

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

M.V., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
TRANSPORTATION SECURITY)
ADMINISTRATION, REGIONAL AIRPORT,)
Tallahassee, FL, Employer)

**Docket No. 10-1642
Issued: June 15, 2011**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 8, 2010 appellant, through his representative, filed a timely appeal from the May 5, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP), which affirmed the reduction of his compensation based on a determination of his capacity to earn wages in a constructed position. Pursuant to the Federal Employees' Compensation Act (FECA)¹ and 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 OWCP properly reduced appellant's wage-loss compensation on the grounds that he has the capacity to earn entry-level wages in the constructed position of budget analyst.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On May 22, 2004 appellant, then a 36-year-old transportation security screener, sustained an injury in the performance of duty when he lifted army field packs. OWCP accepted his claim for lumbar strain and right L4-5 herniated disc. Appellant received compensation for temporary total disability on the periodic rolls.

OWCP informed Dr. Patricia A. Hogan, the attending family physician, that appellant had completed a vocational rehabilitation training program to provide him the skills necessary to obtain an entry-level job as a budget analyst. It provided Dr. Hogan the job description and asked her to indicate whether appellant was capable of performing the specified duties and physical requirements. On June 11, 2009 Dr. Hogan indicated that appellant was capable of performing the job.

OWCP's rehabilitation specialist found that appellant was qualified for the position of budget analyst and should be able to earn an entry-level wage, and eventually a median-level wage. State labor market statistics showed 196 budget analyst positions in the Tallahassee area as of 2008, with 206 positions projected by 2016. Average annual openings were projected to total six, one due to growth and five due to separations. The entry-level wage estimate for 2009 was \$17.61 an hour. OWCP's rehabilitation specialist found that the position was reasonably available to appellant.

In a decision dated November 5, 2009, OWCP reduced appellant's wage-loss compensation to zero effective November 22, 2009 on the grounds that he was no longer totally disabled for work and had the capacity to earn entry-level wages as a budget analyst at a pay rate higher than the current pay rate of his date-of-injury job.

Appellant advised that he tried to find a job as a budget analyst, but his experience was that he did not meet the educational requirement -- most required a master's degree in finance -- or the experience, which was three to four years.

In a decision dated May 5, 2010, OWCP's hearing representative affirmed the reduction of appellant's wage-loss compensation. She found that appellant held a bachelor's degree in finance and economics and met the specific vocational preparation requirement of the constructed position. The fact that some employers preferred or required a master's degree did not establish that appellant was not vocationally prepared for an entry-level position. The hearing representative explained that the lack of current job openings did not mean the position was not performed in sufficient numbers to be considered reasonably available. She found that the opinion of OWCP's rehabilitation specialist outweighed appellant's opinion on the issues of vocational suitability and availability.

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of his duty.² "Disability" means the incapacity,

² 5 U.S.C. § 8102(a).

because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.³

Section 8115(a) of FECA provides that in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his actual earnings, if his actual earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings of the employee do not fairly and reasonably represent his wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity as appears reasonable under the circumstances is determined with due regard to the nature of his injury, the degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment, and other factors or circumstances which may affect his wage-earning capacity in his disabled condition.⁴

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.⁵ When it makes a medical determination of partial disability and of the 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 labor market, that fits the employee's capabilities in light of his physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service. 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

OWCP reduced appellant's wage-loss compensation on the grounds that he had the capacity to earn entry-level wages in the constructed position of budget analyst. It therefore had the burden to establish it gave, in the words of section 8115(a) of FECA, "due regard" to the availability of suitable employment.

Because the rehabilitation specialist is an expert in the field of vocational rehabilitation, OWCP may rely on his or her opinion as to whether the job is reasonably available.⁷ Lack of

³ 20 C.F.R. § 10.5(f).

⁴ 5 U.S.C. § 8115(a)

⁵ *Harold S. McGough*, 36 ECAB 332 (1984).

⁶ *Hattie Drummond*, 39 ECAB 904 (1988); see *Albert C. Shadrick*, 5 ECAB 376 (1953).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8.b(2) (October 2009).

current job openings does not equate to a finding that the position was not performed in sufficient numbers to be considered reasonably available.⁸

State labor statistics showed 196 budget analyst positions in the Tallahassee area in 2008 and 206 positions projected by 2016. Average annual openings were projected to total only six, one due to growth and five due to separations, but the statistics did not show how many of the positions were entry level.

Appellant completed a vocational rehabilitation training program to provide him the skills necessary to obtain an entry-level job as a budget analyst. OWCP reduced his wage-loss compensation to zero on the grounds that he had the capacity to earn entry-level wages as a budget analyst. The labor market statistics upon which the rehabilitation specialist relied to find that the position was reasonably available to appellant in the open labor market did not show how many of the positions were entry level, and therefore suitable to his vocational training. This undermines the finding that the constructed position was reasonably available and therefore suitable.⁹

Because OWCP did not give due regard to the availability of suitable employment, the Board finds that OWCP did not meet its burden to justify the reduction of appellant's wage-loss compensation. The Board will therefore reverse the hearing representative's May 5, 2010 decision affirming OWCP's determination of wage-earning capacity and reduction of wage-loss compensation.

CONCLUSION

The Board finds that OWCP improperly reduced appellant's wage-loss compensation. The evidence does not establish the availability of the constructed position.

⁸ *Id.*, Chapter 2.814.8.c. *But see R.C.*, Docket No. 08-2342 (issued September 25, 2009) (where a rehabilitation counselor provided conflicting information -- advising that two constructed positions were reasonably available but noting, among other things, that entry-level jobs were practically nonexistent -- the Board found that OWCP did not meet its burden of proof to reduce the claimant's compensation, as the rehabilitation counselor's equivocal statements undermined the finding of reasonable availability).

⁹ *Cf. D.B.*, Docket No. 08-547 (issued November 17, 2008) (reversing the reduction of wage-loss compensation on the grounds that the labor market statistics did not show an entry-level wage).

ORDER

IT IS HEREBY ORDERED THAT the May 5, 2010 decision of the Office of Workers' Compensation Programs is reversed. The case is remanded for reinstatement of wage-loss compensation retroactive to the effective date of the reduction.

Issued: June 15, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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