U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIE MALONE and U.S. POSTAL SERVICE,
GREENSBORO BULK MAIL CENTER, Greensboro, NC

Docket No. 97-2663; Submitted on the Record;
Issued September 27, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly reduced appellant's compensation benefits effective May 25, 1997 based on his capacity to perform the duties of department store manager; and (2) whether the Office properly determined that appellant forfeited compensation for the period June 9, 1993 to November 4, 1995.

The Board has duly reviewed the case record and finds that the Office properly reduced appellant's compensation to reflect his wage-earning capacity.

Once the Office accepts a claim, it has the burden of justifying termination of modification of compensation.[1] If an employee's disability is no longer total, but the employee remains partially disabled, the Office may reduce compensation benefits by determining the employee's wage-earning capacity.[2] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions given the nature of the employee's injuries and the degree of physical impairment, his or her usual employment, the employee's age and vocational qualifications and the availability of suitable employment.[3] After the Office makes a medical determination of partial disability and of special 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 market, that fits the employee's capabilities with regard to his or her 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 services or other applicable services. Finally, application of

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[1] *Betty F. Wade*, 37 ECAB 556 (1986).

[2] 20 C.F.R. § 10.303(a).

[3] *Samuel J. Chavez*, 44 ECAB 431 (1993).

the principles set forth in the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.[4]

The Office has stated that in some situations rehabilitation efforts will not succeed. In such circumstances, the Office procedures instruct the vocational rehabilitation counselor to identify positions from the Department of Labor's *Dictionary of Occupational Titles* and proceed with information from the labor market survey to determine the availability and wage rate of the position.[5] The Office does not guarantee that an employee will obtain employment in the selected position, nor is the loss of wage-earning capacity determination erroneous if the employee is unable to secure employment in the selected position.[6]

In the instant case, the Office accepted that appellant sustained tendinitis of the left shoulder and rotator cuff impingement syndrome due to a May 14, 1990 employment injury. The Office authorized an October 18, 1991 surgical repair of the rotator cuff and manipulation under anesthesia on December 5, 1991. The Office further accepted that appellant sustained consequential dysthymia due to his employment injury.[7]

The Office initially referred appellant for vocational rehabilitation in 1992 but interrupted rehabilitation efforts subsequent to the acceptance of his dysthymia. In a report dated October 28, 1993, an Office rehabilitation specialist discussed appellant's current enrollment in a state vocational rehabilitation training program with an anticipated completion date of May 1994. The rehabilitation specialist opined that due to his training program appellant would not require vocational rehabilitation but that job placement assistance would be available.

In a medical report dated January 12, 1996 and a work capacity evaluation for psychiatric/psychological conditions, Form OWCP-5(a), dated February 1, 1996, Dr. Khusraw Bahrani, a Board-certified psychiatrist, opined that appellant could work eight hours per day but not for the employing establishment.

In a medical report and work restriction evaluation dated March 4, 1996, Dr. David G. Dye, a Board-certified orthopedic surgeon, opined that appellant could work eight hours per day without "lifting, reaching, pushing, [or] pulling" with his left arm.

On April 25, 1996 the Office referred appellant's file to a rehabilitation counselor for a determination of suitable positions.

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

[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8 (December 1993).

[6] *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

[7] By decision dated January 21, 1993, the Office granted appellant a schedule award for a 20 percent permanent impairment of his left upper extremity. Appellant's schedule award payments ceased on December 11, 1993, at which time the Office returned him to the periodic rolls.

In a final report dated June 13, 1996, the rehabilitation counselor, after meeting with appellant to verify his background, work history, and education, identified the positions of elementary school teacher, substitute elementary school teacher and department store manager as within his capabilities. The counselor determined the prevailing wage rate and the availability in the general labor market of these positions.

On June 20, 1996 the Office rehabilitation specialist determined that the position of department store manager was appropriate for appellant.

On January 29, 1997 the Office provided appellant with a notice of proposed reduction of compensation based on his ability to perform the duties of a department store manager. The Office advised appellant that if he disagreed with the proposed action, he could submit additional factual or medical evidence relevant to his capacity to earn wages.

In response, appellant, through his attorney, argued that the position of department store manager was not reasonably available within his commuting area. Appellant submitted a lists of two job openings which he alleged represented the total openings for department store managers and which he maintained were more than 100 miles from his home.

In a note dated April 9, 1997, an Office rehabilitation specialist opined that the position of department store manager was reasonably available within appellant's commuting area based on the labor market survey conducted by the rehabilitation counselor and certified by two state employment service representatives.

By decision dated May 6, 1997, the Office finalized its reduction of appellant's compensation.

