U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SELDEN H. SWARTZ and DEPARTMENT OF AGRICULTURE, FOREST SERVICE, ROGUE RIVER NATIONAL FOREST, Medford, OR

Docket No. 02-1164; Oral Argument Held June 17, 2003; Issued January 15, 2004

Appearances: *Selden H. Swartz, pro se*; *Jim C. Gordon, Esq.*, for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined appellant's wage-earning capacity based on his actual earnings as an education services director; and (2) whether the Office properly denied modification of the wage-earning capacity determination.

This is the second time this case has been before the Board. On May 27, 1977 appellant, a 28-year-old survey technician, injured his lower back when he fell while walking in the woods. He filed a claim for benefits on June 13, 1977 which the Office accepted for lumbar strain and herniated disc. The Office also authorized back surgery, which appellant underwent on July 22, 1977. The Office paid compensation for temporary total disability during his absence from work. The Office also accepted recurrences of total disability beginning August 1, 1978, July 23, 1986 and June 30, 1988. The Office paid compensation for total wage loss through November 13, 1993.

In a work restriction evaluation dated April 1, 1992, received by the Office on May 21, 1992 Dr. Paul Altrocchi, appellant's treating physician, indicated that appellant could work an 8-hour day and restricted him to intermittent sitting, 20 minutes of intermittent walking a day, not exceeding 3 to 4 hours a day; continuous lifting up to 20 pounds, 30 to 50 pounds of intermittent lifting, not exceeding 3 to 4 hours a day; intermittent bending for 5 to 10 minutes a day, not exceeding 1 to 2 hours; continuous squatting for 30 to 60 seconds and intermittent squatting from 2 to 5 minutes, not exceeding one hour a day; intermittent stair climbing from 5 to 10 minutes from 3 to 4 hours a day; intermittent kneeling from 5 to 10 minutes from 1 to 2 hours a day; intermittent twisting, with proper posture, from 1 to 2 hours a day; and continuous, "dynamic" standing for 30 minutes a day, with intermittent standing for 30 to 60 minutes a day, for 4 to 6 hours a day.

Based on Dr. Altrocchi's restrictions, appellant was referred to a rehabilitation counselor. The record indicates that he enrolled in a magnetic resonance imaging (MRI) technician training course at the University of Pittsburgh School of Medicine. He successfully completed the training course on March 18, 1993.[1]

On October 25, 1993 appellant obtained employment as an education services director for Cascade East Area Health Education Center (CEAHEC), in Bend, Oregon, at a weekly salary of $711.54, or $37,000.00 a year.

By letter dated December 1, 1993, the Office terminated appellant's wage-loss compensation effective October 25, 1993 on the grounds that his actual earnings exceeded the pay rate of the position of survey technician he held at the employing establishment when injured.[2]

In a January 24, 1995 letter to CEAHEC, appellant indicated that his supervisors had informed him that his worksite was being relocated to Klamath Falls, Oregon, and expressed his concern as to whether his work restrictions would be accommodated in the new office. Appellant requested that the executive director of the program guarantee that he could continue in his present position after the consolidation by either having his work restrictions modified to conform with his new work environment; *i.e.*, by limiting his driving time and frequency and continuing the nonstructured work environment he currently enjoyed or, by retaining his position of director of education services in the Bend area, where he would work out of his home.

By letter dated January 31, 1995, CEAHEC advised appellant that it was required to consolidate its office in the Klamath Falls area and that the position of educational services director required certain modifications in order to conform to these changes. Appellant was offered the same position at the same rate of pay and benefits he currently received, but that the position would require a great amount of travel. It was noted that nothing precluded "common sense resting, as needed," while traveling. Appellant would be reimbursed for moving expenses, up to $2,000.00, if he chose to move to Klamath Falls.

In a February 23, 1995 letter to the Office, appellant advised that CEAHEC had not acceded to his requests and that he had been formally notified that the Bend office would close effective February 28, 1995. In light of his impending lack of employment and income, he requested reinstatement of his compensation for temporary total disability effective February 28, 1995.

In a report dated April 3, 1995, Dr. Norwyn R. Newby, a Board-certified neurosurgeon, stated that appellant had rejected the offer to relocate to Klamath Falls, Oregon, and to continue

[1] Despite the efforts of the vocational counselor, appellant did not obtain employment as an MRI technician. The vocational counselor closed his file effective May 27, 1993.

