

U. S. DEPARTMENT OF LABOR
Employees' Compensation Appeals Board

In the Matter of PAUL L. CYMAN and DEPARTMENT OF THE ARMY,
TANK AUTOMOTIVE COMMAND, Warren, MI

*Docket No. 99-1733; Submitted on the Record;
Issued September 5, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
VALERIE D. EVANS-HARRELL

The issue is whether the Office of Workers' Compensation Programs properly determined that the position of supply technician fairly and reasonably reflected appellant's wage-earning capacity effective January 3, 1999 and properly adjusted his compensation to zero effective that date.

The Board finds that the Office properly determined that the position of supply technician fairly and reasonably reflected appellant's wage-earning capacity effective January 3, 1999 and properly adjusted his compensation to zero effective that date.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.¹ Section 8115(a) of the Federal Employees' Compensation Act provides that the "wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity."² The Board has stated, "Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure."³

On February 23, 1989 appellant, then a 37-year-old firefighter and emergency medicine technician, GS-081-5, step 1, sustained an episode of chest pain and anxiety. Appellant stopped work on that date and on April 8, 1990 he returned to work in a light-duty firefighter position. On August 11, 1991 he began working for the employing establishment as a supply clerk, GS-

¹ *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

² 5 U.S.C. § 8115(a).

³ *Floyd A. Gervais*, 40 ECAB 1045, 1048 (1989); *Clyde Price*, 32 ECAB 1932, 1934 (1981).

2005-5 and on November 15, 1992 he entered into a training program to become a supply technician, GS-2005-7. Appellant completed the training program and on November 14, 1993 he began working as supply technician, GS-2005-7. Appellant continued to work in the supply technician position and by late 1998 he was a GS-2005-7, step 6.

By decision dated December 21, 1998, the Office determined that the position of supply technician fairly and reasonably reflected appellant's wage-earning capacity effective January 3, 1999 and adjusted his compensation to zero effective that date. The Office determined that appellant had been employed as a supply technician for more than 60 days and that his current wage level in that position⁴ was higher than the current wage level for his date-of-injury position, firefighter and emergency medicine technician, GS-801-5, step 1. The Office determined, therefore, that appellant was no longer entitled to compensation for wage loss.

In reaching its determination of appellant's wage-earning capacity, the Office properly noted that appellant had received actual earnings as a supply technician for more than 60 days in that he had been working in the position since November 14, 1993 when the Office issued its December 21, 1998 decision.⁵ The record does not contain any evidence showing that the supply technician position constitutes part-time, sporadic, seasonal or temporary work.⁶ Moreover, the record does not reveal that the position is a make-shift position designed for a claimant's particular needs.⁷ The Board has carefully reviewed the Office's wage-earning capacity decision in the context of the relevant evidence of record and notes that, in addition to making a correct finding that appellant had actual wages as a supply technician, the Office also properly found that such wages fairly and reasonably represented his wage-earning capacity.⁸

Appellant alleged that he continues to suffer wage loss because the Office's calculation did not account for step increases he would have received in his date-of-injury job as well as increased premium pay and Fair Labor Standards Act benefits he would have received if he had

⁴ Appellant earned \$606.83 per week in the supply technician position at the time of the Office's December 21, 1998 decision. The current salary for the date-of-injury job at the time of the decision was \$545.31 per week.

⁵ Office procedure provides 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; see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2-814.7c (December 1993).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2-814.7a (December 1993).

⁷ See, e.g., *Michael A. Wittman*, 43 ECAB 800 (1992) (where the Board found that the evidence did not support a finding that a position with the National Guard fairly and reasonably represented the claimant's wage-earning capacity based on the fact that the claimant only performed limited duties and did not appear every month as normally required); *Elizabeth E. Campbell*, 37 ECAB 224 (1985) (where the Board found that the evidence did not support a finding that the position of "baseball cover sorter" fairly and reasonably represented the claimant's wage-earning capacity based on the fact that the position tended to be seasonal and appeared to have been make-shift work designed for the claimant's particular needs).

⁸ The Office properly calculated appellant's wage loss in accordance with *Albert C. Shadrick*, 5 ECAB 376 (1953).

not been injured. However, as appellant's alleged loss of wage-earning capacity in this case would be due solely to the loss of these potential future step increases and other potential wage and benefit adjustments, such losses are not compensable.⁹

For these reasons, that the Office properly determined that the position of supply technician fairly and reasonably reflected appellant's wage-earning capacity effective January 3, 1999 and properly adjusted his compensation to zero effective that date.

The decision of the Office of Workers' Compensation Programs dated December 21, 1998 is affirmed.

Dated, Washington, D.C.
September 5, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Valerie D. Evans-Harrell
Alternate Member

⁹ The Board has held that the probability that an employee, if not for his or her injury-related condition, might have had greater earnings is not proof of a loss of wage-earning capacity and does not afford a basis for payment of compensation under the Act; see *Dempsey Jackson, Jr.*, 40 ECAB 942, 947 (1989); *Edward T. Campbell*, 35 ECAB 624, 627 (1984); *Billy G. Sinor*, 35 ECAB 419, 422 (1983); *Bobbie P. Beck*, 33 ECAB 146, 147 (1981); *Daniel T. Moriskey*, 30 ECAB 350, 354 (1979); *Margaret E. Grigsby*, 27 ECAB 138, 143 (1975); *Francis X. Milesky*, 13 ECAB 128, 131 (1961).