United States Department of Labor
Employees' Compensation Appeals Board

ROBERT A. FLINT, Appellant	
and	**Docket No. 05-796**
	Issued: December 2, 2005
DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, CRATER LAKE NATIONAL PARK, Crater Lake, OR, Employer	

Appearances:
Robert A. Flint, *pro se*
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 18, 2005 appellant filed a timely appeal of a decision of the Office of Workers' Compensation Programs dated May 25, 2004 regarding his rate of pay and a December 6, 2004 decision, finding that the temporary position of office automation clerk properly represented his wage-earning capacity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether the Office properly determined appellant's rate of pay for purposes of calculating his compensation benefits for the period July 14, 1999 and continuing; and (2) whether the Office properly determined that appellant's actual earnings in the position of temporary office automation clerk fairly and reasonably represented his wage-earning capacity. On appeal, appellant asserts that the Office's vocational rehabilitation program and procedures for determining suitable work constituted an abuse of discretion and violated his exercise of freedom of religion regarding his beliefs concerning the nature and purpose of work. He contended that the Office should have allowed him to continue with a vocational rehabilitation

training program for computer assisted drafting, rather than as a clerk, which he found unsatisfying.

FACTUAL HISTORY

This is appellant's second appeal before the Board. By decision issued October 14, 2003,[1] the Board reversed decisions of the Office dated April 3, 2002 and January 3, 2003, finding that it failed to meet its burden of proof to reduce appellant's compensation to zero effective April 7, 2002 based on his potential earnings in the selected position of hotel clerk. The Board found that the Office failed to establish that appellant was able to perform frequent lifting up to 10 pounds as the position required. The Office also failed to submit the hotel clerk position description to appellant's physician for review. The law and the facts of the case as set forth in the Board's October 14, 2003 decision are hereby incorporated by reference.[2]

The Office accepted that on July 14, 1999 appellant, then a 47-year-old seasonal maintenance worker, sustained a right elbow fracture requiring surgical debridement on May 1, 2000 with subsequent post-traumatic arthritis of the right elbow. The employing establishment noted that prior to the accepted injury, appellant worked 46 days for a total of 368 hours. He remained off work.[3]

In February 17 and April 21, 2004 letters, appellant contended that the Office should have based his compensation beginning July 14, 1999 on the salary of a full-time maintenance worker and not on his actual earnings as a seasonal maintenance worker.[4]

In a May 10, 2004 letter, the employing establishment stated that appellant's date-of-injury position as a WG-5 maintenance worker was seasonal, limited to nine pay periods, with a salary of $12.30 an hour. The employing establishment noted that a "similarly employed federal employee the prior year would have a gross income of $8,856.00." This amount was based on multiplying the $12.30 hourly wage by the 720 hours in 9 pay periods.

[1] Docket No. 03-1148 (issued October 14, 2003).

[2] Following issuance of the Board's October 14, 2003 decision, the Office made appropriate retroactive adjustments to appellant's compensation and replaced his case on the periodic rolls.

[3] In a March 2, 2004 report, Dr. John W. Ellis, a Board-certified family practitioner and second opinion physician, opined that appellant required additional surgery to the right elbow due to post-traumatic arthritis. He also opined that appellant was entitled to an additional schedule award for nine percent permanent impairment of the right elbow due to the resection arthroplasty and limited range of motion. Dr. Ellis found appellant totally disabled for work from July 14, 1999 to March 2, 2004, "except for one week in February 2000." He noted that appellant had reached maximum medical improvement as of August 16, 2000. In a July 5, 2004 letter, appellant asserted that he was entitled to an additional schedule award based on Dr. Ellis' opinion. The Board notes that there is no decision of record addressing Dr. Ellis' opinion that appellant was entitled to an augmented schedule award.

[4] To determine appellant's physical limitations, the Office referred appellant to Dr. John M. Coletti, a Board-certified orthopedic surgeon, for a second opinion examination on April 9, 2004. In a May 15, 2004 letter, Dr. Coletti opined that appellant was unable to perform the position of hotel clerk as he could not perform the frequent lifting required.

By decision dated May 25, 2004, the Office denied appellant's claim for "compensation based upon the salary of a regular full[-]time employee for the period July 14, 1999" and continuing. The Office found that appellant was a part-time seasonal worker not expected to work more than nine pay periods a year. Therefore, his compensation was calculated according to 20 C.F.R. § 10.216(b)(3), pertaining to the calculation of continuation of pay for "intermittent or irregular workers not part of an agency's regular full-time or part-time workforce." The Office noted that the time of the accepted July 14, 1999 right elbow fracture, appellant had been employed for less than one year as a seasonal maintenance mechanic with wages of $12.30 an hour. The Office calculated his pay rate by multiplying the hourly wage of $12.30 by 8 hours a day, equaling $98.40. Using the mathematical formula set forth at 20 C.F.R. § 10.216(b)(3), the Office multiplied the daily pay rate by 150 days worked, equaling $14,760.00 year or $283.85 a week.[5]

On May 28, 2004 the Office referred appellant for vocational rehabilitation. In a June 25, 2004 report, Bruce E. McLean, a vocational rehabilitation counselor, recommended placing appellant with his previous employer.