[2] By letter dated December 8, 1993, appellant requested that the Office reimburse the cost of his MRI training program. He noted that after gaining "current experience in a hospital setting" he accepted the education services director position. Appellant noted the administrative offices were located in Klamath Falls and Portland and anticipated travel of approximately 700 to 1,000 miles each month. He received reimbursement for training of $9,500.00 after certifying his successful completion of the course and employment based on his training.

his employment as an educational services director because he would have been required to drive as much as 25 percent of the time and for distances approaching 270 miles. The physician noted that appellant asserted that the employing establishment was unable to modify his work to exclude long-term driving. Dr. Newby advised that appellant would have a difficult time continuing in his job with the employing establishment given the new schedule and the more frequent driving.

In a report dated April 3, 1995, Dr. Newby stated:

> "Based on the information we have regarding [appellant's] current work requirements, specifically as they pertain to driving, we do not feel he is capable of continuing in that employment without job modifications."

Appellant filed a Form CA-7, claim for compensation beginning March 1, 1995 and continuing, which was received by the Office on February 15, 1996. He requested reinstatement of the compensation he received prior to his employment with CEAHEC.

By decision dated June 20, 1996, the Office found that appellant's wage-earning capacity beginning March 1, 1995 was represented by the position of an MRI technician, for which he was trained in 1993. The Office determined that this position was suitable to his physical limitations and was reasonably available within the commuting distance of his current residence. The Office also noted that the medical evidence appellant submitted did not indicate that his work restrictions had changed. The Office noted that the MRI technician position was at a salary in excess of the wages appellant earned when injured and that he was not entitled to wage-loss compensation as of March 1, 1995.

By letter dated July 2, 1996, appellant requested a review of the written record.

By decision dated December 2, 1996, an Office hearing representative set aside the June 20, 1996 wage-earning capacity decision. The hearing representative noted that the Office erred in determining appellant's wage-earning capacity based on a selected position, that of MRI technician, which was not shown to be reasonably available in appellant's area. The hearing representative also found that the Office erred by failing to consider his actual earnings as an education services director. The hearing representative stated that, as appellant held the education services director position for more than 60 days, the Office should determine whether a retroactive loss of wage-earning capacity was appropriate based on his reemployment effective October 25, 1993 and, if so, then to consider his claim for wage-loss compensation beginning March 1, 1995, under the criteria for modifying a loss of wage-earning capacity determination.

By decision dated January 22, 1997, the Office found that appellant's earnings in his position of education services director fairly and reasonably represented his wage-earning capacity effective on October 25, 1993. Because his actual earnings of wages of $711.54 per week, exceeded the current pay of the job he held at the time of his 1977 employment injury ($314.00 per week), he was not entitled to wage-loss compensation.

By letter dated February 11, 1997, appellant requested reconsideration. He contended that the position of education services director did not fairly and reasonably represent his wage-earning capacity. Appellant asserted that the position had been changed and that it was now

physically too demanding. He argued that, although he was employed in this position for nearly two years at a yearly salary of $37,000.00, he was not given suitable training in order to perform the duties of an education services director. Appellant alleged that the position required him to perform few, if any, of the duties and responsibilities for which he had been trained.

Dr. Newby submitted a Form CA-20 report, dated February 1, 1997, which noted that appellant had no objective findings on examination. In a report dated February 11, 1997, he stated that appellant could be involved in medium work activity with no lifting over 50 pounds. Dr. Newby advised that appellant needed to be in a job that allowed for a changing of positions between standing, sitting and walking. The physician recommended that, if appellant was offered a job which required driving, he restrict his driving time to no longer than two hours consecutively, with a half-hour break between destinations.

By decision dated July 24, 1997, the Office denied modification of the January 22, 1997 wage-earning capacity determination.

Appellant filed an appeal with the Board.[3]

In a decision dated April 7, 2000, the Board set aside the January 22, 1997 Office decision, finding that the Office did not address appellant's contention that the position of education services director did not fairly and reasonably represent his wage-earning capacity. The Board noted that appellant submitted evidence indicating the education services director position in which he was employed from October 25, 1993 to February 28, 1995, may have been makeshift work, which could not be used as the basis of an employee's wage-earning capacity.[4] The Board remanded the case to the Office for consideration of appellant's contention that the position of education services director did not fairly and reasonably represent his wage-earning capacity.

Following remand, the Office further reviewed the record, including the rehabilitation reports and appellant's tenure with the CEAHEC.

