

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL J. MONTI and DEPARTMENT OF JUSTICE,
IMMIGRATION & NATURALIZATION SERVICE, BORDER PATROL,
El Centro, CA

*Docket No. 03-1815; Submitted on the Record;
Issued October 1, 2003*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly modified its August 14, 1992 determination of appellant's loss of wage-earning capacity; and, if so, (2) whether an overpayment of \$78,967.95 occurred in appellant's case from January 1, 1993 to March 22, 2003; and (3) whether appellant was at fault in the creation of the overpayment.

On June 3, 1986 appellant, then a 31-year-old Border Patrol Agent (trainee), injured his right knee while on detail to the U.S. Border Patrol Academy in Glynco, Georgia, for basic training. The Office accepted his claim for internal derangement and dislocation of the right knee and authorized surgeries. He received compensation for temporary total disability on the periodic compensation rolls.

On February 27, 1990 Dr. Richard J. Kearns, an orthopedic surgeon and Office referral physician, reported that appellant was capable of pursuing almost any position, except those requiring prolonged periods of running, impact activities, jumping or kneeling. He completed a work restriction evaluation. On March 19, 1990 the employing establishment advised that it was unable to offer any kind of position to appellant because of the nature of its work and because of the work restrictions imposed.

On April 3, 1992 appellant informed the Office that he had applied for several jobs. He stated that, if someone would pay for training, he could obtain certification as a peace officer and enter the Police Academy. Moreover, appellant stated that a police department captain offered to give him a job within his physical restrictions if he had that certification.

In a decision dated August 14, 1992, the Office reduced appellant's compensation on the grounds that he had the capacity to earn wages in the selected position of security guard. The

Office determined that his wage-earning capacity was 50 percent and, therefore, reduced his compensation for wage loss by half, to \$515.00 every four weeks.¹

On October 19, 1992 appellant wrote to the Office as follows: “This is to notify you that I was hired by the Harris County Sheriff’s Department [in Houston, Texas] and started training on October 19, 1992.” On February 12, 1993 he completed a Form CA-1032 advising the Office of his employment and earnings as a Harris County Deputy. On February 6, 1994 he completed another such form.

On February 2, 1995 the Office wrote to the Harris County Sheriff’s Department and requested appellant’s job title, a brief description of the duties he performed and a description of the “physical limitations required.” The Office also requested the number of hours appellant worked per week, his date of hire and his weekly rate of pay since employment began, including pay increases.

Also on February 2, 1995 the Office wrote to appellant and requested information on any training he received since his injury. The Office asked: “What schooling and/or on the job training did you receive in order for you to hold the Deputy’s position? Are you currently in any continuing education program at this time?” The Harris County Sheriff’s Department responded by providing the number of hours appellant worked per week, his date of hire and his weekly rate of pay since employment began, including pay increases.

Appellant periodically reported his employment and earnings on Forms CA-1032. Notwithstanding notice of his employment, the Office continued to pay compensation based on his capacity to earn wages as a security guard.

In a decision dated April 2, 2003, the Office modified its August 14, 1992 determination of appellant’s wage-earning capacity from 50 to 100 percent on the grounds that he had “rehabilitated himself such that his actual earnings with the Harris County Sheriff’s Department, currently employed as a Deputy, fairly and reasonably represent his wage-earning capacity.” The Office noted appellant’s rating in the selected position of security guard. The Office also noted that, beginning in 1993, appellant each year earned more wages than did a Grade 5, Step 1 employee. After explaining the prerequisites for modifying a determination of wage-earning capacity, the Office stated: “You have exhibited an earning capacity equal to or greater than your grade and step at the date of your injury and as such you have suffered no loss of wages as a result of the June 3, 1986 work injury. Therefore, your monetary workers’ compensation benefits have been terminated effective March 22, 2003.”

