

The issues are: (1) whether the Office properly reduced appellant's wage-loss compensation to zero, finding that his actual earnings as a modified distribution clerk fairly and reasonably represented his wage-earning capacity; and (2) whether the Office properly denied reconsideration of the merits of a November 5, 2002 decision on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On July 1, 2002 appellant, then a 46-year-old distribution clerk, filed an occupational disease claim alleging that on April 17, 2002 he became aware that he had developed pain in his shoulders due to small tears in his right and left rotator cuffs. He attributed these tears to casing mail, lifting parcels, traying mail, reaching above his shoulders and pushing/pulling heavy equipment. The Office accepted appellant's claim for bilateral rotator cuff tears with arthroscopic surgery of the left shoulder required.

Appellant filed a claim for intermittent wage loss due to episodes of partial and total disability during the period June 10 to September 25, 2002 and was advised of the evidence he needed to submit to establish his claim.

By decision dated November 5, 2002, the Office denied appellant's claim for intermittent wage loss during the period June 10 to September 25, 2002, on the basis that he worked full time from June 18 through 25, 2002, was partially disabled from July 1 to 17, 2002, was totally disabled from July 18 to 22, 2002 and returned to full duty on July 23, 2002. He became disabled again on July 25, 2002, was partially disabled on August 5, 2002 but returned to full duty on August 7, 2002. Appellant was totally disabled from August 8, 2002, partially disabled on August 21, 2002 and returned to full duty on August 22, 2002. Lastly, he was totally disabled for all work from August 26 to September 25, 2002, preceding his September 26, 2002 arthroscopic surgery.

Following surgery, appellant returned to work for four hours per day on March 28, 2003. Dr. Terrence R. Lock, a Board-certified orthopedic surgeon, established appellant's work restrictions on June 18, 2003 which recommend working for 4 hours a day with no reaching out to the side or above the shoulder, pushing and pulling limited to 1 hour a day and a 15-pound weight restriction. On October 27, 2003 he found that appellant could work 8 hours a day, 40 hours a week, with restrictions on reaching with the left arm, no working at or above the shoulder level, limited push-pull reach of the left upper extremity and keeping the left elbow in relatively close approximation to his body. The employing establishment offered appellant a permanent light-duty modified distribution clerk position. On January 26, 2004 he commenced his working eight hours a day with restrictions of limited pushing, pulling and reaching with the left extremity, earning \$43,664.00 per year.

By decision dated June 4, 2004, the Office found that appellant's actual earning fairly and reasonably represented his wage-earning capacity. The Office noted that his actual earnings of \$856.24 per week were the same as the current pay rate in his date-of-injury position. It found that appellant's date-of-injury position at level 5, step 0, was \$817.32 per week and included night differential and the current pay rate for that position was \$856.24. He was currently earning \$856.24 at a level 5, step 0, in his modified position which also included night differential. It then subtracted appellant's date-of-injury pay rate from the current pay rate, which resulted in a zero percent wage-earning capacity. The Office reduced his wage-loss compensation to zero, noting that he remained entitled to medical benefits. The Office found that appellant's modified-duty distribution clerk position represented a 100 percent wage-earning capacity or a zero percent loss of wage-earning capacity for the reason that his actual earnings were equal to or greater than the wages of his date-of-injury position.

On June 15, 2004 appellant requested reconsideration. In support, he submitted a May 23, 2002 ultrasound report from Dr. Marnix van Holsbeeck, a physician of unlisted specialty. It reported a full thickness tear of the anterior supraspinatus tendon, apparent impingement of the thickened bursa and torn rotator cuff and a thinness of the distal end of the subscapularis suggesting tendinosis. The September 26, 2002 operative report from Dr. Lock was submitted which described his left shoulder arthroscopic surgery. A leave analysis was also submitted. In a May 26, 2004 ultrasound report, Dr. Mark C. Diamond, a diagnostic radiologist, reported an impression of slight interval increase in full-thickness tear of the supraspinatus tendon, tendinosis of the bicipital tendon and subacromial-subdeltoid bursal thickening. In a May 26, 2004 report, Dr. Lock indicated that he began seeing appellant on June 17, 2002. He noted that he was given work restrictions prior to surgery and had periods of partial and total disability prior to surgery.

By letter dated June 29, 2004, the Office requested that appellant specify which decision or issue he was asking the Office to reconsider. It noted that there were two decisions within the preceding year that could be the subject of his reconsideration request.

In a July 12, 2004 letter to the Office, appellant requested that it reconsider its November 5, 2002 decision. He argued that he had lost wages from June 3, 2002 through September 25, 2002, leading up to surgery and that he also wanted leave buy back from April 17 to May 28, 2002. Appellant noted that a recent ultrasound found a tear in both shoulders.

By decision dated August 18, 2004, the Office denied reconsideration of the November 5, 2002 decision, finding that appellant's request was untimely requested and that it presented no clear evidence of error.

LEGAL PRECEDENT -- ISSUE 1

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury, it has the burden of justifying a subsequent reduction of compensation benefits.¹ Under section 8115(a) of the 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 wage-earning capacity.² 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

The formula for determining loss of wage-earning capacity based on actual earnings was set forth in the case of *Albert C. Shadrick*, 5 ECAB 376 (1953) and is codified by regulation at 20 C.F.R. § 10.403.⁴ Section 10.403(d) provides that the employee's wage-earning capacity in

¹ *Gregory A. Compton*, 45 ECAB 154 (1993).

² 5 U.S.C. § 8115(a).

³ *Dennis E. Maddy*, 47 ECAB 259 (1995).