On July 1, 2004 the employing establishment offered appellant a temporary position as an office automation clerk,[6] classified as GS-0326-04, with an hourly salary of $11.43. The position description noted that the job was temporary, not to exceed 91 days. Duties would be shared between the administrative offices and the fee collection division. For half of the workday, the position required word processing, data entry, filing, sorting incoming mail and preparing outgoing mail. During the remainder of the day, appellant would perform clerical duties related to the fee collection program, including monitoring fee collections, which required operating a motor vehicle. The physical demands involved sedentary clerical work, lifting up to 10 pounds and sitting and standing up to 4 hours.

Appellant returned to work at the employing establishment on July 6, 2004 in the office automation clerk position, with unspecified accommodations due to the July 14, 1999 injury. The base pay for the clerk position was $11.43 an hour.

In an August 9, 2004 report, Mr. McLean noted that appellant was working successfully in the clerk position, reporting no problems with his assigned job duties. In a September 7, 2004 report, Mr. McLean recommended closing the vocational rehabilitation effort as appellant had been "doing well" for more than 60 days and was "efficient enough that some supervisors [were] competing" for appellant's time.

On October 5, 2004 appellant filed a claim for compensation (Form CA-7) for wage loss from October 5 to 15, 2004. On the reverse of the form, the employing establishment noted that appellant was placed on restricted duty as of October 5, 2004 due to his elbow. The employing

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[5] In a June 14, 2004 letter, appellant requested an oral hearing before a representative of the Office's Branch of Hearings and Review regarding the Office's May 25, 2004 decision. In a July 14, 2004 letter, the Office's Branch of Hearings and Review advised appellant that they had received his request for a hearing and obtained his case record. The hearing was scheduled for January 4, 2005. There is no final decision of record from the Branch of Hearings and Review pursuant to the January 4, 2005 hearing.

[6] U.S. Department of Labor, *Dictionary of Occupational Titles* No.209.562-010.

establishment noted that appellant's current pay rate was $11.43 an hour and that current pay rate for date-of-injury position was $14.05 an hour.

Appellant was terminated from the employing establishment effective October 15, 2004. On October 26, 2004 appellant filed a claim for compensation (Form CA-7) for the period October 15, 2004 and continuing.

By decision dated December 6, 2004, the Office reduced appellant's compensation effective July 6, 2004 based on his actual earnings from July 6 to October 15, 2004 as a temporary office automation clerk. The Office found that the position fairly and reasonably represented his wage-earning capacity as he had performed the job successfully for more than 60 days, indicating that it was "suitable to [his] partially disabled condition." The Office further found that as appellant's date-of-injury position was temporary, the position in which he was reemployed was appropriate. The Office noted that the current weekly pay rate for appellant's job and step when injured was $324.23 as of July 6, 2004 and that his actual weekly earnings in his current job were $263.77, resulting in a 19 percent loss of wage-earning capacity.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act provides for different methods of computation of average annual earnings depending on whether the employee worked in the employment in which he was injured substantially for the entire year immediately preceding the injury[7] and would have been afforded employment for substantially a whole year, except for the injury.[8]

Section 8114(d) of the Act provides, in pertinent part:

"(d) Average annual earnings are determined as follows --

> (1) If the employee worked in the employment in which he was employed at the time of injury during substantially the whole year immediately preceding the injury and the employment was in a position for which an annual rate of pay --
>
> > (A) was fixed, the average annual earnings are the rate of pay; or
> >
> > (B) was not fixed, the average annual earnings are the product obtained by multiplying his daily wage for the particular employment, or the average thereof if the daily wage has fluctuated, by 300 if he was employed on the basis of a 6-day workweek, 280 if employed on the basis of a 5 1/2-day week and 260 if employed on the basis of a 5-day week.

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[7] *See John D. Williamson*, 40 ECAB 1179 (1989). The employee worked in a part-time position for a period of over one year, but had not demonstrated the capacity to earn wages concurrently as a full-time employee for one year prior to the employment injury.

[8] 5 U.S.C. §§ 8114(d)(1)-(2); *see Billy Douglas McClellan*, 46 ECAB 208 (1994).

(2) If the employee did not work in employment in which he was employed at the time of his injury during substantially the whole year immediately preceding the injury, but the position was one which would have afforded employment for substantially a whole year, the average annual earnings are a sum equal to the average annual earnings of an employee for the same class working substantially the whole immediately preceding year in the same or similar employment by the United States in the same or neighboring place, as determined under paragraph (1) of this subsection."[9]

If sections 8114(d)(1) and (2) of the Act are not applicable, such as in cases where the date-of-injury employment was seasonal work that would not have provided employment for substantially the whole year preceding the injury, section 8114(d)(3) provides as follows:

