United States Department of Labor
Employees' Compensation Appeals Board

SHERMAN PRESTON, Appellant	)	
and	)	**Docket No. 05-721**
	)	**Issued: June 20, 2005**
U.S. SENATE, CAPITOL BUILDING, Washington, DC, Employer	)	

Appearances:
Sherman Preston, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On February 3, 2005 appellant filed a timely appeal of a January 5, 2005 decision of the Office of Workers' Compensation Programs, denying modification of a May 17, 2004 wage-earning capacity determination. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly determined that the constructed position of bus driver represented appellant's wage-earning capacity.

FACTUAL HISTORY

On May 18, 2001 appellant, then a 47-year-old facilities worker, filed an occupational disease claim (Form CA-2) alleging that he sustained bilateral carpal tunnel syndrome as a result of his federal employment. Appellant stopped working as of May 18, 2001. On July 23, 2001 the Office accepted the claim for bilateral carpal tunnel syndrome.

The Office referred appellant for vocational rehabilitation services. The record contains evidence of payments made to appellant from a private charter company, MCT Tours, commencing January 13, 2003. It is not clear what job appellant was performing at that time. A vocational rehabilitation report dated April 9, 2003 indicated that constructed positions, including bus driver, had been identified as appropriate for appellant. An OWCP-66 form dated April 3, 2003 indicated that the position of bus driver was available full time with wages of $11.20 per hour. In a letter dated August 22, 2003, the Office indicated that an agreement with MCT Tours had been reached for appellant to work as a bus driver starting September 1, 2003 at an annual salary of $25,000.00. The agreement stated that the Office would reimburse MCT Tours for 75 percent of the annual salary from September 1, 2003 to March 1, 2004.

According to a rehabilitation report dated February 11, 2004, appellant stopped working at MCT Tours on December 18, 2003, stating that he was not paid overtime or holiday pay and was owed money by the company. The report stated that appellant began working as a bus driver for a public school system on December 22, 2003, with a minimum of 20 hours per week at $10.03 per hour.

In a letter dated April 4, 2004, the Office advised appellant that it proposed to reduce his compensation on the grounds that his wage-earning capacity was represented by the selected position of bus driver, DOT No. 53-3021.00, at wages of $448.00 per week. The Office stated that the physical requirements did not exceed work tolerance limitations. In a letter dated May 1, 2004, appellant stated that his salary as public school bus driver was limited to 10 months per year, and he submitted pay stubs from his school employment.

By decision dated May 17, 2004, the Office finalized the proposed reduction of compensation. In a letter dated May 21, 2004, appellant requested reconsideration and again submitted copies of pay stubs from his public school employment. In a decision dated January 5, 2005, the Office denied modification of the wage-earning capacity determination. The Office stated that appellant had demonstrated the capacity to work 40 hours per week by working full time for MCT Tours. With respect to the public school employment, the Office stated, "wages from the Prince George's County Public School System do not fairly and reasonably represent your wage-earning capacity because you have the capacity to work 40 hours as a bus driver."

LEGAL PRECEDENT

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.[1]

Under section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, his degree of physical

[1] *Carla Letcher*, 46 ECAB 452 (1995).

impairment, his usual employment, his age, his 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.[2]

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case 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 market, that fits the employee's capabilities with regard to his or her physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the labor market should be made through contact with the state employment service or other applicable service.[3] 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.[4]

ANALYSIS

The Office's wage-earning capacity determination in this case was based on the selected position of bus driver, DOT No. 53-3021.00. The record also indicates that appellant had actual earnings as a bus driver, working for MCT Tours until December 18, 2003 and then working as a bus driver for the Prince George's County Public School System as of December 22, 2003. It is well established that, if a claimant has actual earnings, the Office cannot use a selected position unless it makes a proper determination that actual earnings do not fairly and reasonably represent wage-earning capacity.[5] On reconsideration, the Office made a finding that the public school bus driver position did not fairly and reasonably represent wage-earning capacity because appellant could work 40 hours per week. The Board notes, however, that the Office did not make findings as to how many hours appellant actually worked per week as a school bus driver. The rehabilitation specialist indicated that the job offered a minimum of 20 hours per week, but it is not clear from the pay stubs how many hours appellant was working. The basis for the finding as to work capacity was that appellant had previously worked 40 hours per week.

The Board therefore finds that the Office did not make adequate findings with respect to whether appellant's actual earnings as a school bus driver fairly and reasonably represented his wage-earning capacity. It is the Office's burden of proof to secure the necessary evidence and to make proper findings on the issue of wage-earning capacity. The Office did not meet its burden of proof in this case.

CONCLUSION

The Board finds that the Office failed to make adequate findings with respect to whether appellant's actual earnings fairly and reasonably represented his wage-earning capacity. Since

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[2] *See Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); *see also* 5 U.S.C. § 8115(a).

[3] *See Dennis D. Owen*, 44 ECAB 475 (1993).

[4] 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.403.

[5] *See Daniel Renard,* 51 ECAB 466 (2000).

the Office did not make proper findings with respect to actual earnings, it was premature to use the constructed position of bus driver for a wage-earning capacity determination.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 5, 2005 and May 17, 2004 are reversed.

Issued: June 20, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member