United States Department of Labor
Employees' Compensation Appeals Board

D.T., Appellant	)	
and	)	**Docket No. 11-1015**
	)	**Issued: March 16, 2012**
DEPARTMENT OF THE INTERIOR, BADLANDS NATIONAL PARK, Interior, SD, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 16, 2011 appellant filed a timely appeal from a March 2, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) 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 compensation benefits based on its finding that his actual earnings as a seasonal visitor use assistant fairly and reasonably represented his wage-earning capacity.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. In a decision dated January 6, 2011,[2] the Board reversed an August 27, 2009 OWCP decision finding that appellant's actual earnings as a seasonal visitor use assistant fairly and reasonably represented his wage-earning capacity.[3] It determined that OWCP properly used appellant's actual earnings effective June 22, 2009 as a temporary, seasonal visitor use assistant in determining his wage-earning capacity as he was a temporary employee at the time of his injury. The Board further found, however, that there was no evidence that the offered position was available at least 90 days. As the record did not show the period of his temporary, seasonal position, it concluded that OWCP erred in finding that the position fairly and reasonably represented his wage-earning capacity. The facts and the circumstances as set forth in the prior decision are hereby incorporated by reference.

In a January 14, 2011 telephone call, the employing establishment informed OWCP that appellant "worked from June 21, 2009 through September 13, 2009 and then worked intermittent[ly] until November 21, 2009. [Appellant] returned to work July 11 through August 29, 2010 and then worked intermittent[ly] until December 19, 2010."

By decision dated March 2, 2011, OWCP reduced appellant's compensation based on its finding that his actual earnings in a temporary, seasonal position (a seasonal visitor use assistant) effective June 22, 2009 fairly and reasonably represented his wage-earning capacity. It found that he worked over 90 days from June 22 to November 29, 2009 and July 11 to December 19, 2010. OWCP utilized the formula developed in *Albert C. Shadrick*[4] to determine appellant's loss of wage-earning capacity.

On appeal, appellant maintains that he did not work 90 days as a seasonal visitor use assistant in either 2009 or 2010. He relates that he worked from June 22 until September 12, 2009. During the period September 13 to November 21, 2009, appellant asserts that he did not work any hours and the position during this time was termed "intermittent not seasonal employment." The employing establishment only hired him in 2010 to replace an employee who quit. Appellant worked July 11 to August 29, 2010 and then was an intermittent employee. He worked four days during his intermittent employment. Appellant contends that his appointment was not the equivalent of the position held at the time of injury.[5]

[2] The Board initially dated its decision November 9, 2010; however, on January 6, 2011 it issued an Order Erratum finding that the decision required a new issuance date of January 6, 2011.

[3] Docket No. 10-1012 (issued January 6, 2011). OWCP accepted that appellant, then a 47-year-old temporary, seasonal maintenance mechanic, sustained lumbar sprain and a permanent aggravation of lumbar degenerative disc disease due to an August 24, 2007 employment injury.

[4] 5 ECAB 376 (1953); codified at 20 C.F.R. § 10.403.

[5] Appellant submitted additional evidence with this appeal. The Board has no jurisdiction to review new evidence on appeal; *see* 20 C.F.R. § 501.2(c).

LEGAL PRECEDENT

Section 8115(a) of FECA[6] 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.[7] Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such a measure.[8] The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision,[9] has been codified at 20 C.F.R. § 10.403. OWCP calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the current pay rate for the date-of-injury job.[10] OWCP procedures provide that a determination regarding whether actual earnings fairly and reasonably represent wage-earning capacity should be made after an employee has been working in a given position for more than 60 days.[11]

The Federal (FECA) Procedure Manual provides that OWCP can make a retroactive wage-earning capacity determination if appellant 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.[12]

OWCP's procedure manual provides guidelines for determining wage-earning capacity based on actual earnings:

> "a. *Factors considered*. To determine whether the claimant's work fairly and reasonably represented his or her WEC [wage-earning capacity] the CE [claims examiner] should consider whether the kind of appointment and tour of duty (*see FECA PM 2.900.3*) are at least equivalent to those of the job held on the date of injury. Unless they are, the CE may not consider the work suitable.
>
> "For instance, reemployment of a temporary or casual worker in another temporary or casual (USPS) [United States Postal Service] position is proper, as long as it will last at least 90 days and reemployment of a term or transitional

[6] 5 U.S.C. § 8101 *et seq*.

[7] *Id*. at § 8115(a); *Loni J. Cleveland*, 52 ECAB 171 (2000).

[8] *Lottie M. Williams*, 56 ECAB 302 (2005).

[9] *Albert C. Shadrick*, 5 ECAB 376 (1953).

[10] 20 C.F.R. § 10.403(c).

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1993).

[12] *Id*. at Chapter 2.814.7 (July 1997).

(USPS) worker in another term or transitional (USPS) worker is likewise acceptable. However, the reemployment may not be considered suitable when:

> (1) *The job is part-time* (unless the claimant was a part-time worker at the time of injury or sporadic in nature;
>
> (2) *The job is seasonal* in an area where year-round employment is available;
>
> (3) *The job is temporary* where the claimant's previous job was permanent."[13]

ANALYSIS

On prior appeal, the Board reversed OWCP's finding that appellant's actual earnings as a temporary, seasonal visitor use assistant beginning June 22, 2009 fairly and reasonably represented his wage-earning capacity. It noted that appellant had worked in a temporary, seasonal position at the time of his work injury and thus OWCP could use earnings from a temporary position as the basis for a wage-earning capacity determination. OWCP procedures and Board case law, however, provided that a temporary offered position must be available for at least 90 days in order to be appropriate.[14] The Board found that there was no evidence establishing the duration of the temporary, seasonal position offered by the employing establishment and thus reversed OWCP's wage-earning capacity determination.

By decision dated March 2, 2011, OWCP again reduced appellant's compensation based on its finding that his actual earnings in a temporary, seasonal position as a visitor use assistant effective June 22, 2009 fairly and reasonably represented his wage-earning capacity. It determined that he worked over 90 days from June 22 to November 29, 2009 and July 11 to December 19, 2010. In a telephone call dated January 14, 2011, however, the employing establishment notified OWCP that appellant worked June 21 through September 13, 2009, a period of 84 days, and then worked intermittently until November 21, 2009. Appellant also worked the following summer from July 11 through August 29, 2010 and intermittently until December 19, 2010 under another job offer. On appeal, he contends that he did not work for 90 days as a visitor use assistant. Appellant asserts that after September 13, 2009 he worked in a position classified as intermittent rather than seasonal and maintains that he did not work any hours. There is still no evidence that the employing establishment offered him a seasonal position as a visitor use assistant that was available for more than 90 days. Consequently, OWCP failed to follow its procedures in issuing its wage-earning capacity decision.

[13] *Id*. at Chapter 2.814.7(a) (July 1997).

[14] *Id.*; *C.f., A.P.*, 58 ECAB 198 (2006) (finding that OWCP properly reduced the wage-earning capacity of a temporary firefighter who returned to work in a temporary position as the position was available for over 90 days and as the claimant worked over 60 days in the position).

CONCLUSION

The Board finds that OWCP improperly reduced appellant's compensation benefits after finding that his actual earnings as a seasonal visitor use assistant fairly and reasonably represented his wage-earning capacity.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 2, 2011 is reversed.

Issued: March 16, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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