U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KATHLEEN WEISEMAN and DEPARTMENT OF ENERGY, CHICAGO OPERATIONS OFFICE, Argonne, Ill.

Docket No. 97-1633; Submitted on the Record;
Issued June 9, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's wages of $505.56 as an energy conservation specialist represent her wage-earning capacity.

Appellant, then an energy conservation assistant, sustained a work-related injury on July 8, 1987. The Office accepted her claim for lumbar disc displacement, fracture of the left tibia and fibula, laceration of the head and headaches. Appellant stopped working on the date of her injury. She was earning $435.42 a week at that time as a GS-7. The Office found that appellant returned to work as an energy conservation assistant working three days a week on January 20, 1988, and that on August 12, 1994 appellant obtained a job as an energy conservation specialist at the GS-12 level working three days a week with wages of $505.56 a week. By letter dated July 1, 1996, appellant stated that she returned to the same job after the 1987 employment injury as an energy conservation specialist but worked three days a week instead of five days a week earning $276.00 a week as a GS-9. By August 1994, appellant stated that she was promoted to GS-12. In a report dated November 10, 1993, Dr. Parviz Kambin, a Board-certified orthopedic surgeon and appellant's treating physician, stated that appellant's present difficulties with her left knee, left leg, and back pain were permanent and that she was able to work three days a week.

By decision dated November 24, 1993, the Office awarded appellant a schedule award for a 34 percent permanent impairment to the left leg for 97.92 weeks from April 1, 1992 to February 15, 1993.

By decision dated May 20, 1996, the Office determined that the position of part-time energy conservation specialist with wages of $505.56 a week fairly and reasonably represented appellant's wage-earning capacity. In its decision, the Office noted that appellant's pay rate when injured was a GS-7 at $435.42 a week, that the current pay rate of that job was $565.50 a

week, and the pay rate of the energy conservation specialist at the GS-12, Step 2 level working 3 days a week was $502.56 a week.

By letter dated June 11, 1996, appellant requested a written review of the record by an Office hearing representative.

By decision dated September 19, 1996, the Office hearing representative affirmed the Office's May 20, 1996 decision. The Office hearing representative stated that the evidence also established that appellant's back condition was causally related to her 1987 employment injury and that the surgical procedure recommended by her physician was approved.

By letter dated November 25, 1996, appellant requested reconsideration of the Office's decision. Appellant stated that her loss of wage-earning capacity should have been based on the wages she earned on January 20, 1988, not May 20, 1996. Further, she stated that by being forced to accept a part-time position, she lost the opportunity to receive retirement benefits based on a five-day work week, to receive two days a week compensation at the GS-12 level, and to receive health benefits for a full-time employee. Further, she stated that she was in constant pain.

By decision dated February 27, 1997, the Office denied appellant's reconsideration request.

The Board finds that the Office properly determined that appellant's wages of $505.56 as an energy conservation specialist represent her wage-earning capacity.

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 of benefits.[1]

Under section 8115(a) of Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent his or her wage-earning capacity, or 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] The Board has held that actual earnings do not fairly and reasonably represent a claimant's wage-earning capacity where the actual earnings are derived from a make-shift position designed for appellant's particular needs.[3] Office procedures specifically direct a claims examiner to

[1] *Sylvia Bridcut*, 48 ECAB ___ Docket No. 95-63, (issued November 6, 1996); *James B. Christenson*, 47 ECAB 775, 778 (1996).

[2] *See Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); *see also* 5 U.S.C. § 8115(a).

[3] *See William D. Emory*, 47 ECAB 365, 371 (1996).

consider factors such as part-time, sporadic, seasonal or temporary work.[4] The burden of proof is on the party attempting to show the award should be modified.[5]

The applicable regulation which details the formula to be used by the Office in determining a claimant's loss of wage-earning capacity provides as follows:

> "An employee's wage-earning capacity in terms of percentage is obtained by dividing the employee's earnings by the current pay rate. The comparison of earnings and 'current' pay rate for the job held at the time of injury need not be made as of the beginning of partial disability. *Any convenient date* may be chosen by the Office for making the comparison as long as the two wage rates are in effect on the date used for comparison."[6] (Emphasis added).

In the present case, in its May 20, 1996 decision, the Office calculated appellant's wage-earning capacity based on a percentage of the difference between appellant's pay rate of $435.42 at the time she was injured and her current pay rate of $505.56 as an energy conservation specialist pursuant to the formula set forth in *Albert C. Shadrick*.[7] The record does not show that appellant's job which she had held since returning to work on January 20, 1988 was in any way makeshift, sporadic or temporary. Further, there is no evidence to show that the job was not consistent with appellant's medical restrictions of only being able to work three days a week. The Office properly determined that appellant's current pay rate of $505.56 as an energy conservation specialist working three days a week represented appellant's wage-earning capacity and properly chose May 20, 1996, the date of the Office's decision, to compare appellant's current pay rate with appellant's pay rate at the time of injury.

[4] *Id.*

[5] *See Clarence D. Ross*, 42 ECAB 556, 562 (1991).

[6] 20 C.F.R. § 10.303(b); *see Domenick Pezzetti*, 45 ECAB 787, 790 (1994).

[7] 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.303.

The decisions of the Office of Workers' Compensation Programs dated February 27, 1997 and September 19 and May 20, 1996 are hereby affirmed.

Dated, Washington, D.C.
June 9, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member