U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICARDO G. HERNANDEZ and DEPARTMENT OF THE AIR FORCE, LAUGHLIN AIR FORCE BASE, TX

Docket No. 00-813; Submitted on the Record;
Issued January 15, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation to reflect his wage-earning capacity in the position of a payroll clerk.

On August 18, 1987 appellant, then a 38-year-old temporary laborer, filed a traumatic injury claim alleging that he injured his back while nailing spikes into railroad ties. The Office accepted the claim for lumbar strain. Appellant stopped work on August 18, 1987 and did not return.[1]

In a progress note dated November 2, 1995, Dr. Ralph F. Rashbaum an attending Board-certified orthopedic surgeon, recommended retraining appellant for sedentary light-duty work.

In a January 18, 1996 work restriction evaluation, Dr. Rashbaum referred to a February 1, 1994 functional capacity evaluation (FCE) for determining appellant's restrictions, which included no lifting more than 20 pounds and indicated that appellant had reached maximum medical improvement.

In a progress note dated October 30, 1997, Dr. Rashbaum stated that appellant was being retrained and that "once we get him over this exacerbation, it would be my opinion that he would be able to return to some light work."

Appellant's vocational rehabilitation counselor determined that appellant was capable of performing the duties of a payroll clerk in a final report dated December 5, 1997 and that the state employment services showed that the position was available in sufficient numbers to make it reasonably available within appellant's commuting area.

In a notice of proposed reduction of compensation dated February 12, 1999, the Office found that the physical requirements of a payroll clerk were sedentary, including no climbing,

[1] Appellant's temporary appointment as a laborer ended September 30, 1987.

balancing, stooping, kneeling or crouching and thus met Dr. Rashbaum's restrictions. The Office also found that the position of payroll clerk was reasonably available full time. The Office concluded that the position fairly and reasonably represented appellant's wage-earning capacity and accordingly reduced his wage-loss benefits. The Office gave appellant 30 days to respond.

In a letter dated February 19, 1999, appellant disagreed with the proposed reduction and submitted an October 18, 1998 report by Dr. Rashbaum, who found "essentially no change whatsoever in [appellant's] clinical condition" and stated that appellant was incapable of rehabilitation or retraining.

In a March 19, 1999 report, Dr. Rashbaum stated that appellant could perform light duty, but he doubted "anybody in their right mind would hire him." He also noted that there would not be a problem of releasing appellant to work if he "were offered sedentary work in a nonstructured environment which would allow him to sit, stand and move about." Dr. Rashbaum opined that the payroll clerk position seemed "to be a reasonable approach to trying to get this person back to gainful employment, if in fact such a job was available."

By decision dated April 2 and finalized on April 7, 1999, the Office reduced appellant's monthly wage-loss compensation to $85.00.

In a letter dated April 25, 1999, appellant requested a review of the written record and submitted evidence that he remained totally disabled. Dr. Rashbaum recommended surgery and indicated that appellant was temporarily totally disabled in a note dated March 4, 1999. In an April 16, 1999 report, he indicated that appellant could perform nonstructured work, but that no employer would hire appellant.

By decision dated September 8, 1999, the Office hearing representative affirmed the reduction of compensation.[2]

The Board finds that the Office met its burden of proof to reduce appellant's compensation to reflect his wage-earning capacity in the position of a payroll clerk.

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation, it has the burden of justifying a subsequent reduction in such benefits.[3] In this case, the Office reduced appellant's monetary compensation on the grounds that he has the capacity to earn wages as a payroll clerk.

Under section 8115(a) of the Federal Employees' Compensation Act,[4] wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and

[2] The Board notes that this case record contains documents belonging to another claimant.

[3] *Gewin C Hawkins*, 52 ECAB ____ (Docket No. 99-798, issued January 29, 2001); *Alice J. Tysinger*, 51 ECAB ____ (Docket No. 98-2423, issued August 29, 2000); *Francesco Bermudez*, 51 ECAB _____ (Docket No. 98-1395, issued May 11, 2000).

[4] 5 U.S.C. § 8101 *et seq.*

reasonably represent his wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, his degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect his wage-earning capacity in his disabled condition.[5]

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 usual employment, the employee's age and vocational qualifications and the availability of suitable employment.[6] Accordingly, the evidence must establish that jobs in the position selected for determining wage-earning capacity are reasonably available in the general labor market in the commuting area in which the employee lives. In determining an employee's wage-earning capacity, the job selected must be one reasonably available in the general labor market in appellant's commuting area.[7] The Office may not select a makeshift or odd-lot position or one not reasonably available on the open labor market.[8]

In this case, the Office determined that appellant was no longer totally disabled based on the October 30, 1997 medical report and January 18, 1996 work restriction evaluation of Dr. Rashbaum. In his October 30, 1997 report, Dr. Rashbaum found that appellant was capable of performing light work. Dr. Rashbaum, relying upon a February 1, 1994 FCE, revealed appellant's physical restrictions as no lifting more than 20 pounds and indicated that appellant had reached maximum medical improvement. His subsequent reports of October 18, 1998 and March 19, 1999 are consistent with his earlier reports and the Office's determination that appellant was capable of working in a light-duty position.

On December 5, 1997 the Office rehabilitation specialist closed appellant's case finding that all of the vocational efforts and job placement efforts were not successful in returning appellant to gainful employment after more than a reasonable time period. A loss of wage-earning capacity determination was calculated, based upon the position of payroll clerk, as such position was within appellant's medical restrictions, was within his vocational qualifications as he had previous work experience and had received his GED, in addition to experience from his federal employment and that this position was reasonably available within appellant's commuting area as verified by state employment service reports and the positions actually secured for appellant.

The Board finds that the Office considered the proper factors such as availability of suitable employment, appellant's physical limitations and his usual employment, age,

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[5] 5 U.S.C. § 8115; *Dorothy Jett*, 52 ECAB ___ (Docket No. 99-297, issued January 29, 2001); *James Henderson, Jr.*, 51 ECAB _____ (Docket No. 98-616, issued January 10, 2000).

[6] *See generally*, 5 U.S.C. § 8115(a); A. Larson *The Law of Workers' Compensation* § 57.22 (1989); *see also Bettye F. Wade*, 37 ECAB 556 (1986).

[7] *See Richard Alexander*, 48 ECAB 432 (1997); *Albert L. Poe*, 37 ECAB 684 (1986).

[8] *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

qualifications and training, in determining that the position of payroll clerk represented appellant's wage-earning capacity. The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of payroll clerk and that such a position was reasonably available within the general labor market of appellant's commuting area. Therefore, the Office properly determined that the position of payroll clerk reflected appellant's wage-earning capacity effective April 2, 1999.

The September 8, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
January 15, 2002

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member