U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PENNY L. BAGGETT and U.S. POSTAL SERVICE,
POST OFFICE, Milton, FL

Docket No. 97-2190; Submitted on the Record;
Issued September 28, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined appellant's loss of wage-earning capacity on June 17, 1996; (2) whether the Office met its burden of proof to modify appellant's loss of wage-earning capacity determination on February 11, 1997; and (3) whether appellant established that she sustained a recurrence of total disability during any period after May 21, 1996.

The Board has carefully reviewed the evidence of record and finds that the Office properly computed appellant's loss of wage-earning capacity on June 17, 1996.

Under the Federal Employees' Compensation Act,[1] once the Office has accepted a claim and paid compensation benefits, it has the burden of proof to establish that an injured employee's disability has ceased or lessened, thus, justifying termination or modification of those benefits.[2] An injured employee who is unable to return to the position held at the time of injury or to earn equivalent wages but who is not totally disabled for all gainful employment is entitled to compensation computed on the loss of wage-earning capacity.[3]

Wage-earning capacity is the measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[4] Section 8106(a)[5] of the Act provides for compensation for the loss of wage-earning capacity during an employee's partial disability by

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[1] 5 U.S.C. §§ 8101-8193 (1974).

[2] *James B. Christenson*, 47 ECAB 775, 778 (1996); *Wilson L. Clow, Jr.*, 44 ECAB 157, 170 (1992).

[3] 20 C.F.R. § 10.303(a); *Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

[4] *Dennis D. Owen*, 44 ECAB 475, 479 (1993); *Hattie Drummond*, 39 ECAB 904, 907 (1988).

[5] 5 U.S.C. § 8106(a).

paying the difference between his monthly pay and his monthly wage-earning capacity after the beginning of the partial disability. Section 8115 provides that the wage-earning capacity of an employee is determined by his actual earnings if these fairly and reasonably represent his or her wage-earning capacity.[6]

In this case, appellant's notice of traumatic injury, filed on March 18, 1987, was accepted for a low back strain and temporary aggravation of her degenerative disc disease after appellant, a temporary part-time relief rural carrier, was involved in a vehicle collision.[7] The Office subsequently accepted somatoform pain disorder,[8] based on the report of Dr. Steven P. Doheny, a Board-certified psychiatrist.

Following vocational rehabilitation and evaluation, appellant returned to half-time, limited-duty work as a casual clerk on September 22, 1990 at $5.00 an hour but this temporary position ended on June 28, 1991. Appellant, was then again referred for vocational rehabilitation and job placement.

On January 26, 1996 the employing establishment offered appellant a temporary rehabilitation position of modified casual clerk, four hours a day, six days a week at $11.83 an hour.[9] Appellant accepted the job, which was approved by Dr. Peter M. Szymoniak, a Board-certified orthopedic surgeon and appellant's long-term treating physician, and returned to work on April 15, 1996.

A June 14, 1996 Office memorandum indicated that appellant was earning $9.36 an hour on the date of injury and was paid compensation at the rate of $317.09 a week, based on her total earnings -- $16,488.67 -- for one year prior to the injury. Thus, appellant worked an average of 33.88 hours per week prior to March 17, 1987.

In determining appellant's loss of wage-earning capacity, the Office multiplied the 1996 hourly rate of $11.83 by the 25 hours appellant worked for a total of $295.75 per week, her actual earnings. Multiplying the actual 33.88 hours appellant worked in 1987 by the 1996 rate for that position yielded $400.80. The difference between this rate and appellant's actual earnings represented her loss of wage-earning capacity.

On June 17, 1996 the Office determined that the modified clerk's position fairly and reasonably represented appellant's wage-earning capacity, found that she had a loss in earning capacity of $82.45 weekly, based on the difference between her weekly compensation rate of

[6] 5 U.S.C. § 8115(a); *Lawrence D. Price*, 47 ECAB 120, 121 (1995).

[7] Appellant was hired as a rural carrier for one day a week to relieve the regular carrier, but was working full-time on the date of injury, March 17, 1987, because the regular carrier was on extended sick leave.

[8] Somatization disorder is characterized by the multiplicity and persistence of complaints of pain without evidence of physical disease. *The Merck Manual*, 1590-91 (16th ed. 1992).

[9] This temporary appointment was apparently renewed twice in 1996 and again in January 1997. On March 18, 1997 the employing establishment notified appellant of her separation, effective March 31, 1997, on the grounds that her temporary appointment would expire.

$317.09 and her adjusted earning capacity of $234.64. The Office reduced appellant's disability compensation to $327.00 every four weeks.

