

**United States Department of Labor
Employees' Compensation Appeals Board**

C.L., Appellant)

and)

DEPARTMENT OF AGRICULTURE,)
FEDERAL GRAIN INSPECTION SERVICE,)
Crowley, LA, Employer)

Docket No. 06-1214
Issued: November 29, 2006

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 9, 2006 appellant filed a timely appeal of an April 25, 2006 decision of the Office of Workers' Compensation Programs adjudicating 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 this case.

ISSUE

The issue is whether the Office properly reduced appellant's compensation as of April 21, 2006 on the grounds that a constructed position described as "small business owner/lawn care" with wages of \$600.00 per week represented his wage-earning capacity.

FACTUAL HISTORY

The case was before the Board on a prior appeal.¹ In addition to forfeiture and overpayment issues, the Board addressed the Office's attempt to reduce appellant's

¹ Docket No. 04-1789 (issued February 7, 2006).

compensation on the grounds that he had the ability to earn wages of a small business owner. The Board noted that the Office did not provide a prereduction notice and failed to identify the specific job number of the selected position in the Department of Labor's *Dictionary of Occupational Titles* (DOT) or provide evidence regarding wage information. The history of the case is provided in the prior decision and is incorporated herein by reference.

The Office referred the case to a vocational rehabilitation specialist "to develop one CA-66 [a job classification form] for a small business owner." The rehabilitation specialist completed a single Form CA-66 job classification identifying two job titles: service manager (DOT No. 187.167-142)² and small engine mechanic (DOT No. 625.281-034). The job description states that the position involved managing a lawn equipment repair establishment. The wages reported were \$600.00 per week and the rehabilitation specialist stated that the position was available in appellant's commuting area. In an accompanying statement, the rehabilitation specialist indicated that the CA-66 entailed two job classifications to fully describe the nature and duties of the work. He further stated: "There is no labor market information readily available for a lawn care equipment repair business owner; therefore, two sources of information were used." Based on information from the Louisiana Department of Labor, small engine mechanics earned \$9.17 to \$10.88 per hour in appellant's area. The specialist then stated that individuals in the area who operate lawn equipment repair business were contacted and the "overall consensus" was that someone with 20 years experience would earn at least \$15.00 per hour.

By letter dated March 21, 2006, the Office advised appellant that it proposed to reduce his compensation on the grounds that he had the ability to earn wages of \$600.00 per week as a small business owner/lawn care. By decision dated April 25, 2006, the Office reduced appellant's compensation based on a wage-earning capacity of \$600.00 per week in the selected position.

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.³

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

² An alternate title for this position is manager, service department (wholesale tr.).

³ *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.⁴

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 DOT 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.⁵ 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.⁶

ANALYSIS

In the present case, the Office referred the case to a rehabilitation specialist for determination of relevant information regarding a position of small business owner. The Board notes that there is no position of small business owner or small business owner/lawn care, in the DOT. A specific position in the DOT will have a job description and there will be market information available on the selected position. The rehabilitation specialist identified two other positions and then appeared to write a job description that attempted to adapt the description provided for service manager (DOT No. 187.167-142) to a lawn care equipment repair business.

While there may be circumstances where a position "available in the open market" is appropriate for a wage-earning determination, the evidence in this case does not establish the selected position was appropriate. A position of business "owner" raises a number of issues which are not adequately addressed by the Office or the rehabilitation specialist. With respect to availability, the rehabilitation specialist stated: "Lawn equipment repair companies were consulted and several job openings found to be available." But the position selected was not a specific job available at existing lawn equipment repair companies, it was as an "owner" of a small lawn care business. It is not clear how the determination of reasonable availability can be made for the selected position. The ownership of a business raises considerations that are not addressed by the number of such jobs being performed in a commuting area. Ownership of a business requires starting capital and involves other issues not found in a position listed in the DOT.

In addition, there is the issue of determining the wages of the selected position in this case. The rehabilitation specialist acknowledged that no market information was available for such a position. The wage information was drawn from unidentified businesses and it refers to an individual with 20 years experience. The selected position was not a service manager position. Neither the rehabilitation specialist nor the Office attempted to discuss the inherent

⁴ See *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); see also 5 U.S.C. § 8115(a).

⁵ See *Dennis D. Owen*, 44 ECAB 475 (1993).

⁶ 5 ECAB 376 (1953); see also 20 C.F.R. § 10.303.

difficulty of adequately determining the wages of an “owner” of a small business. The earnings of an owner of a business are dependent on a variety of circumstances, regardless of prior experience and it is not clear how wages of a lawn care business owner can properly be determined. The Board finds that the Office did not properly establish appellant’s wage-earning capacity.

It is, as noted above, the Office’s burden of proof to reduce compensation. The evidence of record does not establish the selected position was proper for a wage-earning capacity determination in this case.

CONCLUSION

The Office did not properly determine that appellant’s wage-earning capacity was represented by a position described as small business owner/lawn care.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers’ Compensation Programs dated April 25, 2006 is reversed.

Issued: November 29, 2006
Washington, DC

David S. Gerson, Judge
Employees’ Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees’ Compensation Appeals Board