Also on April 2, 2003 the Office made a preliminary determination that an overpayment of \$78,967.95 occurred in appellant’s case because he was employed with the Harris County Sheriff’s Department beginning October 19, 1992 and continued to earn wages equal or greater to the current wage of a Grade 5, Step 1 employee. The Office made a preliminary determination that appellant was at fault in the creation of the overpayment because he accepted

¹ The Office initially deducted health benefit premiums of \$93.08 and issued checks for \$421.92. After appellant brought this error to light, the Office reimbursed him for the deductions and effective October 18, 1992 began regular payments of \$515.00 every four weeks.

and retained payments that he knew or should have been expected to know were incorrect. The Office asked appellant to complete an overpayment recovery questionnaire and to attach supporting documents, including copies of income tax returns, bank account statements, bills and canceled checks, pay slips and any other records to support the income and expenses listed. The Office advised that it would use this information to determine whether to waive the overpayment if the preliminary finding of fault was overturned and to decide how to collect the overpayment if the finding was upheld. The Office allowed appellant 30 days to respond.

In a decision dated May 29, 2003, the Office finalized its preliminary determination that an overpayment of \$78,967.95 occurred in appellant's case and that he was at fault in its creation, precluding waiver.

On July 8, 2003 appellant filed an appeal with the Board. He argued that the overpayment occurred through no fault of his own and that the Office should waive the overpayment on grounds of financial hardship. He submitted a completed overpayment recovery questionnaire.²

The Board finds that the Office improperly modified its August 14, 1992 determination of appellant's of wage-earning capacity.

An injured employee who cannot return to the position held at the time of injury (or earn equivalent wages) due to the work-related injury, but who is not totally disabled for all gainful employment, is considered to be partially disabled.³ If the employee has no actual earnings, the Office uses the factors stated in 5 U.S.C. § 8115 to select a position, which represents his or her wage-earning capacity.⁴ However, the Office will not secure employment for the employee in the position selected for establishing a wage-earning capacity.⁵ Compensation for partial disability is payable as a percentage of the difference between the employee's pay rate for compensation purposes and the employee's wage-earning capacity.⁶

In the case of *Ronald M. Yakota*, the Board stated:

“Once the wage-earning capacity of an injured employee is properly determined, it remains undisturbed regardless of actual earnings or lack of earnings. 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

² The Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c). The Board has no jurisdiction, therefore, to review the overpayment recovery questionnaire that appellant submitted on appeal.

³ 20 C.F.R. § 10.402 (1999).

⁴ These factors include: (1) the nature of his injury; (2) the degree of physical impairment; (3) his usual employment; (4) his age; (5) his qualifications for other employment; (6) the availability of suitable employment; and (7) other factors or circumstances which may affect his wage-earning capacity in his disabled condition.

⁵ 20 C.F.R. § 10.403(a) (1999).

⁶ *Id.* at § 10.403(b).

been retrained or otherwise vocationally rehabilitated or the original determination was in fact erroneous. The burden is on the Office to establish that there has been a change so as to affect the employee's capacity to earn wages in the job determined to represent his earning capacity. Compensation for loss of wage-earning capacity is based upon loss of the *capacity* to earn and not on actual wages lost."⁷

In this case, the Office did not contend that there was a material change in the nature and extent of appellant's injury-related condition, nor did it contend that the original determination of wage-earning capacity on August 14, 1992 was in fact erroneous. The Office based the modification of the original determination on the grounds that appellant was retrained or otherwise vocationally rehabilitated. The stated basis for the Office's decision was that appellant had "exhibited an earning capacity equal to or greater than your grade and step at the date of your injury and as such you have suffered no loss of wages as a result of the June 3, 1986 work injury." The Office concluded that appellant had "rehabilitated himself such that his actual earnings with the Harris County Sheriff's Department, currently employed as a Deputy, fairly and reasonably represent his wage-earning capacity." The Office compared appellant's yearly earnings as a Deputy with the yearly earnings of a Grade 5, Step 1 employee and noted that his actual earnings were greater in each year from 1993 to 2002.