It was proper for the Office, in its June 17, 1996 decision to use appellant's actual earnings as the basis for her loss of wage-earning capacity as there is no evidence that appellant's actual earnings did not fairly and reasonably represent her wage-earning capacity effective April 15, 1996. This determination is consistent with Board precedent which provides that, generally, wages actually earned are the best measure of a wage-earning capacity and that in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, they must be accepted as such measure.[10]

Appellant has not provided any reason as to why her actual earnings did not represent her wage-earning capacity. The Office's procedures do provide guidelines for the Office to consider in evaluating whether actual earnings fairly and reasonably represent wage-earning capacity. The Office's procedures specifically provide, in discussing the factors considered for determining wage-earning capacity based on actual earnings, that "reemployment may not be considered suitable when: (1) the job is part-time (unless the claimant was a part-time worker at the time of injury) or sporadic; (2) the job is seasonal; or (3) the job is temporary where the claimant's previous job was permanent."[11] In the present case, appellant was employed in a part-time, temporary position on the date of injury. Appellant's subsequent employment in a part-time, temporary position after injury therefore did not unfairly or unreasonably reflect her wage-earning capacity.[12]

The Office properly utilized the principles set forth in *Albert C. Shadrick*[13] to determine that appellant had a compensation rate based upon her loss of wage-earning capacity of $327.00 every four weeks. An employee's wage-earning capacity is obtained by dividing the pay rate of the selected position by the current pay rate for the date-of-injury job; the wage-earning capacity in terms of dollars is computed by multiplying the pay rate for compensation purposes, as defined at 20 C.F.R. § 10.5(a)(20), by the percentage of wage-earning capacity and subtracting the result from the pay rate for compensation purposes to obtain the employee's loss of wage-earning capacity.[14] The Office properly followed this procedure in this case. The Board therefore concludes that the Office properly determined appellant's wage-earning capacity based upon her actual earnings on June 17, 1996.

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[10] *Clarence D. Ross*, 42 ECAB 556 (1991).

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-earning Capacity*, Chapter 2.814.7 (July 1997).

[12] An employee's wage-earning capacity in terms of percentage is obtained by dividing the pay rate of the selected position by the current pay rate for the date-of-injury job; the wage-earning capacity in terms of dollars is computed by multiplying the pay rate for compensation purposes, as defined at 20 C.F.R. § 10.5(a)(20), by the percentage of wage-earning capacity and subtracting the result from the pay rate for compensation purposes to obtain the employee's loss of wage-earning capacity. 20 C.F.R. § 10.303(b).

[13] 5 ECAB 376 (1953).

[14] 20 C.F.R. § 10.303(b).

The Board finds that the Office did not, however, meet its burden of proof to modify appellant's wage-earning capacity determination on February 11, 1997.

On December 26, 1996 the employing establishment issued a modification of personnel action indicating that appellant would be paid at a rate of $16.07, effective April 15, 1996, based upon a special exception. The employing establishment noted that "the PDC will process any necessary salary and/or leave adjustment per injury comp[ensation] instruction necessary to retroactively pay employee $16.07 an hour due to compensation level." On January 10, 1997 the employing establishment asked the Office to issue a new wage-earning capacity determination because the June 14, 1996 decision was based on an incorrect pay rate of $11.83. The employing establishment added that it had corrected the error and issued a notice of personnel action to reflect the saved salary and thus eliminate compensation payments.

On February 11, 1997 the Office recomputed appellant's wage-earning capacity, using the corrected hourly rate of $16.07. The Office determined that appellant's adjusted-earning capacity was $401.75 a week and therefore there had been no loss of wage-earning capacity, effective April 15, 1996, when she had been reemployed at the $16.07 rate.[15]

In *Ronald M. Yakota*,[16] the Board stated:

> "Once the wage-earning capacity of an injured employee is properly determined, it remains undisturbed regardless of actual earnings or lack of earnings. A modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was in fact erroneous. The burden is on the Office to establish that there has been a change so as to affect the employee's capacity to earn wages in the job determined to represent his earning capacity. Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn and not on actual wages lost."

The Board has also explained that an increase in pay by itself, however, is not sufficient evidence that there has been a change in an employee's capacity to earn wages.[17] As the Board stated in *Willard N. Chuey*, "[w]ithout a showing of additional qualifications obtained by appellant through retraining, it [is] improper to make a new loss of wage-earning capacity determination based on increased earnings."[18]

The Office's own procedures provide further guidelines as to modification of loss of wage-earning capacity:

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[15] The Office determined that an overpayment of $3,421.82 had been created because appellant had not been entitled to wage-loss compensation from April 15, 1996 through February 1, 1997.

[16] 33 ECAB 1629 (1982).

[17] *Billy R. Beasley*, 45 ECAB 244 (1993).

[18] 34 ECAB 1018 (1983).

