U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CLAVON M. HOCUTT and DEPARTMENT OF THE NAVY, NORFOLK NAVAL SHIPYARD, Portsmouth, VA

Docket No. 01-1622; Submitted on the Record;
Issued March 11, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly adjusted appellant's compensation to reflect his wage-earning capacity in the position of user support analyst.

The Office accepted appellant's claim for a right knee strain, left shoulder strain and torn right lateral meniscus. He worked intermittently since his September 20, 1989 employment injury and was eventually placed on the periodic rolls for total disability on February 26, 1999. Appellant received a schedule award for a 17 percent permanent impairment to his right knee from June 7, 1991 through May 14, 1992.

In a report dated July 6, 1999, appellant's treating physician, Dr. Wayne T. Johnson, a Board-certified orthopedic surgeon, stated that he should not lift 20 to 30 pounds on a repetitive basis and should keep his walking to a minimum to "minimize wear and tear on his knee." In a work-capacity evaluation dated March 7, 1999, Dr. Johnson indicated that appellant could walk for four hours, squat for one hour, kneel for one to two hours and do no climbing.

The Office referred appellant to a vocational rehabilitation counselor. In a report dated December 11, 1999, the counselor noted that appellant had completed the 10th grade in high school and subsequently obtained a general equivalency diploma (GED) in 1968. He had performed some computer work at his job while on light duty and the counselor enrolled him in a computer technical training program. On July 5, 2000 the rehabilitation counselor informed appellant that he had completed all of the planned classroom work for the A+ hardware and software certification and he should take one examination for the software or hardware the first week in July and the other examination the last week of July. He repeatedly urged appellant to study hard for the examinations. On July 29, 2000 appellant failed the A+ computer hardware examination by one question and was advised by the rehabilitation counselor to retake the examination. He did not schedule taking the A+ software examination in July. On his own volition appellant entered into a 300-hour internship program with City of Portsmouth Department of Social Services in their computer maintenance section involving setting up email

and fixing computers. On October 30, 2000 appellant began working part time, approximately 38 to 39 hours a week, as a biscuit maker for McDonald's. He indicated that he would continue to search for suitable employment but in the meantime was "content for the moment" working as a biscuit maker for McDonald's. Appellant took the A+ software examination and retook the A+ hardware examination on September 25, 2000 and failed them both. He wanted to restrict his job search to the City of Portsmouth area against the rehabilitation counselor's advice.

On September 1, 2000 the rehabilitation counselor identified the sedentary job of user support analyst as a job that appellant had the professional qualifications to perform, was within his physical restrictions and was reasonably available. The work involved investigating and resolving computer software and hardware problems of users, usually on the telephone. The rehabilitation counselor stated that appellant purchased a microcomputer and "sponsored in course of concentrated study geared to A+ certification." The rehabilitation counselor stated that appellant tested and received national A+ hardware certification and that he took three computer courses on microsoft word and excel and on internet awareness.

On October 10, 2000 appellant reported that he received a certificate for his volunteer internship at Portsmouth Social Services. On October 19, 2000 appellant applied for some computer jobs without success.

On December 5, 2000 the Office informed appellant that it was proposing to reduce his wage-loss compensation because he was capable of earning wages as a user support analyst.

By letter dated January 2, 2001, appellant stated that he did not have training in the field the rehabilitation counselor identified. He stated that he took the job at McDonald's "to help take some of the burden off the compensation and try to return to classes at Electronic Systems (ESI) and retake the test at a later time which [he] knew [he] would be responsible for." Appellant stated that he had asked for more leave time from McDonald's in order to look for a job that would satisfy the Office. He stated that, during the holidays, it had been hard to have contacts return calls but he would start a new job search as soon as possible. By letter dated January 3, 2001, the Office informed appellant that he had not participated in good faith in the Office-approved placement program in that he failed to take the A+ hardware and software examinations in a timely manner and when he finally did take them, he failed them, that he failed to search for employment within his commuting area and that he accepted employment at a wage considerably less than what he could have earned had he complied with the training program.

By decision dated February 6, 2001, the Office adjusted appellant's compensation to reflect his wage-earning capacity in the position of user support analyst.

The Board finds that the Office properly adjusted appellant's compensation to reflect his wage-earning capacity in the position of user support analyst.

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction in such benefits.[1]

[1] *Francesco Bermudez*, 51 ECAB ___ (Docket No. 98-1395, issued May 11, 2000).

Under section 81159(a) of the Federal Employees' Compensation Act, if the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, his or her usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect wage-earning capacity in his or her disabled condition.[2] When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by the Office or 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 labor market, that fits that employee's capabilities with regard to his 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 service or other applicable service.[3] Finally, application of the principles set forth in *Albert C. Shardrick* will result in the percentage of the employee's loss of wage-earning capacity.[4] The basic rate of compensation paid under the Act is 66 2/3 percent of the injured employee's monthly pay.

In this case, in his July 6 and March 7, 1999 reports, appellant's treating physician, Dr. Johnson opined that appellant could lift more than 20 to 30 pounds on a repetitive basis, could walk four hours, kneel one hour, squat one to two hours and not climb at all. On September 1, 2000 the rehabilitation counselor identified the sedentary job of user support analyst as a job that appellant had the professional qualifications to perform, was within his physical restrictions and was reasonably available. The professional qualification listed for the job was a GED. Appellant had a GED and had completed courses for A+ software and hardware identification and completed 300 hours of a computer internship related to email and computer repair for which he received a certificate. Although the rehabilitation counselor stated on the form that appellant had obtained certification in A+ hardware, that statement is inconsistent with his last vocational report dated November 6, 2000, in which he stated that appellant failed the A+ hardware examination. Nonetheless, the job did not specifically require the A+ software and hardware certification. Since appellant had at least taken the classes for A+ software and hardware certification and had received a certificate for participating in a 300-hour computer internship, the evidence establishes that appellant had the professional qualifications to perform the job of user support analyst. The evidence also establishes that the job of user support analyst, which was sedentary was within appellant's physical restrictions. The Office, therefore, properly reduced appellant's compensation based on his wage-earning capacity of a user support analyst.

[2] *See Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); *petition for recon. denied*, (Docket No. 92-118, issued February 11, 1993); *see* also 5 U.S.C. § 8115(a).

[3] *Raymond Alexander*, 48 ECAB 432 (1997); *Dorothy Lams*, 47 ECAB 584 (1996).

[4] *Dorothy Lams*, *supra* note 3; *Albert C. Shardrick*, 5 ECAB 376 (1953); *see also*, 20 C.F.R. § 10.303.

The February 26, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.[5]

Dated, Washington, DC
March 11, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[5] The Board does not have jurisdiction over the decisions issued by the Office on July 10, 2001 and September 20, 2001 subsequent to June 4, 2001, the date appellant filed his appeal with the Board and, therefore, those decisions are null and void. *See Noe L. Flores*, 49 ECAB 344, 346-47 n.1 (1998).