An increase in pay by itself is not sufficient evidence that there has been a change in an employee's capacity to earn wages. As the Board stated in the case of *Willard N. Chuey*, "Without a showing of additional qualifications obtained by appellant through retraining, it was improper to make a new loss of wage-earning capacity determination based on increased earnings."⁸ The Board has held that it may be appropriate to modify a claimant's wage-earning capacity determination on the grounds that the claimant is vocationally rehabilitated *if* the claimant is employed in a job different from the one the claimant was rated in, which pays at least 25 percent more than the current pay of the job the claimant was rated in and these earnings continued for at least three months.⁹ Prior to such a modification, however, the Office is required to determine the duration, exact pay, duties and responsibilities of the new job; determine whether the claimant underwent training or vocational preparation to earn the current salary; and assess whether the actual job differs significantly in duties, responsibilities or technical expertise from the job at which the claimant was rated.¹⁰

The Office has not shown that appellant was vocationally rehabilitated. The record does not establish that appellant was employed in a job different from the one he was rated in. The Office requested but did not obtain from the Harris County Sheriff's Department a description of

⁷ 33 ECAB 1629 (1982) (footnotes omitted, original emphasis); *see also Lawrence M. Nelson*, 39 ECAB 788 (1988).

⁸ *Willard N. Chuey*, 34 ECAB 1018, 1021 (1983).

⁹ *Billy R. Beasley*, 45 ECAB 244 (1993). *Cf.* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.10.c (December 1993) (these earnings must have continued for at least 60 days).

¹⁰ *Billy R. Beasley*, *supra* note 9.

appellant's duties and responsibilities as a Deputy. Without this information, the record is insufficient to permit a proper assessment of whether appellant's job as a Deputy differed significantly in duties, responsibilities or technical expertise from the job of security guard. The Office requested but did not obtain from appellant information on any training or vocational preparation he underwent to earn his current salary, what schooling or on-the-job training he received in order to hold his position as a Deputy, or any continuing education he was currently taking. The record contains almost no evidence on whether appellant underwent training or vocational preparation. In his October 19, 1992 letter, more than two years before the Office made its inquiries, appellant informed the Office that he was hired by the Harris County Sheriff's Department and "started training" that day. This alone does not establish that he obtained additional qualifications and thereby changed his wage-earning capacity. Only after all the factors have been examined can the Office properly determine whether appellant has been retrained or otherwise vocationally rehabilitated such that a modification of his loss of wage-earning capacity is warranted.¹¹

Further, the Office has not established that appellant was employed in a job that paid at least 25 percent more than the current pay of the job he was rated in. Rather than compare appellant's actual earnings with the current pay of a security guard, the Office compared his actual earnings to the current pay of his date-of-injury position. This comparison is improper for the purpose of establishing vocational rehabilitation.¹² Moreover, the Office's figures show that appellant's job as a Deputy paid at least 25 percent more than the current pay of a GS-5, Step 1 employee only beginning in 1999, six years after the overpayment was found to begin. The Board finds that the Office failed to follow accepted procedures and failed to address adequately the relevant factors for determining whether appellant was vocationally rehabilitated.

It is the Office's burden to establish that there was a material change in the nature and extent of the injury-related condition, that the employee was retrained or otherwise vocationally rehabilitated or that the original determination was in fact erroneous. The Office has not met its burden of proof. The Board will reverse the April 2, 2003 decision modifying the determination of appellant's wage-earning capacity.

Reversal of the Office's April 2, 2003 decision dissolves the basis of the overpayment found in this case and renders the Office's May 29, 2003 decision moot.

¹¹ *Odessa C. Moore*, 46 ECAB 681 (1995).

¹² This comparison remains proper for the purpose of determining compensation for partial disability. *See supra* text accompanying note 6.

The April 2, 2003 decision of the Office of Workers' Compensation Programs is reversed and the Office's May 29, 2003 decision is hereby set aside.

Dated, Washington, DC
October 1, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member