacity. The Office based its decision on the rehabilitation counselor's report of December 30, 1996, which indicated appellant continued to be employed in that capacity and that based on progress reports from the employer appellant was qualified for entry level work in TV and VCR repair.

Appellant subsequently submitted a letter dated April 19, 1999, which indicated that: he never received payment during the training period other than compensation from the Office; his employment at Paul's TV and VCR Repair did not include any formal training in the indicated field; Paul's TV and VCR Repair was not a reputable business; he was unable to obtain employment with another employer because of the reputation of Paul's TV and VCR Repair; and that there were no jobs available six hours per day at the indicated pay rate of $210.00 per week. Appellant also indicated that Paul's TV and VCR Repair ceased operation.

By decision dated June 10, 1999, the Office reduced appellant's compensation based on his capacity to earn wages as a electronics mechanic apprentice. The decision noted that appellant was reemployed as an electronics mechanic apprentice with wages of $210.00 per week. The decision also noted that vocational testing, a labor market survey and a review of the medical records indicated that he could perform the duties of electronics mechanic apprentice, DOT #828.261-026 and this position was readily available in appellant's commuting area.

The Board finds that the Office improperly reduced appellant's monetary compensation to reflect a capacity to earn wages in the position of electronics mechanic apprentice.

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.[2] 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 disabled condition.[3]

The formula for determining loss of wage-earning capacity, developed in the *Albert C. Shadrick* decision,[4] has been codified at 20 C.F.R. § 10.303. The Office first calculates

[2] 5 U.S.C. § 8115(a).

[3] *See Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); *see also* 5 U.S.C. § 8115(a).

[4] 5 ECAB 376 (1953).

an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the current pay rate for the date-of-injury job.[5]

As the above language illustrates, there are two methods for determining wage-earning capacity: (1) determining that actual earnings fairly and reasonably represent wage-earning capacity; and then calculating loss of wage-earning capacity by applying the *Shadrick* formula to the actual earnings; and (2) if actual earnings do not fairly and reasonably represent wage-earning capacity, then a constructed position may be used, based on the factors enumerated under section 8115 and in accord with established procedures, followed by application of the *Shadrick* formula.

In the present case, the Office stated that the light-duty position from December 11, 1995 through November 1996 fairly and reasonably represented his wage-earning capacity.[6] The Board notes that the issue is whether the actual earnings fairly and reasonably represented appellant's wage-earning capacity. If the Office makes a determination that actual earnings fairly and reasonably represent wage-earning capacity, then a calculation is made as to the loss of wage-earning capacity, applying the *Shadrick* formula to the actual earnings. In this case, the Office on March 9, 1999 stated that appellant successfully worked the assisted reemployment position for greater that 60 days and the Office would pursue a retroactive wage-earning determination that appellant's employment with Paul's TV and VCR repair "fairly and reasonably represented his WEC." However, in reviewing the April 8, 1999 proposed reduction and the June 10, 1999 loss of wage-earning capacity decision, it is not clear whether the Office based the wage-earning capacity determination on actual wages earned or on a constructed position. The Office's June 10, 1999 decision, notes factors consistent with both actual earnings and a constructed position determination. If the Office based the determination on a constructed position the Office did not explain why actual earnings did not fairly and reasonably represented appellant's wage-earning capacity. If the determination was based on actual earnings, there would be no need for the Office's decision to evaluate the factors set forth at § 8115(a).[7]

The Board has held that generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.[8] The Office must first overcome this presumption and if appropriate, proceed with the alternative method of using a constructed position and follow established procedures for a wage-earning capacity determination based on a constructed position. These procedures include referral to a rehabilitation specialist and selection of an appropriate position, based on proper evaluation of

[5] 20 C.F.R. § 10.303(b).

[6] The Board notes that the Office may perform a retroactive wage-earning determination if appellant worked in the position for at least 60 days, the earnings fairly and reasonably represented wage-earning capacity and the work stoppage was not due to the employment injury. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.817(e) (May 1997).

[7] *See* Federal (FECA) Procedure Manual, 2.814.7(a) (July 1997) (the Office should only consider factors set forth in § 8115 when reaching a constructed loss of wage-earnings capacity determination).

[8] *Floyd A. Gervais*, 40 ECAB 1045, 1048 (1989); *Clyde Price*, 32 ECAB 1932, 1934 (1981).

the medical and other relevant evidence.[9] Without any explanation as to why actual earnings did not fairly and reasonably represent appellant's wage-earning capacity, it was premature for the Office to consider factors reserved for a constructed position determination.[10]

The Board accordingly finds that the Office failed to properly determine appellant's wage-earning capacity. It is the Office's burden of proof to justify a subsequent reduction of compensation benefits and it did not meet its burden.[11]

The June 10, 1999 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, DC
June 6, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

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[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.8 (December 1993).

[10] *See Michael E. Moravec,* 46 ECAB 492 (1995). Moreover, even if the Office offered a sound basis for finding that actual earnings did not fairly and reasonably represent appellant's wage-earning capacity, the Board notes that the record is void of current medical evidence establishing appellant's abilities to perform the duties of the constructed position; *see Keith Hanselman,* 42 ECAB 680 (1991).

[11] *See Gregory A. Compton,* 45 ECAB 154 (1993).