U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAVID H. DAO and DEPARTMENT OF THE NAVY,
PUGET SOUND NAVAL SHIPYARD, Bremerton, WA

Docket No. 02-2009; Submitted on the Record;
Issued January 28, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in reducing appellant's compensation to zero, effective January 27, 2002, based on the selected position of security guard.

On May 4, 2000 appellant, a ship-fitter, injured his left leg in the performance of duty. On June 21, 2000 the Office accepted the claim for a strain of the left medial collateral ligament and on March 6, 2001 the Office issued a schedule award for four percent permanent impairment of the left leg. The Office placed appellant on the periodic rolls.

In a work restriction report dated January 30, 2001, Dr. Garrett Duckworth, Jr., appellant's attending physician, found that he could return to light-duty work subject to listed physical restrictions. He listed limitations on lifting of up to 30 pounds, no bending, stooping, scaffolding, climbing vertical ladders or stairs and no long distance walking.

In a report dated April 17, 2001, the Office noted that appellant would be referred for vocational rehabilitation and that the employing establishment could not offer him placement within his work restrictions.

By letter dated December 11, 2001, appellant informed the Office that he elected retirement benefits, effective October 2001, from the Office of Personnel Management (OPM) in lieu of benefits under the Federal Employees' Compensation Act.

In a report dated January 3, 2002, a rehabilitation counselor discussed the labor market survey conducted on behalf of appellant and identified the position of security guard as vocationally suitable and reasonably available within appellant's commuting area. The rehabilitation counselor also determined that the security guard position was within the medical restrictions imposed by Dr. Duckworth. The rehabilitation counselor subsequently informed the Office that appellant refused the offer of rehabilitation on January 10, 2002 and indicated that, as a result, his rehabilitation case would be closed.

In a letter dated January 12, 2002, OPM confirmed that appellant had elected a disability annuity in lieu of compensation benefits. In an Office memorandum dated February 15, 2002, the Office noted that appellant's compensation benefits were terminated effective January 27, 2002.

By letter dated March 26, 2002, the Office advised appellant of the provisions of 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519 regarding failure or refusal to participate in vocational rehabilitation. The Office advised appellant that he had 30 days to provide reasons for noncompliance together with any evidence supporting his position and that, if he did not comply with the terms of the letter, the rehabilitation effort would be terminated and action taken to reduce his compensation under the described provisions. The Office further notified appellant that electing retirement benefits did not constitute a suitable reason for refusing vocational rehabilitation.

Appellant did not respond to the Office's March 26, 2002 letter.

In a letter dated May 1, 2002, the Office provided appellant with notice of proposed reduction of compensation. The Office advised that the evidence of record established that he was no longer totally disabled and that appellant had the capacity to earn wages as a security guard at the rate of $270.40 per week. The Office also advised that if appellant disagreed with the proposed decision that he should submit additional evidence within 30 days or the Office would proceed with reduction of compensation.

In a letter dated May 17, 2002, appellant indicated that he preferred medical retirement and agreed to the reduction of compensation; however, he felt that the May 1, 2002 proposed reduction would in effect mandate that he return to work.

By decision dated June 10, 2002, the Office reduced appellant's future entitlement to monetary compensation. The Office found that appellant was capable of working limited-duty work and that the modified security guard position was deemed suitable alternative employment. The Office noted that appellant, however, elected to receive retirement benefits and that such an election was not a suitable reason to reject rehabilitation. The Office, therefore, reduced appellant's monetary compensation on the grounds that the position of security guard was found to represent his capacity to earn wages.

The Board finds that the Office met its burden of proof in reducing appellant's compensation on the grounds that he was capable of working as a security guard.

Under the Act,[1] once the Office has accepted a claim and paid compensation benefits, it has the burden of proof to establish that an employee's disability has ceased or lessened, thus justifying termination or modification of those benefits.[2] An injured employee who is unable to return to the position held at the time of injury or to earn equivalent wages but who is not totally

[1] 5 U.S.C. §§ 8101-8193 (1974).

[2] *James B. Christenson*, 47 ECAB 775 (1996).

disabled for all gainful employment is entitled to compensation computed on the loss of wage-earning capacity.[3]

Section 8113(b) of the Act provides as follows:

> "If an individual, without good cause, fails to apply for and undergo vocational rehabilitation when so directed under section 8104 of this title, the Secretary, on review under section 8128 of this title and after finding that, in the absence of the failure, the wage-earning capacity of the individual would probably have substantially increased, may reduce prospectively the monetary compensation of the individual in accordance with what would probably have been his wage-earning capacity in the absence of the failure, until the individual in good faith complies with the direction of the Secretary."

