United States Department of Labor
Employees' Compensation Appeals Board

J.C., Appellant	)	
and	)	**Docket No. 10-1855**
	)	**Issued: June 2, 2011**
DEPARTMENT OF HOMELAND SECURITY, U.S. BORDER PATROL ACADEMY, IMPERIAL BEACH STATION, San Diego, CA, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On July 7, 2010 appellant filed a timely appeal from a June 1, 2010 merit decision of the Office of Workers' Compensation Programs regarding his wage-earning capacity. Pursuant to the Federal Employees' Compensation Act[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether the Office properly determined that appellant's actual earnings as a plane interior technician fairly and reasonably represented his wage-earning capacity.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On March 12, 2008 appellant, then a 35-year-old border patrol trainee, injured his left elbow during a training exercise. He stopped work and received continuation of pay. The Office accepted a closed fracture of the left radius head and left elbow closed dislocation. Appellant underwent a left radial head replacement and repair of left elbow lateral collateral ligaments on March 25, 2008. He was released to modified duty with restrictions on April 9, 2008. On September 11, 2008 appellant was terminated from his federal position as he was unable to perform border patrol agent duties. He claimed wage-loss compensation beginning September 11, 2008 and the Office paid compensation.

On January 26, 2009 Dr. Daniel B. Cullan, II, a Board-certified orthopedic surgeon, found appellant permanent and stationary with restrictions of limited use of the left upper extremity and no lifting greater than 10 pounds.

In August 2009, appellant was referred for vocational rehabilitation. In an initial report of August 27, 2009, the rehabilitation specialist noted that appellant was considering two job offers.

On August 25, 2009 Dr. Michael Lenihan, a Board-certified orthopedic surgeon and associate of Dr. Cullan,[2] listed appellant's work restrictions. He agreed with Dr. Cullan's assessment of appellant's work status. Dr. Lenihan advised that, for no more than two hours a day, appellant could lift no more than 10 pounds, push no more than 20 pounds and pull no more than 30 pounds with no striking or impact loading with the left extremity.

On September 15, 2009 appellant began private employment as an aircraft mechanic/plane interior technician working eight hours a day, five days a week for $15.00 per hour or $600.00 a week.[3] An October 2, 2009 earnings statement verified that appellant earned $15.00 per hour for a 40-hour week plus $30.00 differential for Shift 3, for a total of $630.00. The rehabilitation counselor advised that appellant regularly earned an additional $30.00 per week for Shift 3 work and that he was doing well in his new position.

The employing establishment noted that effective September 15, 2009 appellant's date-of-injury position of Grade 5, Step 02 earned $42,258.00 per year or $812.65 a week.

By decision dated December 31, 2009, the Office found that appellant had been employed as a plane interior technician effective September 15, 2009, which was over 60 days, and that he earned weekly wages of $630.00. It found that there was no evidence the job was temporary and that the medical restrictions of August 25, 2009 supported his capacity to perform such work. The Office found that appellant's actual earnings fairly and reasonably represented his wage-earning capacity. In a computation of compensation worksheet, it advised that the weekly pay rate when disability began, effective September 11, 2008, was $780.43 and the current pay rate for the date-of-injury position, effective September 15, 2009, was $812.65. The

[2] Dr. Lenihan became appellant's treating physician after Dr. Cullan left the practice.

[3] The rehabilitation counselor also provided a position description for a cabin mechanic.

Office used the current rate for appellant's date-of-injury position, $812.65, and applied the *Shadrick*[4] formula to find a loss in earning capacity of $171.69 per week and a compensation rate of $128.77 per week or $515.77 every four weeks. Accordingly, it reduced his compensation effective November 18, 2009 to reflect the loss in wage-earning capacity.

Following clarification regarding life insurance enrollment, the Office issued a January 11, 2010 decision which incorporated the December 31, 2009 decision. A revised computation of compensation worksheet reflects deductions for life insurance, which changed the net compensation appellant received each four weeks from $515.77 to $484.29 after a basic life insurance premium of $12.90 and an optional life insurance premium of $17.88 were taken into account.

