United States Department of Labor
Employees' Compensation Appeals Board

B.B., Appellant	)	
and	)	**Docket No. 10-24**
	)	**Issued: December 23, 2010**
DEPARTMENT OF HOMELAND SECURITY, EMERGENCY PREPAREDNESS & RESPONSE, Alexandria, VA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On October 1, 2009 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated May 6, 2009 which found that his actual earnings represented his wage-earning capacity. He also appealed a July 10, 2009 decision denying his request for an oral hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues on appeal are: (1) whether appellant's actual earnings as a yard foreman fairly and reasonably represented his wage-earning capacity; and (2) whether the Office properly denied appellant's request for an oral hearing.

FACTUAL HISTORY

On April 27, 2006 appellant, then a 51-year-old temporary full-time public assistance project officer, injured his left knee while at work. The Office accepted the claim for a left knee

sprain, medial collateral ligament and temporary aggravation of left leg osteoarthritis. It subsequently accepted contusion and acromioclavicular sprain of the left shoulder and upper arm. Appellant worked intermittently thereafter. On July 6, 2007 he was placed on the periodic rolls and receipt of wage-loss compensation.

Appellant was treated by Dr. James R. Gosey, Jr., a Board-certified orthopedic surgeon, who diagnosed moderate to severe left knee arthritis. On July 31, 2006 Dr. Gosey performed a left total knee arthroplasty and diagnosed left knee osteoarthritis. On August 25, 2006, he noted that appellant sustained an injury by falling on his left hip and left shoulder. X-rays revealed a joint separation of the left shoulder. Dr. Gosey returned appellant to work full time with restrictions on October 2, 2006. On October 27, 2006 he noted appellant's continued complaints of left shoulder pain.

In a memorandum dated July 5, 2006, the Office noted that appellant was employed as a temporary, full-time employee and his weekly pay rate was $385.73. In a July 12, 2006 letter, the employing establishment's human resource department confirmed appellant was a temporary employee, his tour of duty was intermittent and he had worked 54 days in 2006.

On December 28, 2006 Dr. Gosey performed an open acromioclavicular joint repair of the left shoulder and diagnosed third-degree acromioclavicular separation of the left shoulder. On March 26, 2007 he removed the hardware from appellant's left shoulder. On April 23, 2007 Dr. Gosey advised that he could return to work full time with restrictions; however the employing establishment was unable to accommodate his restrictions.

On May 22, 2007 appellant was referred for vocational rehabilitation. In an August 21, 2007 plan, the rehabilitation counselor recommended a 90-day job placement effort and noted that appellant could perform light physical work.

Appellant came under the treatment of Dr. Jeffrey Noblin, a Board-certified orthopedic surgeon, from January 8 to February 14, 2008, for persistent left shoulder pain. He noted a computerized tomography (CT) scan of the left shoulder performed on January 17, 2008 revealed a coracoid fracture and recommended surgery. On February 14, 2008 Dr. Noblin performed arthroscopy of the left shoulder with subacromial decompression followed by open excision of bony coracoid. On February 8, 2008 vocational rehabilitation was closed as surgery made job placement unfeasible.

Appellant submitted a July 22, 2008 work capacity evaluation from Dr. Noblin, who advised that he could return to work full time with restrictions of sitting, walking, standing, twisting, bending/stooping, squatting, kneeling, operating a vehicle, repetitive movements of the wrists and elbows limited to eight hours a day, no reaching or reaching above the shoulder with the left arm, pushing, pulling, lifting and climbing limited to eight hours a day and 10 pounds.

On August 27, 2008 appellant was again referred for vocational rehabilitation. In reports dated October 12 and November 20, 2008 the rehabilitation counselor recommended a 90-day job placement effort and noted that appellant could perform sedentary work with no lifting over 10 pounds, no overhead work and no heights. The rehabilitation counselor recommended placement with a new employer.

In a December 3, 2008 report, Dr. Noblin diagnosed strain of the left acromioclavicular ligament and recommended a follow-up appointment in six weeks.

In a January 23, 2009 Office telephone log, appellant advised that he accepted a position with Easterly Fabrications, LLC as a yard foreman, working three days a week with a pay rate of $300.00 a week. He indicated that he would not be performing any manual labor and his employer would accommodate his work restrictions. Appellant submitted an undated letter from Easterly Fabrication, which noted that he accepted a position as a yard foreman and his duties included yard safety, contracts quality control and operation of heavy equipment but no manual labor. The employer noted that the position was in compliance with his work restrictions. The employer further noted that the position was part time, three days a week with pay of $300.00 a week and that after a temporary 90-day period appellant would assume full-time status and receive comparable pay and benefits. The tentative start date was February 2, 2009.

