United States Department of Labor
Employees' Compensation Appeals Board

LEE Z. WATSON, Appellant	)	
and	)	**Docket No. 04-2176**
	)	**Issued: March 1, 2005**
TENNESSEE VALLEY AUTHORITY, WIDOWS CREEK FOSSIL PLANT, Stevenson, AL, Employer	)	

Appearances:
Lee Z. Watson, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On September 7, 2004 appellant filed a timely appeal from the February 5 and August 17, 2004 merit decisions of the Office of Workers' Compensation Programs, which reduced his compensation to zero and found that he was at fault in the creation of a subsequent overpayment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review these decisions.

ISSUES

The issues are: (1) whether the Office properly modified its 1996 wage-earning capacity determination; (2) whether appellant received an overpayment of $1,791.43 in compensation from February 22 through May 15, 2004; and (3) whether he was at fault in creating the overpayment, thereby, precluding waiver.

FACTUAL HISTORY

On January 10, 1988 appellant, then a 50-year-old full-time laborer, sustained an injury in the performance of duty when he carried two buckets down a steep grade, slipped and fell on his

back. The Office accepted his claim for back strain and facet syndrome. He received compensation for temporary total disability on the periodic rolls.

On December 20, 1995 appellant advised the Office that he was earning wages as a personal care attendant:

> "Currently I am employed by Mrs. Anne Ballard as a personal care attendant for her husband, Jim Ballard. I make $10.00 per hour, [24] hours per week. I work three days, because of the distance I have to drive to work. The Ballards pay $10[.00] per hour only because I work part time. I do not expect to become a full[-]time employee for the Ballards. In this situation I am self-employed as a contract worker. This means that I am responsible for paying my own social security and income taxes from the $240[.00] a week the Ballards pay me. This employment began on October 30, but then I was working only 20 hours per week.
>
> "My duties for [the] Ballards are to assist Mr. Ballard in getting up, getting a shower, drying him, and applying lotion to his arms and legs. I then assist him in getting dressed and to the breakfast table. I prepare a light breakfast, make the bed and clean the kitchen. I then drive Mr. Ballard to Siskin Hospital for therapy, and drive him to other places that he needs to go to. I sometimes assist him with shopping or other errands. I also do some light house work, such as changing light bulbs and sweeping off the terrace. Most of my time however is spent attending to Mr. Ballard."[1]

The Office rehabilitation counselor reported that appellant's wage-earning capacity should be based on his actual income, even though he was not working 40 hours a week: "I feel that he would not be able to make more than $240[.00] per week in a full-time job, if he were to find something else in the open labor market." On March 5, 1996 the Office reduced appellant's compensation to reflect actual earnings of $240.00 per week as a personal care attendant. The Office found that these earnings fairly and reasonably represented his wage-earning capacity.[2]

In 2002 the Social Security Administration informed the Office that appellant earned $88,364.50 in 2000 and $95,253.00 in 2001 as an employee of H. Clay Evans Johnson "Interstate Life Ins Co." On January 13, 2003 the Office asked appellant to provide the name of the company, the job title, a brief description of the duties performed, the weekly rate of pay, all changes in rate of pay and the approximate date of each change for this employment. On March 3, 2003 appellant completed a Form EN1032 indicating that he had worked all of the past 15 months and that Mr. Johnson currently paid him $15.00 an hour to sit with the elderly. Two

[1] Appellant added as a postscript that his hours varied considerably from 7 to 10 hours a day as needed.

[2] *But see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7.a. (December 1995). To determine whether the claimant's work fairly and reasonably represents his or her wage-earning capacity, the Office should consider whether the kind of appointment and tour of duty are at least equivalent to those of the job held on date of injury. For instance, reemployment may not be considered suitable when the job is part time (unless the claimant was a part-time worker at the time of injury) or sporadic in nature.

days after receiving this information, the Office again asked appellant to provide the name of the company, the job title, a brief description of the duties performed, the weekly rate of pay, all changes in rate of pay and the approximate date of each change for his 2000 and 2001 employment. On April 29, 2003 the Office made a third and final request for appellant to submit this information and notified him of the consequences for failing to do so:

> "This letter serves as a third and final request for you to submit the requested information listed above. According to FECA PM 2-0812-10: 'The claimant's failure to supply requested information may result in suspension or forfeiture of compensation.' If you fail to submit the requested information within 30 days from the date of this letter, your compensation benefits will be formally suspended until such time that you do submit the requested information."