Appellant disagreed with the Office's decision and requested a telephonic hearing which was held April 7, 2010. At the hearing, appellant's attorney asserted that appellant's job was a no-bid job that was created for him and could not be used for a loss of wage-earning capacity decision. Appellant testified that he currently worked as an interior aviation technician. He stated that, because he had a 30-pound weight restriction, he could not work as an aviation technician and use his license because he could not lift the 50 pounds necessary to work on the exterior of a plane. Appellant noted that no particular license was needed for his current job. He obtained his current job by researching and sending out his resume and denied that the job was created for him. Appellant testified that he was 10 days from finishing the border patrol academy when he broke his elbow, which he alleged was due to the negligence of his instructors. When he returned to modified duty as a border patrol trainee at the employing establishment his pay had increased to that of a GS-9. No additional evidence pertaining to the loss of wage-earning capacity issue was received.

By decision dated June 1, 2010, an Office hearing representative affirmed the January 11, 2010 decision.

LEGAL PRECEDENT

Section 8115(a) of the Act[5] provides that in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his actual earnings if his earnings fairly and reasonably represent his wage-earning capacity.[6] Office procedures indicate that a determination regarding whether actual wages fairly and reasonably represent wage-earning capacity should be made after a claimant has been working in a given position for more than 60 days[7] and actual earnings will be presumed to fairly and reasonably represent wage-earning capacity only in the absence of contrary evidence.[8] Its procedure manual provides that

[4] *See infra* note 10.

[5] 5 U.S.C. §§ 8101-8193.

[6] *Id.* at § 8115(a).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (July 1997); *see William D. Emory*, 47 ECAB 365 (1996).

[8] *See Mary Jo Colvert*, 45 ECAB 575 (1994).

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.[9] Further, a makeshift[10] or odd-lot position designed for a claimant's particular needs will not be considered suitable.[11]

The formula for determining loss of wage-earning capacity based on actual earnings, developed in the Board's decision in *Albert C. Shadrick*,[12] 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.[13] The amount of any compensation paid is based on the wage-earning capacity determination and it remains undisturbed until properly modified.[14]

ANALYSIS

Appellant was a full-time border patrol trainee at the time of his injury on March 12, 2008. The Office accepted his claim for a closed fracture of left radius head and left elbow closed dislocation, for which he underwent surgery on March 25, 2008. It authorized treatment and paid wage-loss compensation.

After a period of disability, appellant returned to modified duty as a border patrol trainee. He claimed his pay increased from a GS-5 to a GS-9. Appellant's federal employment was terminated on September 11, 2008. On September 15, 2009 he accepted a position working as an aviation interior technician earning $15.00 an hour plus $30.00, a Shift 3 differential, for 40 hours a week or a total of $630.00. The Office reduced appellant's compensation effective November 18, 2009 based on his actual earnings as an aviation interior technician.

The Board finds that appellant's actual earnings as an aviation interior technician fairly and reasonably represent his wage-earning capacity. The employing establishment was unable to accommodate appellant's physical restrictions and terminated his employment on September 11, 2008. Appellant obtained employment in the competitive labor market and had two job offers pending at the time rehabilitation services began. He was selected for a position which was available to the general public. On August 25, 2009 Dr. Lenihan opined that for no more than two hours per day appellant could lift no more than 10 pounds, push no more than 20

[9] Federal (FECA) Procedure Manual, *supra* note 7 at Chapter 2.814.7 (July 1997).

[10] 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).

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

[12] 5 ECAB 376 (1953).

[13] Federal (FECA) Procedure Manual, *supra* note 7 at Chapter 2.814.7(c) (December 1993).