In a vocational rehabilitation status report dated March 11, 2009, the rehabilitation specialist noted that appellant resumed work on February 9, 2009; however, a rehabilitation plan was prepared if the current employment was not maintained. The rehabilitation plan noted the objective of obtaining placement with a new employer in a position of a dispatcher with wages of $320.00 a week or an estimator with average weekly wages of $560.00. These positions were light duty and sedentary in conformance with appellant's work restrictions.

In an April 3, 2009 vocational rehabilitation report, the rehabilitation counselor noted speaking to appellant on January 30, 2009 and advised that he obtained a position with Easterly Fabrications as a supervisor of employees performing marine maintenance work. Appellant reported that the owner was a friend who accommodated his restrictions but his work was mostly supervisory. He believed that the job would become permanent but he was not sure when that would occur but he was currently working three days a week with a salary of $100.00 a day. On February 19, 2009 the rehabilitation counselor noted speaking with appellant who indicated that he was working full time and his main responsibility was overseeing other employees. On April 14, 2009 the rehabilitation counselor informed appellant that he would be closing the rehabilitation file because he had successfully obtained employment. Appellant reported that everything was going well with his job and that he was glad to be off worker's compensation.

In a rehabilitation status report dated April 22, 2009, the rehabilitation specialist noted that appellant had returned to work and was employed for over 60 days with Easterly Fabrications as a supervisor. The specialist indicated that appellant began his job on a part-time basis but was now working full time and had wages of $500.00 a week.

By decision dated May 6, 2009, the Office found that appellant had been employed as a supervisor/boat outfitting for Easterly Fabrications effective February 9, 2009 which was over 60 days and that the pay in that position of $500.00 a week was equivalent to the pay rate for the position he held at the time of his injury; thus, no loss of wages occurred. The pay rate for the position appellant held at the time of injury was $385.73. The Office concluded that his actual earnings as a full-time supervisor/boat outfitting fairly and reasonably represented his wage-earning capacity.

On June 12, 2009 appellant requested an oral hearing. He noted that he started work at Easterly Fabrications on January 26, 2009 on a part-time basis for three days a week with wages of $300.00. Appellant advised that the job never developed into a full-time position and he worked from January 26 to March 15, 2009, when he stopped work due to right hip pain. He also disputed his pay rate.

In a decision dated July 10, 2009, the Office denied appellant's request for an oral hearing. Appellant found that the request was not timely filed. Appellant was informed that his case had been considered in relation to the issues involved, and that the request was further denied for the reason that the issues in this case could be addressed by requesting reconsideration from the office and submitting evidence not previously considered.

LEGAL PRECEDENT -- ISSUE 1

Under section 8115(a) of the Federal Employees' Compensation Act,[1] wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. 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.[2] The Office's procedure manual provides that factors to be considered in determining whether the claimant's work fairly and reasonably represents his wage-earning capacity include the kind of appointment, that is, whether the position is temporary, seasonal or permanent and the tour of duty, that is, whether it is part time or full time.[3] Further, a makeshift[4] or odd-lot position designed for a claimant's particular needs will not be considered suitable.[5]

The formula for determining loss of wage-earning capacity based on actual earnings, developed in the Board's decision in *Albert C. Shadrick*,[6] has been codified by regulations at 20 C.F.R. § 10.403. Office 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.[7] The amount of any

[1] 5 U.S.C. § 8115(a).

[2] *Hayden C. Ross*, 55 ECAB 455 (2004).

[3] Federal (FECA) Procedure Manual, Part 2 -- *Claims, Reemployment*: *Determining Wage-Earning Capacity*, Chapter 2.814.7 (July 1997).

[4] A makeshift position is one that is specifically tailored to an employees' particular needs and generally lacks a position description with specific duties, physical requirements and work schedule. *See William D. Emory*, 47 ECAB 365 (1996); *James D. Champlain*, 44 ECAB 438 (1993).

[5] *See, e.g*., *Michael A. Wittman*, 43 ECAB 800 (1992).

[6] 5 ECAB 376 (1953).

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

compensation paid is based on the wage-earning capacity determination and it remains undisturbed until properly modified.[8]

ANALYSIS -- ISSUE 1

Appellant was full-time, temporary public assistance project officer, at the time of his injury on April 27, 2006. The Office accepted appellant's claim for sprain of the left knee, medial collateral ligament, temporary aggravation of osteoarthritis of the left leg, contusion of the left shoulder and upper arm and sprain of the left shoulder and upper arm acromioclavicular. It authorized treatment and paid appropriate wage-loss compensation.

