United States Department of Labor
Employees' Compensation Appeals Board

B.G., Appellant	)	
and	)	
SMITHSONIAN INSTITUTION, OFFICE OF PROTECTION SERVICES, NATURAL HISTORY MUSEUM, Washington, DC, Employer	)	**Docket No. 09-1671** **Issued: May 14, 2010**

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 June 22, 2009 appellant filed a timely appeal of the March 12, 2009 decision of the Office of Workers' Compensation Programs, which reduced his compensation benefits to zero. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUE

The issue is whether the Office properly determined that appellant's actual earnings fairly and reasonably represented his wage-earning capacity.

On appeal, appellant contends that he is disabled and unable to earn the wages he received while working for the employing establishment and that the Office based its decision reducing his compensation benefits to zero on a job he held for less than two months.

FACTUAL HISTORY

On July 10, 2000 appellant, then a 34-year-old museum protection officer, filed an occupational disease claim, alleging plantar fasciitis and bone spurs to both feet due to standing on cement and hard floors. On July 20, 2001 the Office accepted his claim for aggravation of bilateral plantar fasciitis. It paid appropriate wage-loss compensation and medical benefits.

Appellant received vocational rehabilitation in 2002 and 2003. He did not complete a Form CA-1032 that was sent to him on October 10, 2007 and did not keep the Office apprised of his address for a period of two years. Appellant completed a Form CA-1032 on December 13, 2007 and indicated that he had been employed with three different trucking companies over the prior year. An itemized statement of earnings from the Social Security Administration confirmed that appellant worked for various transport/hauling companies in 2005 and 2007. Appellant began vocational rehabilitation on May 2, 2008 and was provided with job placement services through November 30, 2008.

In a letter to the Office dated February 15, 2009, appellant indicated that he worked for Lotus, L.L.C. (hereinafter Lotus) from November 24, 2008 to January 28, 2009. He noted that he was released five days after he broke his thumb. Appellant stated, "The purported reason was a work slow-down in the oil field, although my superior hinted that the actual reason was my injury." He noted that his salary was $17.00 per hour.

In response to a letter from the Office dated January 30, 2009, the employing establishment indicated that the current base salary for the position appellant held on the date of injury was $27,037.00 per year.

By decision dated March 12, 2009, the Office found that appellant's actual wages as a driver for Lotus, effective November 24, 2008, with wages of $682.29 per week ($17.00 per hour) represented his wage-earning capacity as he demonstrated an ability to perform the duties of the job for two months or more. The position was found suitable to his partially disabled condition. The Office noted that appellant's date-of-injury pay rate was $465.73 effective June 22, 2000 and that the current pay rate for his date-of-injury position effective March 12, 2009 was $519.88. It concluded that, as appellant's wages exceeded the wages of the job he held when injured, his entitlement to wage-loss compensation ended when he was reemployed with no loss in wage-earning capacity.

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.[1] Disability means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.[2]

[1] 5 U.S.C. § 8102(a).

[2] 20 C.F.R. § 10.5(f).

In determining compensation for partial disability, the wage-earning capacity of an employee is determined by the employee's actual earnings if the employee's actual earnings fairly and reasonably represent his wage-earning capacity.[3] 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.[4]

In the case of *Albert C. Shadrick*,[5] the Board set forth the principle that, if current actual earnings are used as one of the factors in computing an employee's wage-earning capacity, then the current increased wage for the employee's original job should also be used to avoid any distortions caused by changes in business conditions since the injury. Following this principle, the Office established the *Shadrick* formula as the method of computing compensation when determining an injured worker's wage-earning capacity.[6]

The Federal (FECA) Procedure Manual provides that the Office any make a retroactive wage-earning capacity determination if an employee has 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 the injury-related condition affecting the ability to work.[7]

ANALYSIS

The Board finds that the Office did not properly determine appellant's wage-earning capacity. When the Office learns that an employee has returned to alternative work more than 60 days after the fact, the claims examiner may consider a retroactive loss of wage-earning determination. Such a determination is generally to be considered appropriate where an investigation reveals that appellant held private employment and had substantial earnings, which were not reported to the Office or were otherwise not used in adjusting compensation entitlement.[8]

The March 12, 2009 decision constitutes a retroactive wage-earning capacity determination. Appellant returned to work on November 24, 2008 and worked in this position until January 28, 2009. He informed the Office of this employment in a February 15, 2009 letter after he started working at Lotus. The Office reduced appellant's compensation in its March 12, 2009 decision finding that his actual earnings represented his wage-earning capacity as he held

[3] 5 U.S.C. § 8115(a).

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

[5] 5 ECAB 376 (1953).

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.2 (December 1993). For the formula itself, *see id., Computation of Compensation*, Chapter 2.900.16.c (January 1991).

[7] *Id.* at Chapter 2.814.7(c) (December 1993).

[8] *Id.* at Chapter 2.814.7(e).

the position for more than 60 days. The Office found only that the position was "suitable" because he had demonstrated his ability to perform the duties for two months. The Office did not address how such employment fairly or reasonably represented appellant's wage-earning capacity, or whether his subsequent work stoppage was due to his injury-related condition, as required by its procedures.[9] The Office did not address appellant's vocational rehabilitation or his position at Lotus as part of its adjudication. Accordingly, it did not fully consider all criteria for making a retroactive wage-earning capacity determination.[10]

CONCLUSION

The Board finds that the Office improperly determined appellant's wage-earning capacity. The Office did not follow its procedures in making a retroactive loss of wage-earning capacity decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 12, 2009 is reversed.

Issued: May 14, 2010
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

[9] *Id.*

[10] *Id.; see also Selden H. Swartz,* 55 ECAB 272 (2004).