"c. *Increased Earnings.* It may be appropriate to modify the rating on the grounds that the claimant has been vocationally rehabilitated if one of the following two circumstances applies:

> (1) *The claimant is earning substantially more* in the job for which he or she was rated. This situation may occur where a claimant returned to part-time duty with the employing establishment and was rated on that basis but later increased his or her hours to full-time work.
>
> (2) *The claimant is employed in a new job* (*i.e.*, a job different from the job the claimant was rated for which he or she) which pays at least 25 percent more than the current pay of the job for which the claimant was rated.

d. *[Claims Examiner] Actions.* If these earnings have continued for at least 60 days, the CE should:

> (1) *Determine the duration, exact pay, duties* and responsibilities of the current job.
>
> (2) *Determine whether the claimant* underwent training or *vocational preparation to earn the current salary.*
>
> (3) *Assess whether the actual job* differs significantly in duties, responsibilities, or technical expertise from the job at which the claimant was rated."

e. *If the results of this investigation establish* that the claimant is rehabilitated or self-rehabilitated, or if the evidence show that the claimant was retrained for a different [job], compensation may be determined using the Shadrick formula…."[19]

In this case, the Office determined that appellant's pay had increased, but did not attempt to determine whether appellant underwent training or vocational preparation to earn the current salary. The case record does not indicate that appellant was retrained or otherwise rehabilitated such that a modification of her loss of wage-earning capacity was warranted.[20]

The Board also notes that the record does not indicate that the June 17, 1996 loss of wage-earning capacity determination was erroneous because appellant was being paid at an incorrect pay rate. The record indicates that in December 1996 the employing establishment commenced paying appellant a "saved" salary at a "special exception" rate, effective April 15,

[19] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-earning Capacity*, Chapter 2.814.11 (c)-(e) (June 1996).

[20] *See Billy R. Beasley*, *supra* note 17.

1996, to conform with her compensation rate. The record does not indicate that the pay rate of $16.53 per hour which the employing establishment eventually paid appellant was actually the pay rate for other employees performing the same position as appellant, such that this was the correct pay rate and the previous loss of wage-earning capacity was based upon an incorrect pay rate. The Office therefore did not meet its burden of proof to modify appellant's loss of wage-earning capacity determination.

The Board also finds that appellant did not establish that she sustained a recurrence of total disability during any period after May 21, 1996.

Appellant claimed intermittent wage-loss compensation for brief periods from May 21 through September 30, 1996. The Office denied the claim on November 14, 1996 but amended that decision on December 13, 1996 and paid benefits for the hours claimed on August 29 and 30, 1996. The Office stated that while the reports and disability forms completed by Dr. Szymoniak indicated that appellant was out of work, the physician provided no medical rationale explaining how appellant's accepted conditions prevented her from working.

Appellant then filed claims for wage-loss compensation for four hours a day from January 14 through March 21, 1997 and submitted a note from Dr. Syzmoniak stating that appellant could work four hours a day five days a week for the next two months. On April 15, 1997 the Office informed appellant that she had to establish a material worsening of her condition to be entitled to additional compensation and that she needed to obtain a rationalized medical opinion explaining why she was capable of working four hours but not five, as she had been doing.

By decision dated May 13, 1997, the Office denied additional wage-loss compensation after February 2, 1997 on the grounds that appellant had failed to establish either that the Office's wage-earning capacity determination was in error or that her physical condition had worsened, thus entitling her to additional wage-loss compensation.

The medical evidence received from Dr. Szymoniak does not substantiate that appellant's condition worsened such that she could not perform the duties of her part-time limited position at any time after May 21, 1996.[21] On May 29, 1996 he noted that appellant had undergone magnetic resonance imaging on May 8, 1996, which was unchanged from 1994. Dr. Szymoniak noted that he had informed appellant that her overall condition was not any worse and that she could continue her job as she had been doing it. On September 4, 1996 Dr. Szymoniak noted that while appellant had been examined at an emergency room earlier that week for back pain, her complaints were not new. He reiterated that appellant could return to work with the same restriction she has had. On October 1, 1996 Dr. Szymoniak again stated that he did not know of any reason why appellant could not continue in the part-time light-duty job that she had been performing for the past few months. These reports from Dr. Szymoniak therefore do not support a finding that appellant's condition had worsened such that she could no longer perform her light-duty job.

[21] *See Gus N. Rodes*, 46 ECAB 518 (1995).

On January 13, 1997 Dr. Szymoniak issued a note wherein he indicated that appellant should work four hours per day, five days a week for the next two months. He offered no explanation as to why appellant was unable to work her previous schedule of 25 hours per week. Without a properly rationalized explanation, the Office could not assume that appellant's accepted condition had worsened and caused appellant additional disability.

Finally, on March 25, 1997 Dr. Szymoniak indicated that appellant had been ill with a respiratory illness for 10 days, that she was not at work because of this illness and that appellant's back had worsened because of coughing and sneezing. Again, his report is not sufficiently well rationalized to support that appellant was disabled due to her accepted employment condition. Dr. Szymoniak relates appellant's inability to work to her respiratory illness, rather than her back condition. If in fact appellant had sustained disability due to her back condition, Dr. Szymoniak should have explained how appellant's accepted back condition had in fact worsened to cause disability. The Office properly concluded that appellant had not submitted the type of medical evidence necessary to establish that her condition had worsened, causing total disability after May 21, 1996.

The decisions of the Office of Workers' Compensation Programs dated May 13, 1997 and November 14 and June 17, 1996 are hereby affirmed. The decision of the Office of Workers' Compensation Programs dated February 11, 1997 is hereby reversed.

Dated, Washington, D.C.
September 28, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member