When a claimant fails to proceed with an approved training program, the Office must direct appellant to comply with the program and explain that if appellant fails to comply the Office will apply the provisions of section 8113(b) and reduce his monetary compensation.[4]

20 C.F.R. § 10.519(a) provides as follows:

> "Where a suitable job has been identified, [the Office] will reduce the employee's future monetary compensation based on the amount which would likely have been his or her wage-earning capacity had he or she undergone vocational rehabilitation. [The Office] will determine this amount in accordance with the job identified through the vocational rehabilitation planning process, which includes meetings with the [Office] nurse and the employer. The reduction will remain in effect until such time as the employee acts in good faith to comply with the direction of [the Office]."

In the instant case, rehabilitation efforts by the Office proved futile because appellant declined vocational placement and elected retirement benefits. Appellant argued that he was informed of his opportunity to elect retirement benefits and indicated that he declined the position because he was offered vocational rehabilitation after he had elected such benefits.

Wage-earning capacity is the measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[5] Section 8106(a) of the Act provides for compensation for the loss of wage-earning capacity during an employee's disability by paying

[3] 20 C.F.R. § 10.303(a); *Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

[4] Federal (FECA) Procedure Manual, Part 2 -- *Claims, Reemployment: Vocational Rehabilitation Services*, Chapter 2.813(11) (December 1993).

[5] *Dennis D. Owen*, 44 ECAB 475, 479 (1993); *Hattie Drummond*, 39 ECAB 904, 907 (1988).

the difference between his monthly pay and his monthly wage-earning capacity after the beginning of the partial disability.[6]

Section 8115 provides that the wage-earning capacity of an employee is determined by his actual earnings if these fairly and reasonably represent his or her wage-earning capacity.[7] If the actual earnings do not fairly and reasonably represent the employee's wage-earning capacity or if the employee has no actual wages, wage-earning capacity is determined by considering the nature of the injury, the degree of physical impairment, the employee's usual employment, age and 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.[8] A job in the position selected for determining wage-earning capacity must be reasonably available in the general labor market in the commuting area, in which the employee lives.[9]

In this case, Dr. Duckworth, in a work evaluation, found that appellant who had a left leg impairment was capable of working 8 hours per day with lifting up to 30 pounds, no bending, stooping, scaffolding, climbing vertical ladders or stairs and no long distance walking. The Office referred appellant to a rehabilitation counselor based on the physician's findings and later found that the position of security guard represented his wage-earning capacity.

The selected position is regarded as "light" with occasional lifting and pulling of no more than 20 pounds and on-the-job-training for one to three months. It requires guarding property against fire, theft, vandalism and illegal entry by patrolling buildings and grounds, examining doors, windows and gates, reporting data, unusual occurrences or irregularities and routine checks, observing departing personnel and sounding an alarm or calling the police if necessary. The position paid $270.40 a week and was readily available in appellant's geographical area. Appellant never contended that he was unable to perform the duties of the offered position and submitted no evidence disputing the light nature of a security guard position.

The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of security guard and that such a position was reasonably available within the general labor market of appellant's commuting area. Due to the circumstances of the case, the earnings of the selected position as security guard reasonably represent appellant's wage-earning capacity.

Accordingly, the Board finds that the Office has met its burden in reducing appellant's compensation to zero.

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[6] An employee's wage-earning capacity in terms of percentage is obtained by dividing the pay rate of the selected position by the current pay rate for the date-of-injury job; the wage-earning capacity in terms of dollars is computed by multiplying the pay rate for compensation purposes, as defined at 20 C.F.R. § 10.5(a)(20), by the percentage of wage-earning capacity and subtracting the result from the pay rate for compensation purposes to obtain the employee's loss of wage-earning capacity. 20 C.F.R. § 10.303(b).

[7] 5 U.S.C. § 8115(a); *Lawrence D. Price*, 47 ECAB 120 (1995).

[8] *Mary Jo Colvert*, 45 ECAB 575, 579 (1994); *Samuel J. Chavez*, 44 ECAB 431, 436 (1993).

[9] *Barbara J. Hines*, 37 ECAB 445, 450 (1986).

The decision of the Office of Workers' Compensation Programs dated June 10, 2002 is affirmed.

Dated, Washington, DC
January 28, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member