> "If either of the foregoing methods of determining the average annual earnings cannot be applied reasonably and fairly, the average annual earnings are a sum that reasonably represents the annual earning capacity of the injured employee in the employment in which he was working at the time of injury having regard to the previous earnings of the employee in [f]ederal employment and of other employees of the United States in the same or most similar class working in the same or most similar employment in the same or neighboring location, other previous employment of the employee, or other relevant factors. However, the average annual earnings may not be less than 150 times the average daily wage the employee earned in the employment during the days employed within one year immediately preceding his injury."[10]

ANALYSIS -- ISSUE 1

The evidence shows that appellant did not work in the employment in which he was injured for substantially the entire year immediately preceding the July 14, 1999 injury.[11] Prior to the July 14, 1999 injury, appellant worked for only 46 days. The evidence also shows that appellant would not have been afforded employment for substantially a whole year, as his position was seasonal, not to exceed nine pay periods. For these reasons, the Office should have applied section § 8114(d)(3) of the Act[12] to the computation of appellant's pay rate.[13] This section specifies that an employee's "average annual earnings may not be less than 150 times the

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[9] 5 U.S.C. §§ 8114(d)(1)-(2).

[10] 5 U.S.C. § 8114(d)(3).

[11] The phrase "substantially for the entire year" has been interpreted to mean at least 11 months; *see* Federal (FECA) Procedure Manual, Part 2 -- *Claims, Determining Pay Rates*, Chapter 2.900.4(a) (December 1995).

[12] 5 U.S.C. § 8114(d)(3).

[13] *Ricardo Hall*, 49 ECAB 390 (1998).

average daily wage the employee earned in the employment during the days employed within one year immediately preceding his injury."[14]

In its May 25, 2004 decision, the Office did not refer to section 8114(d)(3). Instead, the Office used the mathematical formula set forth at 20 C.F.R. § 10.216(b)(3), under the implementing regulations dealing with calculation of continuation of pay for a claimant who is not a full-time worker. The Board notes that the formulae for the calculation of minimal annual earnings are identical, both requiring a minimum of 150 times the average earned daily wage during the period immediately preceding the accepted injury. Therefore, the Office's reference to section 10.216(b)(3) of the implementing regulations was harmless error. The Office used the correct formula to determine that appellant's actual hourly earnings of $12.30, multiplied by 8 hours a day, equaled $98.40. The Office multiplied this daily rate by the minimum 150 days, equaling $14,760.00 a year or $283.85 a week. Therefore, the Office based appellant's compensation on the correct actual weekly earnings according to the appropriate mathematical formula.

LEGAL PRECEDENT -- ISSUE 2

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages. Compensation payments are based on the wage-earning capacity determination.[15]

It is well established that, once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.[16] Once the wage-earning capacity of an injured employee 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.[17] Section 8115(a) of the Act[18] provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his actual earnings if his actual earning fairly and reasonably represent his wage-earning capacity.[19] 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 a measure.[20]

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[14] 5 U.S.C. § 8114(d)(3).

[15] *See Sharon C. Clement,* 55 ECAB ____ (Docket No. 01-2135, issued May 18, 2004).

[16] *See Lawrence D. Price*, 47 ECAB 120 (1995); *Charles E. Minniss*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

[17] *Katherine T. Kreger*, 55 ECAB ___ (Docket No. 03-1765, issued August 13, 2004); *Sue A. Sedgwick*, 45 ECAB 211 (1993).

[18] 5 U.S.C. §§ 8101-8193.

[19] 5 U.S.C. § 8115(a); *Loni J. Cleveland*, 52 ECAB 171 (2000).

[20] *Stanley B. Plotkin*, 51 ECAB 700 (2000).

ANALYSIS -- ISSUE 2

In the present case, appellant was employed in a seasonal, part-time position on the date of injury. The Office reduced his compensation effective July 6, 2004 based on his actual earnings as a temporary office automation clerk. As appellant was a temporary employee on the date of injury, his subsequent employment in a temporary position was not erroneous.[21] Appellant performed the position from July 6 to October 4, 2004 without incident, a period of more than 60 days. There is no evidence of record that appellant required special assistance to perform the tasks of the job as listed in the detailed position description provided.[22] Also, there is no evidence of record, and appellant does not contend, that the duties listed on the position description were not within his medical restrictions at the time the offer was made. The Board finds that the office automation clerk job properly represented appellant's wage-earning capacity. Therefore, the Office's reduction of appellant's compensation based on his actual earnings in that position was proper.

CONCLUSION

The Board finds that the Office properly calculated appellant's rate of pay, using an appropriate formula to determine his actual earnings for compensation purposes. The Board further finds that the Office properly found that the position of office automation clerk properly represented his wage-earning capacity.

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[21] *Penny L. Baggett*, 50 ECAB 559 (1999).

[22] *Selden H. Swartz*, 55 ECAB ___ (Docket No. 02-1164, issued January 15, 2004) at fn. 11. *See also James D. Champlain*, 44 ECAB 438, 440-41 (1993), where the Board noted that the record contained a position description which included the physical requirements of the position, indicating that it was not a makeshift position.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 6 and May 25, 2004 are affirmed.

Issued: December 2, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board