On April 5, 2003 appellant completed another Form EN1032[3] indicating that Holly C. Armistead paid him $15.50 an hour for "sitting with elderly." The Office requested an earnings report from the Social Security Administration for the period January 1, 2002 through August 1, 2003, but no response appears in the record.

On October 1, 2003 the Office notified appellant that it was proposing to reduce his compensation for wage loss. The Office explained: "One of the grounds upon which it may be determined that you have been vocationally rehabilitated is if you earn substantially more in the job for which you were rated. This situation may occur where you returned to part-time duty and was rated on that basis, but later increased your hours to full-time work." The Office compared the $240.00 a week appellant earned in his part-time position as a personal care attendant in 1996 to the $88,364.40 he earned in 2000 and $95,253.00 he earned in 2001, "which represents substantially more than a 25 percent increase in salary for you." This demonstrated, the Office concluded, that the previous wage-earning capacity determination should be modified to reflect that appellant had been vocationally rehabilitated from part-time to full-time employment as a personal care attendant with Mr. Johnson, and that his salary in that position now reflected his true wage-earning capacity.

In a decision dated February 5, 2004, the Office modified its 1996 wage-earning capacity determination on the grounds that "your rehabilitation improved your medical condition enabling you to go from part time to full time and you are capable of performing the duties of Personal Care Attendant." The Office noted:

> "In 1996 at the time of our previous decision, your salary as a Personal Care Attendant, 24 hours per week at $10[.00] per hour, was $12,480[.00] per year or $240[.00] per week. The information we received from Social Security Administration for the year 2000 was $88,364.50 and 2001 was $95,253.00 as an employee of Clay Evans Johnson, which represents more than 100 percent increase in salary for you."

[3] The Office received this form on August 11, 2003.

Because the Office determined that his rate of pay was higher than the current rate of pay of his date-of-injury position, the Office reduced his compensation to zero. The Office notified him that this reduction would be effective February 22, 2004.

On June 4, 2004 the Office made a preliminary finding that appellant received an overpayment of $1,791.43 from February 22 through May 15, 2004 because it continued to issue compensation for wage loss after he was no longer entitled to such compensation. The Office also made a preliminary finding that appellant was at fault.

The Office attempted to set up a conference call to discuss the issue and to address repayment. Appellant advised that he would not hold a conference because the decision to stop his compensation was wrong.

In a decision dated August 17, 2004, the Office found that appellant received an overpayment of $1,791.43 in compensation from February 22 through May 15, 2004. The Office further found that he was at fault in creating the overpayment:

> "I had tried to contact you on July 7, 2004, and mailed you a letter dated July 16, 2004, in order to hold a conference to discuss the overpayment and findings of fault. You called me back on July 16, 2004, and stated that you did not want to take part in a conference, as you totally disagreed with the overpayment. I explained that without a conference to gather additional information regarding fault finding and the overpayment amount I would have to make a decision based on what I had.
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> "This Office failed to stop your compensation payments until May, 15, 2004, despite the fact that you were issued a February 5, 2004, decision reducing his compensation payments to zero, effective February 22, 2004. You have not returned any of the checks issued to you after February 22, 2004. Based on the above, you have been found to be with fault in the matter of the overpayment."

LEGAL PRECEDENT -- ISSUE 1

The United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.[4] If the disability is partial, the United States shall pay the employee during the disability monthly monetary compensation equal to $66^{2}/_{3}$ percent of the difference between his monthly pay and his monthly wage-earning capacity after the beginning of the partial disability, which is known as his basic compensation for partial disability.[5]

In determining compensation for partial disability, an employee's wage-earning capacity is determined by actual earnings if the actual earnings fairly and reasonably represent his wage-

[4] 5 U.S.C. § 8102(a).

[5] *Id*. at § 8106(a); *see id. at* § 8110 (augmented compensation for dependents).

earning capacity.[6] 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.[7]

Once a loss of wage-earning capacity is established, 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.[8] The burden of proof is on the party attempting to show modification of the award.[9]

ANALYSIS -- ISSUE 1

On March 5, 1996 the Office determined that appellant's earnings as a part-time personal care attendant fairly and reasonably represented his wage-earning capacity. The burden of proof is therefore on the Office to justify its modification of this determination.

The Office found that a substantial increase in earnings in 2000 and 2001 demonstrated that appellant was vocationally rehabilitated from part-time to full-time employment as a personal care attendant.[10] According to the Office's procedure manual, it may be appropriate to modify a rating on grounds that the claimant has been vocationally rehabilitated if the claimant is either earning substantially more in the job for which he was rated or is employed in a new job (*i.e.*, a job different from the job for which he was rated) that pays at least 25 percent more than the current pay of the job for which he was rated.[11] The Office found that appellant was earning substantially more in the job for which he was rated.

