U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT L. O'BRIEN and U.S. POSTAL SERVICE,
POST OFFICE, Santa Barbara, CA

Docket No. 01-247; Submitted on the Record;
Issued April 3, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly reduced appellant's compensation based on his capacity to earn wages as a commercial drafter; and (2) whether the Office properly refused appellant's request for reconsideration on the merits under 5 U.S.C. § 8128.

On June 7, 1983 appellant, then a 34-year-old letter carrier, was injured in the performance of duty when he was lifting a mail sack and felt a "snap" in his back. Appellant was treated for his work injury by Dr. Kenneth K. Koch, a Board-certified orthopedic surgeon. The Office accepted appellant's traumatic injury claim for a thoracic strain, compression fracture at L1 and acute exacerbation of spondylolisthesis at L5. Appellant returned to limited duty on August 1, 1983 and later full duty on September 12, 1983. Appellant subsequently filed a claim for a recurrence of disability beginning January 3, 1984, which was also accepted by the Office. Appellant stopped work on February 15, 1984 and began receiving compensation on the periodic rolls.

In an (OWCP-5) work restriction form dated January 24, 1991, Dr. Koch reported that appellant could work 6 hours per day with a 10-pound lifting restriction. He advised that appellant could sit intermittently up to four hours per day and stand possibly two to four hours per day or walk up to four hours per day.

The Office subsequently referred appellant for vocational rehabilitation. A labor market survey was conducted on December 1, 1995 and three job titles were considered consistent with appellant's level of education, prior work experience and professional interest: commercial

drafter, construction drafter and tool design drafter.[1] Appellant attended a computer assisted design (CAD) drafting training program from March 26 until December 20, 1996.

Dr. Koch was provided a copy of the position description of the Department of Labor, *Dictionary of Occupational Titles* number 017.261-026 for a commercial drafter and agreed that appellant had the physical capability of performing the job on a full-time basis.[2] He completed an (OWCP-5) work evaluation form that released appellant to work for eight hours per day effective September 1, 1995.

In a vocational rehabilitation note dated April 15, 1997, a rehabilitation specialist indicated that appellant had completed 90 days of participation in job placement but, "[d]espite a diligent job placement effort, the labor market has remained extremely poor throughout the 90-day placement period."

In a May 1, 1997 status report, a rehabilitation specialist indicated that jobs in appellant's field of training continued to be performed in sufficient numbers and that appellant "has a wage-earning capacity of $8.00 to $11.00 per hour with $9.50 the median." It was noted that appellant would receive a computer with appropriate CAD software to enhance his employability.

On May 22, 1997 the Office issued a notice of proposed reduction of compensation indicating that appellant's wage-earning capacity would be determined on the basis of the position of a commercial drafter. Appellant was given 30 days to respond to the proposed action.

In a June 26, 1997 decision, the Office reduced appellant's compensation based on his capacity to earn wages as a commercial drafter at the rate of $9.50 per hour.

On July 3, 1997 appellant requested a review of the written record.[3]

In a decision dated July 3, 2000 and finalized on July 9, 2000, an Office hearing representative affirmed the Office's June 26, 1997 decision.[4]

On July 14, 2000 appellant filed for reconsideration and argued that the Office's determination of his wage-earning capacity was based on "information that was outdated and no

[1] The labor market survey dated December 1, 1995, showed that out of 10 employers contacted there were 2 openings for entry level CAD drafters and 1 opening for a nonentry level designer. Four employers noted that they had recently hired for the position and two employers indicated upcoming openings.

[2] The record indicates that there was no DOT job description for a CAD commercial draftsperson so the Office used the DOT job description listing for the general position of a commercial drafter and the salary median of $9.50 for that position.

[3] This case was before the Board on a separate issue of dependency when the Office rendered its loss of wage-earning capacity determination. Thus, the case was not sent to the Office hearing representative until after the Board issued its decision in *Robert Lee O'Brien*, Docket No. 97-1000 (issued November 5, 1999).

[4] The Board notes that the hearing representative's decision appears to contain a typographical error as it states that the decision being affirmed was dated August 31, 1999.

longer relevant to the local job market." Appellant did not submit any evidence in support of his reconsideration request.

