United States Department of Labor
Employees' Compensation Appeals Board

W.G., Appellant	)	
and	)	**Docket No. 06-367**
	)	**Issued: December 27, 2006**
DEPARTMENT OF THE TREASURY, BUREAU OF ENGRAVING & PRINTING, Washington, DC, Employer	)	

Appearances:
Leslie McAdoo, Esq., for the appellant
Catherine Carter, Esq., for the Director

Oral Argument October 12, 2006

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 29, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated August 25, 2005. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office met its burden of proof to modify its February 21, 1975 wage-earning capacity determination based on actual earnings as a psychology technician as of July 24, 1983; and (2) whether the Office met its burden of proof to modify the prior wage-earning capacity determination based on actual earnings as readjustment counseling therapist as of December 21, 1992.

FACTUAL HISTORY

The Office accepted that appellant sustained aggravation of preexisting spondylolisthesis causally related to his federal employment as an apprentice plate printer. On February 21, 1975

the Office reduced his compensation on the grounds that his wage-earning capacity was represented by the constructed position of laboratory technician. The laboratory technician position was described as a general assistant in performing laboratory tests. The Office determined that appellant's pay rate for the date-of-injury job was $200.17 per week, while appellant was capable of earning $110.00 per week.[1]

Appellant received a bachelor's degree in zoology in 1981. He began working at the National Institute of Mental Health (NIMH) as a psychology technician on July 24, 1983. A Standard Form 50 (SF-50) indicated that his pay rate was $20,256.00 per year. A September 9, 1985 SF-50 stated that appellant's title was physiologist.[2] On December 21, 1992 appellant began working as a readjustment counseling therapist for the Veterans Administration (VA).

In a letter dated June 15, 2004, a rehabilitation specialist discussed the pay rate for the selected position of laboratory technician in 1983. The specialist stated that, using national and state job information from 1990 to 2003, pay rates for the position had increased an average of 12 percent. According to the specialist, using a 12 percent increase over a five-year cycle would result in an increase in pay rate from $110.00 per week in 1975 to $138.00 per week in 1983.

On June 29, 2004 the Office issued a notice of proposed reduction in compensation. It found that the 1975 wage-earning capacity determination could be modified as of July 24, 1983, since appellant had obtained a bachelor's degree and took a new job as a psychology technician that earned more than 25 percent of the current pay rate for the constructed laboratory technician position. In addition, the wage-earning capacity could again be modified as of December 20, 1992 based on the actual earnings as a readjustment counseling therapist. The Office found that the nine years experience in working at NIMH had resulted in an increase in earnings. According to the Office, the earnings for the VA position were $754.40 per week, while the 1992 pay rate for the psychology technician position was $515.35.

By decision dated August 9, 2004, the Office modified the February 21, 1975 wage-earning capacity determination as of July 24, 1983, based on the actual earnings of a psychology technician. The Office again modified the loss of wage-earning capacity as of December 21, 1992, based on actual earnings as a readjustment counseling therapist.

Appellant requested a hearing before an Office hearing representative, which was held on December 8, 2004. At the hearing he argued that the Office had not established that he was vocationally rehabilitated and did not properly modify the wage-earning capacity determination. Appellant noted that the record contained a position description from NIMH for a psychologist position, while he had never worked as a psychologist. He described the psychology technician position as one that provided laboratory assistance -- he held surgical instruments, compiled data, did chromatography, drew blood and stored serum in a freezer. Appellant disputed the determination of wages earned in the constructed laboratory technician position in 1983. He

[1] The record indicated that the Office subsequently accepted that appellant's current date-of-injury pay rate was incorrect and that appellant was entitled to additional compensation.

[2] An October 17, 2000 letter from the NIMH stated that appellant worked as a physiologist. The job description indicated that the position involved animal research and biochemical studies.

submitted a December 7, 2004 statement from a professor of statistics, who argued that the rehabilitation specialist had failed to properly explain his methodology and the data did not support the conclusions.

With respect to the readjustment counseling therapist position, appellant argued that he had no training in psychology or counseling. He stated that he was hired under the Vietnam Veterans Readjustment Act, which required a two-year training program. According to appellant, he was not qualified for the position, he did not receive training while on the job and he left after one year.

In a decision dated August 25, 2005, the hearing representative affirmed the August 9, 2004 decision. He found that the Office properly reduced appellant's compensation as of July 24, 1983 and December 21, 1992.

LEGAL PRECEDENT -- ISSUES 1 and 2

Once the wage-earning capacity of an injured employee is determined, 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.[3] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[4]

An increase in pay, by itself, is not sufficient evidence that there has been a change in an employee's capacity to earn wages.[5] Without a showing of additional qualifications obtained by appellant, it is improper to make a new loss of wage-earning capacity determination based on increased earnings.[6]

With respect to modification of wage-earning capacity, the Office Procedure Manual provides:

> "c. *Increased Earnings.* It may be appropriate to modify the [wage-earning capacity] rating on the grounds that the claimant has been vocationally rehabilitated if one of the following two circumstances applies:
>
> > (1) The claimant is earning substantially more in the job for which he or she was rated. This situation may occur where a claimant has returned to part-time duty with the employing agency and was rated on that basis, but later increased his or her hours to full-time work.

