U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RAMON C. ESTRADA and DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, AIRWAY FACILITIES DIVISION, Denver, CO

Docket No. 00-2220; Submitted on the Record;
Issued June 12, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's actual earnings as an electronics engineer fairly and reasonably represented his wage-earning capacity.

On July 2, 1996 appellant, then a 47-year-old electronics engineer, sustained employment-related back and cervical strains when an aircraft in which he was a passenger flipped on landing. He stopped work that day. On June 16, 1997 the Office accepted that he sustained acceleration of a major depressive disorder.[1] On August 25, 1997 appellant was reemployed in a modified electronics engineer position. He retired effective November 9, 1997. On October 10, 1998 appellant submitted a Form CA-7, claim for compensation, for November 10, 1997 and continuing. By decision dated December 2, 1999, the Office determined that his actual earnings on August 25, 1997, the date of his reemployment as an electronics engineer, fairly and reasonably represented his wage-earning capacity. In an attached worksheet, the Office applied the *Shadrick* formula[2] and noted that appellant's current weekly pay rate for the date-of-injury position was $1,044.81 and noted that his current actual weekly earnings were $1,044.81. The Office then determined that his loss of wage-earning capacity was zero and, therefore, he was not entitled to wage-loss compensation. On April 25, 2000 appellant, through his attorney, requested reconsideration. In a May 12, 2000 decision, the Office modified its prior

[1] On June 26, 1996 appellant filed an occupational disease claim alleging that factors of employment caused stress, nervousness and depression. The claim was initially denied but was accepted by the Office on June 16, 1997. The claims were later consolidated.

[2] *See Albert C. Shadrick*, 5 ECAB 376 (1953).

order to show that the modified position of electronics engineer was within appellant's work restrictions. The instant appeal follows.[3]

The Board finds that the Office properly computed appellant's loss of wage-earning capacity.

Pursuant to section 8115(a) of the Federal Employees' Compensation Act,[4] in determining compensation for partial disability, wage-earning capacity is determined by the actual wages received by an employee, if the earnings fairly and reasonably represent his wage-earning capacity. The Board has previously explained that, generally, wages actually earned are the best measure of a 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.[5]

Office regulations at section 10.403[6] codify the Board's case law promulgated in the case of *Albert C. Shadrick*[7] to accommodate the statutory amendments to section 8101(4) of the Act.[8] The regulations define three basic terms which are used in formulating an employee's entitlement to compensation based on his or her wage-earning capacity. These terms are: (1) pay rate for compensation purposes; (2) current pay rate; and (3) earnings. Pay rate for compensation purposes is, as defined in section 8101(4), the greater of the employee's pay as of the date of injury, the date disability begins or the date of recurrence of disability if more than six months after returning to work. Current pay rate is defined as the salary or wages for the job the employee held at the time of injury. Earnings is defined as the employee's actual earnings or the salary or pay rate of the position selected as representative of his or her wage-earning capacity.[9]

Furthermore, Office procedures provide that the Office may make a retroactive wage-earning capacity determination, when a claimant has worked in an alternative position for at least

[3] On appeal appellant's attorney requested that the Board approve a health club membership for appellant. Pursuant to section 501.2(c) of its procedures, the Board has jurisdiction to consider and decide appeals from final decisions issued by the Office. 20 C.F.R. § 501.2(c). The record in this case indicates that in March and May 1999 both appellant's treating psychologist, Dr. Sherry Kramer, and his treating Board-certified orthopedic surgeon, Dr. John P. Smith, recommended that the Office approve a health club membership for appellant. Appellant subsequently requested that his treating physician be changed to Dr. Perry L. Haney, a physiatrist. By letter dated May 12, 1999, the Office approved appellant's request to change physicians and informed him that Dr. Haney should provide a reasoned medical recommendation regarding appellant's health club request. While, in a report dated May 30, 1999, Dr. Haney made reference to appellant's membership in a fitness center, the record before the Board does not contain a final decision regarding appellant's request. As such, the Board concludes that it has no jurisdiction over this aspect of the claim.

[4] 5 U.S.C. §§ 8101-8193.

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

[6] 20 C.F.R. § 10.403 (1999).

[7] *Albert C. Shadrick, supra* note 2.

[8] 5 U.S.C. § 8101(4).

[9] 20 C.F.R. § 10.403(b)(2) (1999).