By decision dated August 2, 2000, the Office found that the position of education services director fairly and reasonably represented his wage-earning capacity and did not constitute a makeshift position.

By letter dated August 24, 2000, appellant requested a review of the written record.

In a January 24, 2001 decision, an Office hearing representative set aside the August 2, 2000 Office decision and remanded the case for further development of the evidence. The hearing representative instructed the Office to contact appellant's previous employers at CEAHEC, in order to obtain additional information and evidence regarding the nature, duties

[3] Docket No. 98-48 (issued April 7, 2000).

[4] The Board noted that the use of what may be an inappropriate position as the basis of an employee's wage-earning capacity will be more closely scrutinized where the Office applies its loss of wage-earning capacity decision prospectively, that is, to a period after the employee was no longer working in the position used as representative of his or her wage-earning capacity.

and responsibilities of the position; *i.e.*, to confirm or deny appellant's allegation that the job was a makeshift position and that appellant performed few duties or responsibilities.

On remand, the Office telephoned the number for the Bend office of CEAHEC, but received no answer. The Office then contacted directory assistance for the Klamath Falls office of CEAHEC, but was unable to obtain a listing for either the full name or acronym. The Office also attempted to call the telephone numbers listed on the old letterhead for the Klamath Falls office of CEAHEC, but these had been disconnected. Further, the Office attempted to contact some of the individuals associated with the CEAHEC program during the period in which appellant was employed, but was also unsuccessful.

In addition, the Office attempted to contact CEAHEC in writing. In a February 12, 2001 letter addressed to the Klamath Falls letterhead, the Office asked CEAHEC to provide additional information regarding appellant's period of employment as an education services director with CEAHEC from October 25, 1993 through February 28, 1995. The Office noted appellant's assertions that: (a) he did not have the requisite skills or experience to perform the position; (b) his immediate supervisor was on extended vacation or frequently out of the office and, therefore, unavailable to provide appellant with the necessary training or support to carry out his duties, or to provide him with the flexibility to function with his physical restrictions; and (c) the position for which he was hired was on paper only and no real job existed. The Office asked CEAHEC to indicate the basis on which appellant was hired, any additional training that was promised to him, the duties he actually performed during his tenure with CEAHEC and whether his work was self-directed or directed by program management. The Office also asked CEAHEC to confirm or deny appellant's allegation that he had no duties assigned to him whatsoever during an eight-month period in 1995. The letter was returned by the U.S. Postal Service on February 22, 2001 as "undeliverable" and "unable to forward."

By decision dated March 2, 2001, the Office reinstated the previous wage-earning capacity determination, finding that the position of education services director fairly and reasonably represented appellant's wage-earning capacity. The Office noted that it had attempted to contact CEAHEC by both mail and telephone in order to obtain additional information and evidence regarding the nature, duties and responsibilities of the position and to verify appellant's assertion that the position was makeshift, but had been unsuccessful. Therefore, the Office found the contemporaneous evidence from 1993 to be most probative and determined that the position of education services director fairly and reasonably represented his wage-earning capacity.

By letter dated March 26, 2001, appellant requested a review of the written record.

By decision dated August 27, 2001, an Office hearing representative affirmed the March 2, 2001 decision, noting that appellant failed to show that the Office's original wage-earning capacity determination was erroneous.

The Board finds that the Office properly determined appellant's wage-earning capacity based on his actual earnings as an education services director.

Section 8115(a) of the Federal Employees' Compensation Act provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity.[5] Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.[6] In addition, the Federal (FECA) Procedure Manual provides that the Office can make a retroactive wage-earning capacity determination if appellant worked in the position for at least 60 days, the position fairly and reasonably represented his wage-earning capacity and "the work stoppage did not occur because of any change in his injury-related condition affecting the ability to work."[7]