⁴ *Afegalai L. Boone*, 53 ECAB 533 (2002).

terms of percentage is obtained by dividing the employee's actual earnings by the current pay rate for the job held at the time of injury.⁵ The employee's wage-earning capacity in dollars is computed by first multiplying the pay rate for compensation purposes by the percentage of wage-earning capacity. The resulting dollar amount is then subtracted from the pay rate for compensation purposes to obtain loss of wage-earning capacity. Compensation payable is then adjusted by applicable cost-of-living adjustments.⁶

ANALYSIS -- ISSUE 1

The Board finds that the Office properly determined that appellant's wage-earning capacity was fairly and reasonably represented by his actual earnings as a modified distribution clerk effective January 26, 2004.

Appellant accepted a permanent full-time modified distribution clerk position with the employing establishment and successfully performed the job for five months prior to the Office's wage-earning capacity determination. The position was based on the physical restrictions that Dr. Lock recommended following appellant's 2002 surgery. He returned to work at a salary equivalent to his earnings in the date-of-injury position. The medical evidence establishes that appellant's position as a modified distribution clerk conforms to the physical capacity limitations set by Dr. Lock and there is no evidence that the position is make shift, seasonal or temporary in nature.

In determining the wage-earning capacity based on actual earnings as developed in the *Shadrick* decision, the Office must first calculate the employee's wage-earning capacity in terms of a percentage by dividing actual earnings by the current date-of-injury pay rate. The Office properly used appellant's actual earnings of \$856.24 and the current pay rate for his date-of-injury job of \$856.24, to determine that he had a 100 percent wage-earning capacity.⁷ The Office then multiplied his date-of-injury pay rate of \$817.32 by 100 percent (1) to equal \$817.32 and then subtracted appellant's date-of-injury pay rate of \$817.32 to establish a 0 percent loss of wage-earning capacity. In his modified position, appellant is earning \$43,664.00 per year. The Office noted that his pay rate for his date-of-injury job, level 5 step 0 was \$817.32 per week, including night differential. The current rate for that position is \$856.24, including night differential. Appellant is actually earning \$856.24 per week, including night differential. As appellant's actual earnings are equivalent to the current pay scale for his date-of-injury position the Office found that he had a zero percent loss in wage-earning capacity. The Board finds that the Office properly determined that his actual earnings fairly and reasonably represented his wage-earning capacity and reduced his monetary compensation benefits to zero.

⁵ *Linda K. Blue*, 53 ECAB 653 (2002); *see also supra* note 4.

⁶ *See Linda K. Blue*, *supra* note 5.

⁷ The Office then multiplied appellant's date-of-injury pay rate of \$817.32 by 100 percent (1) to equal \$817.32 and then subtract his date-of-injury pay rate of \$817.32 to establish a zero percent loss in wage-earning capacity.

CONCLUSION -- ISSUE 1

The Board finds that the Office properly reduced appellant's wage-loss compensation to zero in determining that his actual wages in the position of modified distribution clerk fairly and reasonably represented his wage-earning capacity.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act does not entitle a claimant to a review of an Office decision as a matter of right.⁸ This section vests the Office with discretionary authority to determine whether it will review an award for or against payment of compensation.⁹ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).¹⁰ One such limitation is that the application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.¹¹ In those instances when a request for reconsideration is not timely filed, the Office will undertake a limited review to determine whether the application presents "clear evidence of error" on the part of the Office.¹² In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹³

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.¹⁴ The evidence must be positive, precise and explicit and it must be apparent on its face that the Office committed an error.¹⁵ Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁶ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁷ The evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.

⁸ 5 U.S.C. § 8128(a); see *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁹ Section 8128 of the Act provides: "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

¹⁰ 20 C.F.R. § 10.60(1999).

¹¹ *Id.* at § 10.607(a).

¹² *Id.* at § 10.607(b).

¹³ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁴ See *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁵ See *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁶ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹⁷ See *Leona N. Travis*, *supra* note 15.

ANALYSIS -- ISSUE 2

Appellant's June 15, 2004 letter requesting reconsideration of the Office's November 15, 2002 decision was submitted more than one year after that decision was issued and was, therefore, untimely. As his request was filed more than one year after the Office's last merit decision, he was required to demonstrate "clear evidence of error" on the part of the Office in issuing the November 5, 2002 decision. Appellant submitted a July 12, 2004 letter in which he argued that he had lost wages from June 2 through September 25, 2002, leading up to his left shoulder arthroscopic surgery and that he wanted leave buy back from April 17 to May 28, 2002. He also indicated that a recent ultrasound found tears in both shoulders. He submitted several ultrasound reports dating from 2002 through 2004, which merely listed the diagnostic findings. Dr. Lock explained when he began treating appellant and the preoperative restrictions limiting certain physical movements. The Board finds that none of the submitted evidence is relevant to the issue of his claim of intermittent disability for work leading up to September 26, 2002. The evidence does not address the intermittent dates for which appellant claimed wage loss due to his accepted shoulder conditions. The evidence submitted does not raise a substantial question concerning the correctness of the Office's decision. This evidence does not establish clear evidence of error on the part of the Office in denying appellant's request for reconsideration. The Board finds that this evidence fails to establish clear error on the part of the Office and is insufficient to *prima facie* shift the weight of the evidence in favor of appellant's claim or raise a substantial question that the Office erred in denying his claim.¹⁸

CONCLUSION -- ISSUE 2

The Board finds that the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that it was untimely filed and failed to show clear evidence of error.

¹⁸ *John Crawford*, 52 ECAB 395 (2001); *Linda K. Cela*, 52 ECAB 288 (2001).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 18 and June 4, 2004 are affirmed.

Issued: July 20, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board