60 days, the Office has determined that the employment fairly and reasonably represented the wage-earning capacity and the work stoppage did not occur because of any change in the claimant's injury-related condition affecting his or her ability to work. The procedures further indicate that an assessment of suitability need not be made since the employee's performance of the duties is considered the best evidence of whether the job is within the employee's physical limitations.[10] The Board has concurred that the Office may perform a retroactive wage-earning capacity determination in accord with its procedures.[11]

On appeal appellant contends that he stopped work because he was working beyond his restrictions and that the claim should be developed as a recurrence of disability. The Board finds, however, that the Office properly determined that appellant's actual earnings as an electronics engineer fairly and reasonably represented his wage-earning capacity. The record in the instant case indicates that the Office followed established procedures in making a retroactive wage-earning capacity determination. Appellant returned to a modified electronics engineer position on August 27, 1997 and had worked more than 60 days when he retired on November 9, 1997.

Appellant argued that he stopped work due to his employment-related condition. The medical evidence indicates that, in a report dated August 7, 1997, Dr. Heidi Klingbeil, appellant's treating Board-certified physiatrist, advised that he could work eight hours per day with restrictions. In a separate report also dated August 7, 1997, Dr. Klingbeil advised that she strongly suggested that appellant be allowed part-time work or work at home status "given his present stress and the need for rest breaks." She continued, "while it is not a medical restriction, it is felt appropriate and likeliest to result in a good outcome for him." Appellant's treating psychologist, Dr. Sherry Kramer, provided a July 23, 1997 treatment note in which she advised that she could not "ethically support more than two weeks off on [appellant's] traumatic injury claim." In an August 11, 1997 treatment note, she recommended part-time work "to minimize amount of contact [with] anxiety-provoking situations and to establish some sense of personal control in [appellant]." By report dated August 18, 1997, Dr. Kramer recommended that appellant only work four hours per day.

In a report dated September 19, 1997, Dr. George Kalousek, who is Board-certified in psychiatry and neurology and performed a fitness-for-duty examination for the employing establishment, advised that the employing establishment could let appellant work part time to alleviate stress but also stated that appellant was able to perform his primary duties in spite of his depression and anxiety.

By report dated October 30, 1997, Dr. Kramer advised that "[i]t appears [appellant] will be unable to achieve remission of psychological symptoms if he continues full-time employment."

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[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity,* Chapter 2.814.7(e) (May 1997).

[11] *See Tamra McCauley*, 51 ECAB ___ (Docket No. 98-1820, issued March 17, 2000); *Elbert Hicks*, 49 ECAB 283 (1998).

In a November 12, 1997 report, the rehabilitation nurse assigned to appellant's case reported that, while appellant was working full time, he was taking time off for frequent group and therapy sessions and had much flexibility at work with the ability to sit/stand as indicated, with a cot provided. She further indicated that appellant had numerous disciplinary problems and was to receive a removal letter for various reasons not related to his workers' compensation claims.

While the Act contemplates that actual earnings will not be used to determine wage-earning capacity if they do not fairly and reasonably represent wage-earning capacity, in the present case, appellant had actual earnings until he retired on November 9, 1997 and he did not submit any evidence to establish that his actual earnings did not fairly and reasonably represent his wage-earning capacity. In the instant case, appellant performed the modified position for more than 60 days, from August 25 to November 9, 1997. The Office thus properly determined that the position fairly and reasonably represented appellant's wage-earning capacity and correctly followed the procedures for making a retroactive wage-earning capacity decision. The Board further finds there is no rationalized medical evidence to indicate that appellant's work stoppage was due to a change in his accepted conditions. Dr. Klingbeil initially advised that appellant could work eight hours. While she later recommended that he be allowed to work part time, she indicated that this was not a medical restriction. Dr. Kramer provided an insufficient explanation for her opinion that appellant should only work part time and Dr. Kalousek advised that appellant was capable of performing his primary duties. There is, therefore, no probative evidence that appellant's work stoppage on November 9, 1997, the day he retired, was causally related to his employment-related conditions and the Office properly determined that appellant's actual earnings fairly and reasonably represented his wage-earning capacity.[12]

[12] Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was, in fact, erroneous. *See Sue A. Sedgwick*, 45 ECAB 211 (1993).

The decision of the Office of Workers' Compensation Programs dated May 12, 2000 is hereby affirmed.

Dated, Washington, DC
June 12, 2002

Michael J. Walsh
Chairman

Alec J. Koromilas
Member

Michael E. Groom
Alternate Member