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

pounds and pull no more than 30 pounds with no striking or impact loading with the left extremity. Appellant worked in the aviation interior position for more than 60 days. There is no evidence that the position was seasonal, temporary or makeshift work designed for his particular needs and no evidence to show that he was not working eight hours a day.[15] As there is no evidence that appellant's wages in this position did not fairly and reasonably represent his wage-earning capacity, they must be accepted as the best measure of his wage-earning capacity.[16]

Appellant's attorney argued that appellant's job was a no-bid job that the employing establishment created. The Office hearing representative found, and the record supports, there is no factual basis for this argument. Appellant sold his services in the competitive labor market and retained a position, which was available to the general public in the private sector. He testified as to his duties and acknowledged that it was a real job. As noted, there is no evidence that the position was seasonal, temporary or makeshift work designed for appellant's particular needs or that he was not working eight hours a day. The Board notes that he did not challenge that he had actual earnings before the Office's hearing representative. Rather, appellant indicated that he cannot utilize his aviation license and work on the exterior of a plane because of his 30-pound weight restriction. Frustration or desire over not being able to work in a particular environment, however, is not considered in determining the suitability of a position.[17] Additionally, appellant applied for and accepted such position.

As appellant's actual earnings as a plane interior technician fairly and reasonably represent his wage-earning capacity, the Board must determine whether the Office properly calculated his wage-earning capacity based on his actual earnings. The Board finds that this aspect of the case is not in posture for decision.

In computing the compensation, the Office used the current pay rate for the job and step when appellant was injured. The rate of pay for compensation purposes is the highest rate which satisfies the terms of section 8101(4) of the Act, *i.e.*, the monthly pay at the time of injury, or the monthly pay at the time disability begins, or the monthly pay at the time of recurrent disability, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater, except when otherwise determined under section 8113 of the Act with respect to any period.[18]

After the March 12, 2008 work injury and March 25, 2008 surgery, appellant returned to modified duty on April 9, 2008 and was terminated from his federal position on September 11, 2008 as he was unable to perform border patrol agent duties. The Board finds that, as appellant only worked modified duty after the March 12, 2008 employment injury and did not return to regular employment, he is not entitled to a recurrent pay rate.[19] Appellant testified that he was

[15] *J.C.*, 58 ECAB 700 (2007).

[16] *Loni J. Cleveland*, 52 ECAB 171 (2000).

[17] *Cf. Lillian Cutler*, 28 ECAB 125 (1976) (frustration from desire to work in a particular position is not compensable).

[18] 5 U.S.C. § 8101(4); *see Patricia K. Cummings*, 53 ECAB 623 (2002).

[19] 5 U.S.C. § 8101(4); *see Jeffrey T. Hunter*, 52 ECAB 503 (2001).

only days from graduation from the academy when he was injured. He advised that, before he was terminated from the employing establishment, his salary increased to a GS-9 level. As appellant was working as a modified border patrol trainee and asserted that his salary increased to that of a GS-9, the Office should develop the issue of whether appellant was employed in a learner's capacity under section 8113(a).[20] The case will, therefore, be remanded to the Office to determine whether he is entitled to a pay rate based upon his date of injury, date of disability or a learner's capacity under section 8113(a) of the Act, if applicable. After such further development as the Office deems necessary, the Office shall issue a *de novo* decision regarding the pay rate on which his loss of wage-earning capacity determination is based.

CONCLUSION

The Board finds that the Office properly determined that appellant's actual earnings fairly and accurately represented his wage-earning capacity. The case is remanded to the Office for further development regarding his proper pay rate for compensation purposes.

[20] If an individual (1) was a minor or employed in a learner's capacity at the time of injury; and (2) was not physically or mentally handicapped before the injury; the Secretary of Labor, on review under section 8128 of this title after the time the wage-earning capacity of the individual would probably have increased but for the injury, shall recompute prospectively the monetary compensation payable for disability on the basis of an assumed monthly pay corresponding to the probable increased wage-earning capacity. 5 U.S.C. § 8113(a). FECA Program Memorandum No. 122 provides that the compensation rate of a learner should be adjusted if the pay rate increased as a result of a change in his or her learner's status, which would have brought him or her either: (1) to a new level within; or (2) to completion of the learner's program. FECA Program Memorandum No. 122, issued May 19, 1970; *see Hayden C. Ross*, 55 ECAB 455 (2004); *Mary K. Rietz*, 49 ECAB 613 (1998).

ORDER

IT IS HEREBY ORDERED THAT the June 1, 2010 decision of the Office of Workers' Compensation Programs is affirmed in part and the case remanded in part for further proceedings consistent with this decision.

Issued: June 2, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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