U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ELBERT HICKS and U.S. POSTAL SERVICE,
POST OFFICE, Baltimore, MD

Docket No. 03-1105; Submitted on the Record;
Issued December 4, 2003

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly refused to modify its determination of appellant's loss of wage-earning capacity; and (2) whether the Office properly denied appellant's request for vocational rehabilitation.

The Office accepted that appellant sustained a contusion of the lumbar spine and a contusion of the right hand on July 16, 1984 when he was attacked by dogs while delivering mail. By decisions dated January 8, 1991[1] and April 15, 1993,[2] the Board found that the Office had not met its burden of proof to terminate appellant's compensation.

By decision dated September 29, 1994, the Office reduced appellant's compensation, effective November 4, 1990, based on his actual earnings as a mail and file clerk at the Department of the Navy, Naval Air Station, Mayport, Florida. The Board affirmed the September 29, 1994 decision by decision dated January 20, 1998. The Board found that appellant's "performance of this position for 16 months is persuasive evidence that it represents his wage-earning capacity," that there was "no evidence that this position was seasonal, temporary, less than full time, make-shift work designed for appellant's particular needs, or obtained other than on the open labor market and that there was "no evidence that appellant stopped performing this position because of a change in his injury-related condition affecting his ability to work."[3] The Board denied appellant's petition for reconsideration by order dated July 29, 1998.[4]

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[1] Docket No. 90-1201 (issued January 8, 1991).

[2] Docket No. 92-1525 (issued April 15, 1993).

[3] *Elbert Hicks*, 49 ECAB 283-84 (1998).

[4] Docket No. 95-1448 (issued July 29, 1998).

By letter dated June 1, 2000, appellant requested that the Office provide retraining to restore his full wage-earning capacity. Appellant stated that he was applying to graduate school.[5]

By letter dated June 13, 2000, the Office advised appellant that his claim was not in posture for vocational rehabilitation services, as a formal decision establishing his wage-earning capacity had already been issued and modification of this decision was not warranted.

By letter dated June 19, 2000, appellant contended that medical evidence since 1996 showed that his medical condition had changed. In an August 1, 2001 letter, appellant again requested vocational rehabilitation and stated that he had been accepted in the culinary arts program at Johnson and Wales University in Norfolk, Virginia.

By decision dated March 12, 2002, the Office found:

> "Given the fact that the Office has already established your wage-earning capacity, entitlement to rehabilitation services is not required and, therefore, must be denied. … To date, you have failed to meet one of the established criteria for modification of the Office's September 29, 1994 LWEC [loss of wage-earning capacity] determination."

Appellant requested a hearing, which was held on December 10, 2002.

By decision dated March 11, 2003, an Office hearing representative found that appellant had not met his burden of proof to establish that the Office's determination of appellant's loss of wage-earning capacity should be modified and that the evidence did not support appellant's contention that he qualified to participate in vocational rehabilitation services, as a loss of wage-earning capacity determination had already been issued.

The Board finds that appellant has not established that modification of the Office's determination of his loss of wage-earning capacity is warranted.

Once loss of wage-earning capacity 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.[6] The burden of proof is on the party attempting to show the award should be modified.[7]

Appellant has not shown that the Office's original determination of his wage-earning capacity, issued on September 29, 1994, was erroneous. The Board affirmed this decision on January 20, 1998. Appellant does not allege that his wage-earning capacity has increased because he has been retrained or rehabilitated.

[5] Appellant had previously requested that the Office provide vocational rehabilitation in an October 4, 1996 letter.

[6] *Charles D. Thompson*, 35 ECAB 220 (1983); *Elmer Strong*, 17 ECAB 226 (1965).

[7] *Jack E. Rohrabaugh*, 38 ECAB 186 (1986).

Appellant contends that the Office's determination of his loss of wage-earning capacity should be modified on the basis that his medical condition has changed. Appellant submitted results of a computerized tomography scan and of a magnetic resonance imaging scan of his lumbar spine done in 1996. In a July 23, 1996 medical report, Dr. A. Van Norman interpreted these reports and diagnosed "Primarily low back pain with some radiating left leg pain intermittently without neurologic deficit or radiologic evidence of source for pain." As these reports do not address appellant's ability to work, they lend no support to his contention that his actual earnings beginning November 4, 1990 no longer represent his wage-earning capacity.