As the medical evidence established that appellant could perform work with restrictions on movement of his left shoulder and not returning to the employing establishment, the Board finds that the Office's determination that appellant was no longer totally disabled for work was proper. The Office then relied on an Office vocational rehabilitation counselor's determination that the position of department store manager was reasonably available within appellant's commuting area and that he had the necessary vocational training for the position. The Office further found that the position was within appellant's physical capabilities.[8] The Office, therefore, concluded that appellant had the capacity to earn wages as a department store manager and calculated his loss of wage-earning capacity following the principles set forth in the *Shadrick* decision.[9] As the Office followed established procedures for determining the vocational suitability and reasonable availability of the position selected, the Board finds that the Office, having given due regard to the factors specified at section 8115(a) of the Federal Employees' Compensation Act, properly reduced appellant's monetary compensation on the grounds that he has the capacity to earn wages as a department store manager. The Office is not obligated to secure a job for a claimant. The Board has held that a lack of current job openings

[8] The position included light lifting; however, appellant's lifting restrictions apply only to his left arm.

[9] *Albert C. Shadrick*, *supra* note 4.

does not equate to a finding that the position is not performed in sufficient numbers to be considered reasonably available.[10]

The Board further finds that the Office properly determined that appellant forfeited his compensation for the period June 9, 1993 to November 4, 1995 because he knowingly failed to report his employment activities.

In the instant case, by decision dated May 6, 1997, the Office found that appellant forfeited compensation for the period June 9, 1993 to November 4, 1995 as a consequence of his knowing failure to fully report his earnings during this period.

Section 8106(b) of the Act[11] provides that a partially disabled employee must report his earnings from employment or self-employment, by affidavit or otherwise, in the manner and at the times specified by the Secretary of Labor. The penalty for failing to make an affidavit or report when required or knowingly omitting or understating any part of an employee's earnings is forfeiture of his right to compensation during the period for which the affidavit or report was required.[12]

The Office, however, to establish that appellant should forfeit the compensation he received during the period, must establish that he knowingly failed to report employment or earnings. As forfeiture is a penalty, it is not enough merely to establish that there were unreported earnings from employment. The inquiry is whether appellant knowingly failed to report his employment activities and earnings. The term "knowingly" is not defined within the Act or its implementing regulations. In common usage, the Board has recognized that the definition or "knowingly" includes such concepts as "with knowledge," "consciously," "intelligently," "willfully," or "intentionally."[13]

In this case, on September 5, 1994 appellant signed an affidavit on a Form EN-1032 covering the previous 15-month period. Appellant listed his employment during this period as teaching a class for Myrna Williams from June 20 to August 19, 1994 with earnings of $3,000.00. In signing the form, appellant certified that he had no other employment or self-employment during the covered period. The form advised him that he must report all employment. The form specifically warned appellant that anyone "who fraudulently conceals or fails to report income or other information which would have an effect on benefits or who makes a false statement or misrepresentation of a material fact" in claiming compensation benefits under the Act might be subject to criminal prosecution.

In an investigative memorandum dated October 11, 1995, an employing establishment inspector stated that an investigation revealed that appellant had worked since December 1993 as

[10] *Alfred R. Hafer*, 46 ECAB 553 (1995).

[11] 5 U.S.C. § 8106(b).

[12] *Charles Walker*, 44 ECAB 641 (1993).

[13] *Christine P. Burgess*, 43 ECAB 449 (1992).

a maintenance clerk, substitute teacher and special education assistant. The investigative report contained copies of payroll records establishing that appellant worked part time as a maintenance clerk for Quality Oil from December 19, 1993 to April 13, 1994 earning $5.25 per hour. The report also includes copies of checks from the Forsyth County School Board to appellant dated January 14, 1994.

On November 4, 1995 appellant signed an affidavit on a Form EN-1032 for the period August 4, 1994 to November 4, 1995. On this form, appellant listed his employment with Quality Oil Company from December 30, 1993 to April 20, 1994 and also listed earnings from June 20 to November 30, 1994, working for the Quality Education Institute. Appellant further specified earning $67.50 on January 14, 1994, as a substitute teacher with the Forsyth County school system. Appellant listed his employment during this period as teaching a class for Ms. Williams with earnings of $3,390.00.

In a supplemental investigative memorandum dated April 3, 1996, an investigator with the employing establishment indicated that appellant reported earnings from outside the period covered by the November 4, 1995 EN-1032 form which he had not reported on his prior EN-1032 form. The investigator also related that from February 15 to December 15, 1995 appellant earned $7,863.36 working for the Forsyth County school system. Accompanying the report are checks from the school system indicating that during the period covered by the CA-1032 Form signed November 4, 1995 appellant earned in excess of $6,500.00.

The factual circumstances of record, including appellant's level of education and his signing of strongly worded certification clauses on the Forms EN-1032, provide persuasive evidence that appellant "knowingly" understated his earnings and employment activities.[14] Appellant reported some of his earnings, which shows that he understood the requirement to report earnings and employment. His failure to report additional earnings and employment must be considered to have been made with knowledge of the reporting requirements. The Office, therefore, properly found that appellant forfeited his compensation for the period June 5, 1993 to November 4, 1995.[15]

[14] *Mamie L. Morgan*, 41 ECAB 661 (1990).

[15] On May 6, 1997 the Office issued a preliminary finding of an overpayment in the amount of $42,029.37 due to appellant's forfeiture of compensation; however, the Office has not yet finalized its determination of overpayment and thus this issue is not currently before the Board.

The decisions of the Office of Workers' Compensation Programs dated May 6, 1997 are hereby affirmed.

Dated, Washington, D.C.
September 27, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member