In a decision dated October 3, 2000, the Office denied appellant's request for reconsideration.

The Board finds that the Office properly reduced appellant's wage-loss compensation.[5]

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction of benefits.[6]

Under section 8115(a) of the Federal Employees' Compensation Act,[7] wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances, which may affect wage-earning capacity in the employee's disabled condition.[8] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[9] The job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area where the employee lives.[10] Where vocational rehabilitation is unsuccessful, the rehabilitation counselor will prepare a final report, which lists two or three jobs, which are medically and vocationally suitable for the employee and proceed with information from a labor market survey to determine the availability and wage rate of the position.[11]

The Office procedures pertaining to vocation rehabilitation services emphasize returning partially disabled employees to suitable employment.[12] If the employment injury prevents the injured worker from returning to the job held at the time of injury, vocational rehabilitation services are provided to assist the employee in placement with the previous employer in a

[5] The Board does not have jurisdiction to review evidence submitted by appellant subsequent to the Office's final decision. 20 C.F.R. § 501.2(c).

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

[7] 5 U.S.C. § 8115(a).

[8] *See Richard Alexander*, 480 ECAB 432 (1997); *Pope D. Cox*, 39 ECAB 143 (1988).

[9] *Id.*

[10] *Rosa M. Garcia*, 49 ECAB 272 (1998).

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.814.8 (December 1993).

[12] *Id.*

modified position or, if not feasible, developing an alternative plan based on vocational testing, which may include medical rehabilitation, training and/or placement services.[13]

Based on appellant's work experience, qualifications and professional interest, a rehabilitation counselor determined to enroll appellant in a CAD commercial drafting program and conducted a labor survey on December 1, 1995 to find that the position was being performed in sufficient numbers in appellant's commuting area to make it reasonably available. The median wage of $9.50 per hour was also determined based on the Department of Labor, *Dictionary of Occupational Titles* listing. A copy of the job description of a commercial drafter was provided to appellant's treating physician, who agreed that appellant could perform the duties of the job.

The Board finds that the Office considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment and age and employment qualifications, in determining that the position of admissions clerk 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 caseworker and that such a position was reasonably available within the general labor market of appellant's commuting area. Although appellant was not successful in obtaining an entry level position as a CAD commercial drafter consistent with his training, the labor market survey of December 1, 1995 showed that the job was being performed in sufficient numbers in appellant's commuting area to make it reasonably available. Contrary to appellant's contention on appeal, the fact that the rehabilitation counselor was unable to secure a job offer for appellant does not establish that the position was not available in appellant's area.[14] Therefore, the Office properly reduced appellant's compensation based on his capacity to earn wages as a commercial drafter at the rate of $9.50 per hour.

The Board finds that the Office properly denied appellant's request for reconsideration on the merits under section 8128.

Section 8128(a) of the Act vests the Office with the discretionary authority to determine whether it will review an award for or against compensation.[15] The regulations provide that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.[16] When an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim. Evidence that repeats or

[13] *Id*. at Chapter 2.813.6(b); *see Sylvia Bridcut*, 48 ECAB 162 (1996); *Clayton Varner*, 37 ECAB 248 (1985).

[14] *See Kenneth Tappen*, 49 ECAB 334 (1998); *Alfred R. Hafer*, 46 ECAB 553 (1995) (the Board held that a lack of current job openings does not equate to a finding that the position was not performed in sufficient numbers to be considered reasonably available).

[15] 5 U.S.C. § 8128; *see Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[16] 20 C.F.R. § 10.606(b) (1999).

duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[17] Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.[18] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[19]

In this case, appellant's reconsideration request did not show that the Office erred in applying or interpreting a specific point of law. Appellant did not advance a relevant legal argument nor did he submit any new and relevant evidence. Because appellant did not satisfy one of the three requirements of section 8128, the Office properly refused to perform a merit review.

The October 3 and July 3, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
April 3, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

[17] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

[18] *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

[19] 20 C.F.R. § 10.608(b).