Appellant also submitted reports from Dr. Eric R. Javier describing his work tolerance limitations. The earliest of these reports, dated September 27, 1999, listed limitations of no repetitive lifting over ten pounds, no frequent bending and four hours of daily work for four weeks. Although Dr. Javier attributed these limitations to appellant's low back problems, there is no showing that such back problems are related to the accepted condition of lumbar contusion appellant sustained at work on July 16, 1984. These reports do not establish a worsening of appellant's injury-related condition and do not warrant a modification of the Office's determination of his loss of wage-earning capacity.[8]

Appellant also submitted a copy of the Department of the Navy's notification of personnel action, showing his employment as a mail clerk there was terminated on August 23, 1993 for the reason that he was unable to perform the duties of his position. This does not show that appellant stopped performing the position that was the basis of his wage-earning capacity because of a change in his injury-related condition affecting his ability to work.[9] The employing establishment's August 3, 2000 letter denying appellant's request for restoration of his employment lends no support to appellant's contention that the Office's determination of his loss of wage-earning capacity, which was based on actual earnings for a different employer in a different position, should be modified. Appellant has not shown that modification of the Office's determination of his loss of wage-earning capacity is warranted.

The Board finds that the Office did not properly deny appellant's request for vocational rehabilitation.

The vocational rehabilitation provisions of the Federal Employees' Compensation Act[10] vest the Office with discretionary powers and a decision granting or refusing to grant an application for vocational rehabilitation will not be set aside by the Board unless it represents an abuse of discretion.[11]

The Office denied appellant's request for vocational rehabilitation solely on the basis that he had already been rated for loss of wage-earning capacity. The Office relied on a provision of

[8] *Dana Bruce*, 44 ECAB 132 (1992).

[9] *See Mary Jo Colvert*, 45 ECAB 575 (1994).

[10] 5 U.S.C. § 8104 states, in part: "The Secretary of Labor may direct a permanently disabled individual whose disability is compensable under this subchapter to undergo vocational rehabilitation."

[11] *Willie S. Bolden*, 33 ECAB 316 (1981).

its procedure manual that states that a case will be referred to a rehabilitation specialist when the claimant has well-defined work limitations and the claimant has not been rated for loss of wage-earning capacity.[12]

The Office interpreted this provision to state that a claimant who has been rated for a loss of wage-earning capacity will not be referred for vocational rehabilitation. This interpretation is an abuse of discretion for two reasons. First, it is incorrect in that this section of the procedure manual does not address when to deny a request for vocational rehabilitation; rather it defines a situation, in which the Office will exercise its discretion to grant vocational rehabilitation services.

Second, the Office's interpretation is contrary to Board precedent, the Office's regulations and the purpose of the Act. The Board has stated: "If there is a loss of wage-earning capacity, the Office must allow the applicant to submit a proposed plan for vocational rehabilitation; this plan is entitled to careful consideration by the Office to determine whether under the circumstances it is feasible and whether it is likely to reduce the loss of wage-earning capacity."[13] The Board has found that the Office abused its discretion by denying[14] and by terminating[15] vocational rehabilitation services, in cases where a loss of wage-earning capacity determination had already been issued. The Board has also stated that, in determining whether to grant requested vocational rehabilitation services, "Each case must be judged on its particular circumstances."[16]

The Office's federal regulations addressing vocational rehabilitation state, in part: "To ensure that vocational rehabilitation services are available to all who might be entitled to benefit from them, an injured employee who has a loss of wage-earning capacity shall be presumed to be 'permanently disabled,' for purposes of this section only…."[17] The Board has stated, "The purpose of providing training under the Act is to upgrade the skills or education of beneficiaries who cannot return to their former federal employment, in order that they may qualify for other suitable employment and restore lost earning capacity."[18] This purpose is not served by summarily excluding from consideration for vocational rehabilitation those employees who have been determined by an Office decision to have a loss of wage-earning capacity. Those employees with a loss of wage-earning capacity are the very ones who are intended beneficiaries of the vocational rehabilitation provision of the Act. As the Board noted in *Wommack*, where

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.5c (November 1996).

[13] *Hix Nathan Wommack, Jr.*, 31 ECAB 795, 797 (1980).

[14] *Stephen P. Souza*, 27 ECAB 38 (1975).

[15] *James B. Cameron, Jr.*, 27 ECAB 643 (1976).

[16] *Raymond F. Porter, Jr.*, 29 ECAB 15, 18 (1977).

[17] 20 C.F.R. § 10.519.

[18] *Gary L. Loser*, 38 ECAB 673, 678 (1987).

there is a loss of wage-earning capacity the Office should carefully consider whether vocational rehabilitation could reduce the loss.

The March 11, 2003 decision of the Office of Workers' Compensation Programs is affirmed with respect to the denial of modification of appellant's loss of wage-earning capacity. With respect to denial of vocational rehabilitation, the March 11, 2003 decision is set aside and the case remanded to the Office for consideration of appellant's proposed plan.

Dated, Washington, DC
December 4, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member