But this alone does not justify a modification of the prior decision. The Office's procedure manual goes on to state that if the conditions above are met, and earnings have continued for at least 60 days, the Office should: (1) determine the duration, exact pay, duties and responsibilities of the current job; (2) determine whether the claimant underwent training or vocational preparation to earn the current salary; and (3) assess whether the actual job differs significantly in duties, responsibilities or technical expertise from the job at which the claimant was rated. If the results of this investigation establish that the claimant is rehabilitated or self-

[6] *Id*. at § 8115(a).

[7] *Don J. Mazurek*, 46 ECAB 447 (1995).

[8] *Elmer Strong*, 17 ECAB 226 (1965).

[9] *Daniel J. Boesen*, 38 ECAB 556 (1987).

[10] Although the Office stated that the rehabilitation improved appellant's medical condition, there is no evidence of a material change in the nature and extent of his injury-related condition.

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.10.c (December 1993).

rehabilitated, or if the evidence shows that the claimant was retrained for a different job, compensation may be redetermined using the *Shadrick* formula.[12]

The Office did not conduct this investigation, or it did not obtain sufficient results from its attempted investigation to justify modification based on increased earnings. The Office modified its 1996 wage-earning capacity determination solely on the observation that appellant's earnings in 2000 and 2001 showed that he was earning substantially more in the job for which he was rated. Although wages actually earned are generally the best measure of a wage-earning capacity,[13] once the wage-earning capacity of an injured employee is properly determined, it remains undisturbed regardless of actual earnings or lack of earnings.[14] Moreover, there is no proof in this case that appellant earned the reported $88,364.50 in 2000 and $95,253.00 in 2001 working as a personal care attendant. The Social Security Administration indicated only that he worked for Mr. Johnson "Interstate Life Ins Co." It did not state what Mr. Johnson paid him for. When the Office assumed that it was for sitting with the elderly because appellant disclosed that Mr. Johnson paid him $15.00 an hour for that purpose in 2002 and early 2003, it was just guessing; there is no direct evidence what appellant did in 2000 and 2001 to earn the money in question.[15] Three times he failed to respond to the Office's questions about his 2000 and 2001 earnings, and although the Social Security Administration provided the Office with the employer's name and address, the Office sought no information from him.[16]

The record is thus one of substantially higher earnings in 2000 and 2001 with no probative evidence of appellant's duties and responsibilities, no probative evidence that he underwent any training or vocational preparation, and no probative evidence on whether that job differed significantly in duties, responsibilities or technical expertise from the job in which he was rated. The Office did not meet its burden of proof.

CONCLUSION

The Office improperly modified its 1996 wage-earning capacity determination. The evidence fails to establish that appellant was vocationally rehabilitated. The Board will reverse the Office's February 5, 2004 decision and remand the case for payment of appropriate

[12] For the *Shadrick* formula itself, see *id*., *Computation of Compensation*, Chapter 2.0900.16.c (January 1991). *See generally Albert C. Shadrick* , 5 ECAB 376 (1953).

[13] *See supra* text accompanying notes 6 and 7.

[14] *Ronald Masao Yokota*, 33 ECAB 1629 (1982) (Actual wages or earnings received after disability, while evidence of wage-earning capacity, are not conclusive; ability to earn, rather than wages actually received, is generally regarded as the test). *Cf. Elden H. Tietze*, 2 ECAB 38 (1948) (once wage-earning capacity has been established -- and by this is meant properly established on the basis of the evidence -- there should be no reason to alter the established wage-earning capacity or the compensation rate unless the physical impairment should become greater or less.)

[15] If the Office assumed correctly, appellant sat with the elderly 16.1 hours a day, everyday of the year in 2000 and 17.4 hours a day, every day of the year, in 2001.

[16] Appellant's failure to respond caused the Office to threaten suspension or forfeiture of compensation, not a reduction based on modified wage-earning capacity.

compensation. The second and third issues on appeal, which relate to an overpayment arising as a result of the Office's February 5, 2004 decision to reduce appellant's compensation to zero, are moot.

ORDER

IT IS HEREBY ORDERED THAT the February 5, 2004 decision of the Office of Workers' Compensation Programs is reversed. The Office's August 17, 2004 overpayment decision is set aside and the case remanded for payment of appropriate compensation.

Issued: March 1, 2005
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member