In this case, appellant's treating physician, Dr. Altrocchi, released him to return to work for an eight-hour workday, with certain physical restrictions in April 1992. He returned to full-time work as an education services director on October 25, 1993, a job whose duties were within his work restrictions, at the weekly rate of $711.54 or $37,000.00 a year. Further, there is no evidence that the position was an odd-lot or make-shift position.[8] Appellant remained employed as an education services director continuously from October 25, 1993 until the position was consolidated in February 1995 and moved from Bend to Klamath Falls, Oregon. The evidence demonstrates that he did not stop working because of residuals from his employment injury, but because he chose not to relocate to Klamath Falls. The January 31, 1995 letter from CEAHEC noted that appellant would be provided with the same position at the same salary and commensurate benefits at Klamath Falls and would reimburse moving expenses up to $2,000.00, but that he declined the offer. CEAHEC indicated that the job would require him to travel long distances on certain occasions, but that he would not be precluded from resting as needed during such trips. Further, the contemporaneous medical evidence of record indicates that there was no material change in appellant's physical condition or work restrictions during this time and he did not submit medical evidence demonstrating that he was unable to perform the position of education services director due to his 1977 employment injury at the time of his discharge in February 1995. Appellant was treated shortly thereafter by Dr. Newby, who submitted reports in April 1995 and February 1997, indicating that he had no objective findings of disability and was not precluded from working full time with restrictions on driving long distances without being able to take occasional breaks. The evidence of record thus demonstrates that the position of education services director was suitable based on appellant's residuals from his accepted employment injury. His actual earnings in the position reasonably reflected his ability to earn wages, and there was no material change in the nature and extent of his injury-related condition at the time of his discharge on February 28, 1995.

Pursuant to the January 24, 2001 Office decision, the Office attempted to contact appellant's previous employer in order to obtain additional information and evidence regarding

[5] U.S.C. § 8115(a); *Clarence D. Ross*, 42 ECAB 556 (1991).

[6] *Hubert Myatt*, 32 ECAB 1994 (1981).

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

[8] *Joseph M. Popp*, 48 ECAB 624 (1997); *James D. Champlain*, 44 ECAB 438, 440-41 (1993).

the nature, duties and responsibilities of the position, but was unsuccessful. The Office provided copies of a February 12, 2001 letter it sent to CEAHEC requesting information which was returned as undeliverable by the U.S. Postal Service. The Office further indicated that it made several unsuccessful attempts to contact CEAHEC as well as its former management personnel by telephone. Based on the existing, contemporaneous evidence of record, the Board finds that the Office met its burden of showing that appellant's actual earnings as an education services director fairly and reasonably represented his wage-earning capacity.

Once a loss of wage-earning capacity is determined, a modification of such a 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.[9] The burden of proof is on the party attempting to show the award should be modified.[10]

The evidence does not establish that appellant's actual earnings as an education services director did not fairly and reasonably represent his wage-earning capacity and the Office properly adjusted his compensation based on this wage-earning capacity determination. Appellant submitted a June 16, 2001 letter from his former wife, who stated that she lived with appellant during the period he was employed with CEAHEC. She related that he "did not know what he was supposed to be doing" at CEAHEC and that his supervisor was frequently not present at the worksite to offer advice. She stated that, "as far as him being qualified for a job in which he is expected to read or write with any degree of preciseness [appellant] does not have this capability. I know this because I wrote all of his papers while he was in college." This evidence is insufficient to meet his burden of showing that the education services director position did not fairly and reasonably represent his wage-earning capacity. Appellant failed to demonstrate that it was an odd-lot or make-shift position designed for his particular needs or that it was seasonal in nature. The education services director position contained a position description which included the physical requirements of the position and conforms with those specified by his attending physician. Appellant has produced no evidence that he required special assistance to perform the tasks of the job or that the job was seasonal.[11] His successful completion of specialized training in the University of Pittsburgh MRI program, request for reimbursement of expenses and other letters to the Office, indicate that as of 1993 appellant acquired experience in a hospital setting and learned skills upon which he was hired in the education services director position. This contemporary evidence is much more probative than his former wife's brief note that appellant did not know what he was doing as she had written his papers while in college. For these reasons, appellant has not shown that the Office's original determination with regard to his wage-earning capacity was erroneous.

[9] *George W. Coleman*, 38 ECAB 782, 788 (1987); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

[10] *Jack E. Rohrabaugh*, 38 ECAB 186, 190 (1986).

[11] *See Champlain*, *supra* note 8 at 440-41, where the Board noted that the record contained a position description which included the physical requirements of the position. The Board compared the facts in that case with *Elizabeth E. Campbell*, 37 ECAB 224 (1985), where due to her age and limited education, she was able to obtain a position only through direct job placement search by a vocational rehabilitation service. This position was also considered seasonal, unlike the job with CEAHEC, and might have been make-shift because it allowed the use of a partner to lift cartons and was eliminated when the employee was laid off.

The decision of the Office of Workers' Compensation Programs dated August 27, 2001 is hereby affirmed.

Dated, Washington, DC
January 15, 2004

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member