[3] *Sue A. Sedgwick*, 45 ECAB 211 (1993).

[4] *Id.*

[5] *Marie A. Gonzales*, 55 ECAB 395, 399 (2004).

[6] *See Willard N. Chuey*, 34 ECAB 1018 (1983).

(2) The claimant is employed in a new job (*i.e.*, a job different from the job for which he or she was rated) which pays at least 25 percent more than the current pay of the job for which the claimant was rated.

"d. CE [c*laims examiner*] *Actions*. If these earnings have continued for at least 60 days, the CE should:

(1) *Determine the duration, exact pay, duties* and responsibilities of the current job.

(1) *Determine whether the claimant* underwent training or vocational preparation to earn the current salary.

(2) *Assess whether the actual job* differs significantly in duties, responsibilities, or technical expertise from the job at which the claimant was rated."[7]

ANALYSIS -- ISSUE 1

The record notes that appellant was hired as a psychology technician on July 24, 1983. In order to modify a wage-earning capacity determination, the Office must establish appellant was retrained or otherwise vocationally rehabilitated. The record establishes that in 1981 appellant had received his bachelor's degree. While the record does not contain the specific education requirements for the psychology technician position, the addition of a college degree represents a significant new vocational qualification.

As noted, vocational rehabilitation may be established if appellant is employed in a new job that pays at least 25 percent more than the job for which he was originally rated. Although appellant argues the position was similar to the position of laboratory technician on which his wage-earning capacity was determined in 1975, the position was a different position.[8] The laboratory technician was a constructed position for a general position of laboratory assistance. Appellant's job was in a specific type of laboratory and involved duties such as chromatography and data analysis. This clearly required technical expertise and responsibilities that differed from the constructed position.

Appellant also argues the Office did not properly determine that the psychology technician paid at least 25 percent more than the constructed laboratory technician position. The SF-50 indicated that the psychology technician pay rate at the time appellant was hired was $20,256.00 per year, or $389.54 per week. The determination of wages for the laboratory technician position in 1983 was made by a rehabilitation specialist, who has access to the available wage information. The rehabilitation specialist acknowledged that he did not have

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11c and d (July 1997).

[8] There also appeared to be an argument that the Office had erroneously relied on a job description for a psychologist. Although the record contains a psychologist job description, there is no indication the Office based any wage-earning capacity determination on a psychologist position.

specific wage information from 1983 for the position, but he made an estimation based on available evidence. He concluded that the laboratory technician wages would be $138.00 per week, or an approximately 25 percent increase over the 1975 wages. Appellant contested the methodology and submitted a statement from a statistics professor criticizing the calculations of the rehabilitation specialist. The statistics professor did not offer an alternative methodology. The determination of wage information is within the expertise of the rehabilitation specialist and his conclusions are reasonable based on the available information. The wages of the psychology technician at $389.54 per week were more than 25 percent greater than the 1983 wages of $138.00 in the constructed position.

The Board accordingly finds that, based on the evidence of record, the psychology technician position was proper for a modification of an existing wage-earning capacity determination. Appellant was vocationally rehabilitated and employed in a new job earning at least 25 percent more than the position in which he was rated. His wage-earning capacity as of July 24, 1983 is therefore determined based on actual earnings of $389.54 per week.[9]

ANALYSIS -- ISSUE 2

The Office also made a finding that appellant was vocationally rehabilitated as of 1992 because he gained nine years of work experience at NIMH and this resulted in an increase in wages as a readjustment counseling therapist. The evidence of record, however, is not sufficient to support such a finding. It is not clear from the record how the work experience related to the readjustment counseling therapist position. According to appellant, his position as a psychology technician did not involve counseling or therapy training. Moreover, it appeared appellant began working as a physiologist during his employment with NIMH. The job description for physiologist does not indicate that it would provide relevant experience for a readjustment counseling therapist position. Appellant reported that when he was hired in the counseling position in December 1992 he was to receive training over a two-year period. However, he did not receive training and left after one year.

Under these circumstances, the Board finds that the Office has not established that appellant was retained or otherwise vocationally rehabilitated as of December 1992. As noted above, an increase in earnings is not itself sufficient to modify a wage-earning capacity determination. According to the Office's procedures, the Office must make a proper determination as to whether the claimant underwent training or vocational preparation to earn the current salary. The Office did not make a proper determination with respect to the readjustment counseling therapist position in this case.

CONCLUSION

The Office met its burden of proof to modify the wage-earning capacity determination as of July 24, 1983. With respect to December 21, 1992, the Office did not meet its burden of proof to modify the wage-earning capacity determination.

[9] The formula used to compute wage-earning capacity is found at 20 C.F.R. § 10.403.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 25, 2005 is affirmed with respect to the July 24, 1983 modification of wage-earning capacity and reversed with respect to the December 21, 1992 modification.

Issued: December 27, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

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

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