U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RONALD L. HARTMAN and DEPARTMENT OF COMMERCE, NATIONAL OCEANIC ATOMOSPHERIC ADMINISTRATION, Boulder, CO

Docket No. 02-2361; Submitted on the Record;
Issued March 12, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's wage-loss compensation to reflect his wage-earning capacity in the position of computer systems hardware analyst.

On June 17, 1996 appellant, then a 49-year-old woodworker, filed a traumatic injury claim alleging that he injured his back while picking up a pallet to recycle.[1] The Office accepted the claim for low back strain and subsequently amended to include a permanent aggravation of chronic degenerative disc disease. Appellant returned to light-duty work on September 5, 1996 and his usual job on January 7, 1997. Appellant filed a recurrence claim on July 10, 1997, which the Office accepted.[2] On or about October 29, 1997 the employing establishment advised that no light-duty position was available to appellant.[3] Appellant was placed on the periodic rolls by letter dated January 6, 1998.

In a January 5, 1998 work capacity evaluation, Dr. Elizabeth F. Yurth, a Board-certified physiatrist and appellant's treating physician, indicated that he had reached maximum medical improvement. She indicated that appellant could return to work 8 hours a day with frequent breaks and restrictions of lifting no more than 10 to 50 pounds, no twisting, no sitting more than 2 hours at a time, no walking more than 1 hour at a time and no standing more than 30 minutes.

On or about June 23, 1998 the Office referred appellant for vocational rehabilitation services. In September 1998, the Office developed a rehabilitative training program, in which

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[1] It is noted that there is a duplicate record as the Oasis system printed out pages 1-141 which will be designated "B." The remaining part of the record is numbered pages 1 to 677 and will be designed as "R."

[2] The Office noted that this was not a classic recurrence claim and that the case should not have been closed and reopened the claim for medical benefits.

[3] Appellant stopped work on October 28, 1997.

appellant was enrolled in a computer technology program at Aims Community College in Greeley, Colorado. Appellant successfully completed the program June 9, 2001. Appellant's counselor informed the Office that appellant had participated in vocational efforts and positions in the noted areas were found vocationally and medically suitable and available in appellant's area. However, on March 6, 2002 rehabilitation efforts were closed as unsuccessful.

On May 21, 2002 the Office proposed to reduce appellant's compensation on the grounds that the position of computer systems hardware analyst reasonably represented his wage-earning capacity.

In a letter dated May 30, 2002, appellant disagreed with the Office's proposal to reduce his compensation benefits.

By decision dated July 5, 2002, the Office reduced appellant's compensation on the grounds that the position of computer systems hardware analyst represented appellant's wage-earning capacity.

The Board finds that the Office properly reduced appellant's compensation based on his ability to earn wages as a computer systems hardware analyst.

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 in such benefits.[4] If the employee's disability is no longer total but is partial, appellant is only entitled to the loss of his wage-earning capacity.[5]

Under section 8115(a) of the Federal Employees' Compensation Act,[6] wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity or if the employee has no actual earnings, wage-earning capacity is determined with due regard to the nature of injury, degree of physical impairment, usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect the employee's wage-earning capacity in his or her disabled condition.[7]

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by the Office or to an Office wage-earning capacity specialist for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open

[4] *Francis J. Carter*, 53 ECAB ___ (Docket No. 00-1789, issued April 11, 2002); *Garry Don Young*, 45 ECAB 621 (1994).

[5] *Pope D. Cox*, 39 ECAB 143 (1987).

[6] 5 U.S.C. §§ 8101-8193.

[7] *See James M. Frasher*, 53 ECAB ___ (Docket No. 01-362, issued September 25, 2002); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); 5 U.S.C. § 8115(a).

labor market, that fits that employee's capabilities with regard to his physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service.[8] Finally, application of the principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.[9] The basic rate of compensation paid under the Act is 66 2/3 percent of the injured employee's monthly pay.

In this case, Dr. Yurth's January 5, 1998 work restrictions established that appellant could work an 8-hour day with lifting from 10 to 15 pounds, standing 30 minutes, sitting 2 hours, frequent breaks, and walking for 1 hour. The vocational evidence shows that appellant had an associate degree from Aims Community College, enabling him to work as a computer systems hardware analyst. The job of computer systems hardware analyst identified by the rehabilitation counselor in the September 18, 1998 rehabilitative training program was described as sedentary with no lifting of more than 10 pounds. The computer analyst job therefore was within appellant's physical restrictions. The job was also within appellant's vocational experience given his computer training and the college degree he obtained.

Further, the vocational counselor stated that the computer analyst job was reasonably available in appellant's commuting area. Although appellant stated that his numerous attempts to obtain a position in the computer field were unsuccessful, the Board has held that the mere fact that appellant is not able to secure a job does not establish that the work is not available or suitable. Where, as here, the evidence establishes that jobs in the selected position are reasonably available, the selection of such a position is proper even though the employee has been unsuccessful in obtaining work or has submitted documents from individuals employers who indicated that they did not have an available position.[10] Because the position of computer systems hardware analyst was within appellant's physical restrictions and vocational experience and was reasonably available, the job represents appellant's wage-earning capacity.

[8] *Richard Alexander*, 48 ECAB 432 (1997); *Dorothy Lams*, 47 ECAB 584 (1996).

[9] *Dorothy Lams*, *supra* note 8; *Albert C. Shadrick*, 5 ECAB 376 (1953).

[10] *See Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

The July 5, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
March 12, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member