On July 22, 2008 Dr. Noblin advised that appellant could return to work full time with restrictions. Based on these limitations, the Office developed a rehabilitation plan in which appellant could perform sedentary work, no lifting over 10 pounds, no overhead work and no heights. On January 23, 2009 appellant accepted a position with Easterly Fabrications as a yard foreman, working three days a week with a pay rate of $300.00 a week. The Office reduced his compensation effective May 6, 2009 based on his actual earnings as a yard foreman. The Board finds, however, that this reduction was improper as the work appellant performed beginning February 9, 2009 was a makeshift position not available in the open labor market.[9]

The actual earnings on which the Office based its wage-earning capacity determination are unreliable as to appellant's ability to earn wages in the open labor market under normal employment conditions.[10] While wages actually earned may be the best measure of an injured worker's capacity for employment such wages may not be based on sheltered employment.[11] The job appellant obtained was performed for a company owned by friend of his who accommodated his restrictions noting the job would be mostly supervisory and appears to consist of work that was designed around his left knee sprain, osteoarthritis and shoulder injuries. The owner noted that appellant was employed part time, with a tentative start date of February 2, 2009 for three days a week with a temporary appointment of 90 days after which time he could

[8] *See Sharon C. Clement*, 55 ECAB 552 (2004).

[9] *Elbert Hicks*, 49 ECAB 283 (1998).

[10] *See A.J.*, 61 ECAB ___ (Docket No. 10-619, issued June 29, 2010).

[11] *See Connie L. Potratz-Watson*, 56 ECAB 316 (2005); *see also M.H.*, 61 ECAB ___ (Docket No. 09-2349, issued September 2, 2010) (where the Board found that the job appellant obtained was for a company owned by her daughter and consisted of work designed around appellant's ailments and involved a self-determined schedule of miscellaneous clerical task that were changed frequently to accommodated appellant's restrictions and demonstrated that the job was make shift and not a position available in the open labor market).

assume full-time status. The employer noted that he reviewed appellant's work restrictions and that the position was not in violation of the limitations. The record reveals that appellant was working a full-time permanent position when he was injured.[12] There are also special circumstances giving rise to his employability in this case. It cannot be stated that the wages paid were not the result of a charitable motive or sympathy on the part of the friend.[13] The personal relationship between the employer and employee in this case also makes the nature of the earnings suspect. Appellant did not sell his services in the competitive labor market; the facts of the employment were distorted by the close relationship of this employer to the injured employee.[14]

Appellant's employer provided only a vague description of the duties of a yard foreman noting miscellaneous tasks including sedentary duties, no manual labor, responsible for ensuring "yard safety and quality control of existing and future contracts" and operating heavy equipment. The Office failed to obtain a detailed description of the specific sedentary tasks to be performed and the type of heavy equipment he was to operate and how often. Similarly, the employer did not provide a set schedule for work and noted that the position began as temporary part-time appointment for 90 days when appellant's date-of-injury position was full time. The employer represented that he reviewed the work restrictions from appellant's physicians and assured him that he would not be violating his restrictions. The position appears to be made to accommodate appellant's restrictions. Despite these accommodations, he could not perform essential functions of the position as the record reveals he stopped work on March 15, 2009.

The Board further notes that the reports of the rehabilitation counselor do not evidence any other contact with the employer other than the undated job offer from the owner. On January 30, 2009 appellant advised the rehabilitation counselor that "the owner is a friend of his who accommodates his restrictions but his work is mostly supervisory work." This statement gives rise to the inference of sheltered employment. As noted, wages actually earned are the best measure of an injured worker's capacity for employment such wages may not be based on sheltered employment.[15] On April 22, 2009 the rehabilitation specialist noted that appellant had returned to work and was employed for over 60 days with Easterly Fabrications as a supervisor. The rehabilitation specialist further indicated that he began his job on a part-time basis but as of February 19, 2009 he was full time; however, there is no evidence of record from the employer verifying this information or that he remained employed at the time the Office's May 6, 2009 decision.

[12] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (October 2009) (provides that in determining whether a return to alternative employment fairly and reasonably represents the claimant's employee's wage-earning capacity, the Office should consider whether the kind of appointment and tour of duty are at least equivalent to those of the job held on date of injury; unless they are, the claims examiner may not consider the work suitable).

[13] Arthur Larson & Lex K. Larson, *The Law of Workers' Compensation*, Chapter 82 (2006), citing Modern Equip. Co. v. Industrial Comm n, 247 Wis. 517, 20 N.W.2d 121 (1945) where the injured worker was the brother of his employer.

[14] *See M.H., supra* note 11.

[15] *Supra* note 11.

The Office erred by accepting his actual earnings in the yard foreman position as the best measure of his wage-earning capacity.[16] The May 6, 2009 wage-earning capacity determination will be reversed.

CONCLUSION

The Board finds that the Office improperly found that the position of yard foreman properly represented appellant's wage-earning capacity as of May 6, 2009.[17]

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated May 6, 2009 is reversed.

Issued: December 23, 2010
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

[16] *Id. See also Afegalai L. Boone*, 53 ECAB 533 (2002).

[17] Due to the disposition of this case, the second issue, pertaining to the denial of appellant's hearing request, is rendered moot.