

**United States Department of Labor
Employees' Compensation Appeals Board**

SHEPARD A. WASHINGTON, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
New Orleans, LA, Employer**

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**Docket No. 03-1057
Issued: June 4, 2004**

Appearances:
Shepard A. Washington, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On or about March 17, 2003 appellant filed a timely appeal from the January 28, 2003 decision of the Office of Workers' Compensation Programs, which denied a merit reconsideration of its December 17, 2002 decision, finding that his actual earnings as a review clerk fairly and reasonably represented his wage-earning capacity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the Office's December 17, 2002 and January 28, 2003 decisions.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation for wage loss on the grounds that his actual earnings as a review clerk fairly and reasonably represented his wage-earning capacity; and (2) whether the Office properly denied a reopening of appellant's case for a review on the merits.

FACTUAL HISTORY

On February 12, 1998 appellant, then a 43-year-old distribution clerk, filed a claim alleging that his bilateral shoulder and neck conditions were a result of his federal employment. The Office accepted his claim for right shoulder impingement syndrome and right shoulder arthroscopy with debridement. The Office also accepted his claim for left shoulder tendinitis and authorized a left shoulder arthroscopy.¹

On September 5, 1999 appellant filed a claim alleging that his bilateral wrist condition was a result of his federal employment. The Office accepted his claim for bilateral carpal tunnel syndrome and authorized surgical releases.²

Appellant received compensation for temporary total disability on the periodic rolls. On August 8, 2000 he returned to work in a limited-duty assignment as an expeditor. On December 22, 2000 he was medically cleared to perform the duties of a review clerk. Appellant began work as a review clerk effective January 13, 2001.

According to the employing establishment, the duties of a review clerk included the following:

“Receiving register mail or pouches on the dock from truck drivers and putting mail in the renzo cart. Then escorting the renzo cart to the registry cart. Also any allied duties in this section.”

According to the official position description, the duties and responsibilities of a review clerk included the following:

“1. Assists in checking assigned cases and racks for distribution, proficiency and accuracy and prepares reports of errors found for the attention of the immediate supervisor.

“2. Assists the supervisor with on-the-job training in distribution, dispatching, labeling, pouching and disposition of all classes of mail in accordance with established procedures.

“3. Examines and disposes of incoming and/or outgoing mail which is un-ZIP Coded, mis-ZIP Coded, illegible, incomplete or incorrectly addressed.

“4. Uses such references as, but not limited to, ZIP Code Directory, telephone directories and local master schemes.

“5. May rate mail with short-paid postage or mail being forwarded.

¹ File No. 160312226.

² File No. 160344355. The Office administratively combined these cases for more efficient case management.

“6. May maintain records of mail volumes, work hours; and assist supervisor in carrying out special distribution assignments.

“7. Separates and manually distributes mail. May have scheme(s) assignments.

“8. Performs other job-related tasks in support of primary duties.”³

On May 30, 2001 appellant suffered a recurrence of disability and again received compensation for temporary total disability on the periodic rolls. His attending physician released him to full-time limited duty as of September 17, 2001. After receiving the physician’s work capacity evaluation form, the employing establishment offered appellant a modified-duty assignment on October 15, 2001. After reviewing his medical restrictions, however, the employing establishment advised appellant as follows on October 22, 2001: “Based on the above restrictions, you are physically able to report to your bid assignment and perform the full[-]duty requirements of that assignment. This assignment is within your physical/medical restrictions.” Appellant returned to work in his previous limited-duty assignment as a review clerk on October 27, 2001. The Office deleted him from the periodic rolls on November 21, 2001.

Appellant underwent a functional capacity evaluation on January 31, 2002. Dr. Scott M. Fried, an orthopedic and hand surgeon, reported on February 7, 2002 that appellant “falls below sedentary work capabilities.” He reported that appellant had substantial limitations that should be considered permanent, adding: “If he remains symptomatic or becomes progressively more so, more stringent restrictions with respect to his work activities may need to be considered.” On May 13, 2002 Dr. Fried cleared appellant to return to work as a review clerk following a work stoppage beginning May 3, 2002. On October 21, 2002 Dr. Fried reported new restrictions: “A new note was written for [appellant] not to do any lifting, no overhead work activity and no repetitive use of either upper extremity and frequent rest breaks.”

In a decision dated December 17, 2002, the Office noted that while appellant remained disabled for the job he held on the date of injury, he was capable of working and had been employed as a review clerk since November 5, 2001. The Office found that this position fairly and reasonably represented his wage-earning capacity and further found as follows: “Since you have demonstrated the ability to perform the duties of this job for 2 months or more, this position is considered suitable to your partially disabled condition.” Because appellant’s actual earnings as a review clerk exceeded the current wages of the job he held when he was injured,⁴ the Office found that appellant had no loss of wage-earning capacity and, therefore, terminated his compensation for wage loss.

On January 10, 2003 appellant requested reconsideration. He argued that he was not capable of performing and had not demonstrated the ability to perform, all the duties required of a review clerk. Appellant explained that he was able to work only because his supervisors were

³ The record does not set forth the physical demands of this position.

⁴ The employing establishment confirmed the current annual pay for the position appellant held when he was injured, \$41,991.00 and the current annual pay he was receiving as a review clerk, \$43,037.00.

sympathetic and worked with him and allowed him to stop whenever his pain worsened. Appellant stated that he took as many pain pills as he could and it still did not alleviate his pain. It also made him drowsy and light-headed: "So if it was not for the supervisors I would not -- could not stay at work without taking months off at a time."

In a decision dated January 28, 2003, the Office denied a merit review of appellant's claim. The Office found that appellant failed to submit new and relevant evidence to show that his actual earnings as a review clerk did not fairly and reasonably represent his wage-earning capacity. The Office also found that appellant advanced no new legal contentions and submitted no evidence to show that the Office erroneously applied or interpreted a point of law.

LEGAL PRECEDENT -- ISSUE 1

Section 8115(a) of the Federal Employees' Compensation Act provides that the wage-earning capacity of an employee is determined by actual earnings if actual earnings fairly and reasonably represent the wage-earning capacity.⁵ 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.⁶

ANALYSIS -- ISSUE 1

Appellant returned to work as a review clerk on or about October 27, 2001 and remained in that position for over a year. The fact that he earned wages in that position for such a length of time raises a presumption that his actual earnings fairly and reasonably represented his wage-earning capacity. When the Office issued its decision on December 17, 2002 there was no evidence to the contrary. On May 13, 2002 Dr. Fried, the attending orthopedic and hand surgeon, cleared appellant to return to work as a review clerk after a brief stoppage. On October 21, 2002 he reported new restrictions, but there is no evidence that these restrictions prevented appellant from performing his duties as a review clerk.

In this case, appellant's actual earnings as a review clerk are the best measure of his wage-earning capacity and must be accepted as such measure, as there was no evidence showing that they did not fairly and reasonably represent his wage-earning capacity. Because appellant's actual earnings as a review clerk were greater than the current pay of the position he held when he was injured, the Office properly determined that he had no loss of wage-earning capacity.⁷

⁵ 5 U.S.C. § 8115(a).

⁶ *Don J. Mazurek*, 46 ECAB 447 (1995).

⁷ The formula for determining loss of wage-earning capacity based on actual earnings was developed in *Albert C. Shadrick*, 5 ECAB 376 (1953) and is codified by regulation at 20 C.F.R. § 10.403 (1999). Section (d) of this regulation provides that wage-earning capacity in terms of percentage is computed by dividing the employee's earnings -- in this case his actual earnings -- by the current salary or pay rate for the job held at the time of injury.

Once the Office accepts a claim, it has the burden of proof to justify a termination or modification of compensation benefits.⁸ The Board finds that the Office has met its burden of proof in this case and will affirm the Office's December 17, 2002 decision, which terminated appellant's compensation for wage loss on the grounds that his actual earnings as a review clerk fairly and reasonably represented his wage-earning capacity.

LEGAL PRECEDENT -- ISSUE 2

The Act provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative), who receives an adverse decision. The employee shall exercise this right through a request to the district Office. The request, along with the supporting statements and evidence, is called: "application for reconsideration."⁹

An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision. The application for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.¹⁰

A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.¹¹

ANALYSIS -- ISSUE 2

In its December 17, 2002 decision, the Office terminated appellant's compensation for wage loss on the grounds that his actual earnings as a review clerk fairly and reasonably represented his wage-earning capacity. Less than a month later, on January 10, 2003 appellant requested reconsideration. His request was, therefore, timely. The question for determination is whether his request or application for reconsideration meets at least one of the standards for reopening his case for a review on the merits.

In his request appellant made no showing that the Office had erroneously applied or interpreted a specific point of law. He did, however, advance a relevant legal argument not previously considered by the Office, namely, that notwithstanding the fact that he was earning wages as a review clerk, he was in truth, not capable of performing the duties of that position and

⁸ *Harold S. McGough*, 36 ECAB 332 (1984).

⁹ 20 C.F.R. § 10.605 (1999).

¹⁰ *Id.* § 10.606.

¹¹ *Id.* § 10.608.

had not demonstrated such a capacity. Appellant explained that he was able to work only because his supervisors were sympathetic and worked with him and allowed him to stop whenever his pain worsened. Also, his medication, which was ineffective, made him drowsy and light-headed. If it were not for his supervisors, he explained, he could not have stayed at work without taking months off at a time.

This legal argument is relevant to the issue decided by the Office in its December 17, 2002 decision, because it has a tendency to prove that appellant's actual earnings as a review clerk do not fairly and reasonably represent his wage-earning capacity. Further, the Office did not previously consider this argument. The Board, therefore, finds that appellant's request for reconsideration meets the second standard for obtaining a merit review of his case. In addition, this direct evidence constitutes relevant and pertinent new evidence not previously considered by the Office, thereby meeting the third standard above. As appellant's request for reconsideration meets at least one of the standards for obtaining a merit review of his case, the Board will reverse the Office's January 28, 2003 decision and remand the case for a merit review on the issue of whether the December 17, 2002 wage-earning capacity determination should be modified. The Office shall develop the evidence as necessary and issue an appropriate final decision on this point.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation for wage loss on the grounds that his actual earnings as a review clerk fairly and reasonably represented his wage-earning capacity. The Board further finds, however, that the Office improperly denied a reopening of appellant's case for a review of the merits, as appellant's January 10, 2003 request for reconsideration meets at least one of the standards for obtaining such a merit review.

ORDER

IT IS HEREBY ORDERED THAT the January 28, 2003 decision of the Office of Workers' Compensation Programs is reversed. The Office's December 17, 2002 decision is affirmed. The case is remanded for further action consistent with this opinion.

Issued: June 4, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member