U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of NEWTON K. OMIYA and DEPARTMENT OF THE NAVY, NAVAL SHIPYARD, Pearl Harbor, Hawaii

*Docket No. 95-2015; Submitted on the Record;*
*Issued August 19, 1998*

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DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM, BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly computed appellant's loss of wage-earning capacity based on his actual earnings as a supply clerk as of April 4, 1995.

On April 5, 1985 appellant, a 47-year-old maintenance worker, injured his lower back injury while lifting a 10-pound pipe. Appellant filed a (Form CA-1) claim for traumatic injury on April 22, 1985, which the Office accepted for a low back strain. Appellant was off work until May 6, 1985, when he returned to light duty. Appellant was assigned to medium duty on May 31, 1985, and returned to his usual job on July 2, 1985.

On October 9, 1985 appellant was examined by Dr. Masao Takai, a Board-certified orthopedic surgeon, who stated in a report dated October 9, 1985 that appellant had been doing well from July until September 1985, when he began to notice discomfort in his lower back. Dr. Takai noted no obvious deformities in the lumbar spine and stated that a computerized axial tomography (CAT) scan showed no herniated disc problem, but stated that x-rays revealed narrowing of the disc in the lower lumbar spine. Dr. Takai stated that, based on his examination, appellant sustained an acute back strain with degenerative lumbar disc disease, which he believed was not a new injury but rather a recurrence of symptoms from his April 1985 employment injury. The Office ultimately expanded its acceptance of appellant's claim to that of a low back strain with herniated nucleus pulposus.

Appellant sustained several recurrences of his lower back condition, and periodically filed claims for continuing compensation based on this condition.

In a letter dated August 30, 1989, the Office scheduled a second opinion examination with Dr. Rowlin L. Lichter, a Board-certified orthopedic surgeon. In a report dated December 6, 1989, Dr. Lichter stated that he had examined appellant on October 5 and November 15, 1989, and noted that appellant had been working as a labor review clerk. Dr. Lichter diagnosed an

L4-5 disc disruption despite essentially normal magnetic resonance imaging (MRI) scan, degenerative disc disease, and chronic pain syndrome.

In a work restriction evaluation dated December 6, 1989, Dr. Lichter outlined restrictions of no lifting above 75 pounds, and indicated appellant could work an 8-hour day.[1]

On July 16, 1990 Dr. Takai placed restrictions on appellant which prevented him from performing his duties as a labor review clerk. The employing establishment located a light-duty position for appellant as a supply (typing) clerk on August 24, 1990, which appellant tentatively accepted on August 30, 1990. In a September 6, 1990 work restriction evaluation, Dr. Takai opined that the duties of the position were in compliance with the physical restrictions imposed by appellant's condition.

Appellant accepted the supply clerk position on September 20, 1990, and commenced working at this job on September 23, 1990.

Appellant intermittently filed claims for continuing compensation over the next five years.

By letter decision dated April 4, 1995, the Office reduced appellant's entitlement to wage-loss compensation, finding that his actual wages of $710.40 per week in the reassigned supply clerk position fairly and reasonably represented his wage-earning capacity as of April 4, 1995. The Office stated that he had been employed in this position since February 28, 1991, a period of more than 60 days, and that the employing establishment had confirmed that the job was not seasonal or temporary.

The Board finds that the Office improperly computed appellant's loss of wage-earning capacity based on his actual earnings, effective April 4, 1995, without adjusting pursuant to 20 C.F.R. § 10.303(b).

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened to order to justify termination or modification of compensation benefits.[2] After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[3]

Where an employee sustains an injury-related impairment that prohibits the employee from returning to the employment held at the time of injury, or from earning equivalent wages, but that does not render the employee totally disabled for all gainful employment, the employee is considered partially disabled and is entitled to compensation for his loss of wage-earning

[1] In a handwritten note, Dr. Lichter stated on the form that "all restrictions are on a nonphysical basis and not evaluable [sic]."

[2] *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

[3] *Id.*

capacity as provided for under section 8115 of the Federal Employees' Compensation Act.[4] Thus, if an employee is not totally disabled for all gainful employment, the threshold question which must be addressed before a loss of wage-earning capacity determination is required is whether appellant is prohibited by her injury from returning to his employment held at the time of injury or from earning equivalent wages.

In this case, appellant was ultimately prohibited by residuals of his accepted injury from returning to the position he held at the time of his April 5, 1985 employment injury. However, appellant's condition improved such that he was able to accept a supply clerk position at the employing establishment in a limited-duty capacity.

The Board initially discussed the necessity for payment of compensation where an employee has sustained a loss of wage-earning capacity, but has actual earnings, in the case of *Albert C. Shadrick*.[5] *Shadrick* provides that appellant's wage-earning capacity shall be determined by actual earnings, if such actual earnings fairly and reasonably represent appellant's wage-earning capacity. The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Shadrick* decision, has been codified by regulation at 20 C.F.R. § 10.303. Section (a) of this regulation recognizes the basic premise that 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 loss of wage-earning capacity.[6]

Section (b) of this regulation provides the formula to be utilized by the Office for computing compensation payable for partial disability.[7] First, the Office must determine appellant's "wage-earning capacity in terms of percentage" by dividing her earnings by the current, or updated, pay rate for the position he held at the time of injury. Next, the Office must proceed with a consideration of appellant's "wage-earning capacity in terms of dollars" by applying section 8101(4) of the Act to determine his "Pay Rate for Compensation Purposes." This requires a comparison of the highest pay rate by comparing the rate as of the date of injury, the date disability begins or the date of recurrence if more than six months after returning to work.[8] Finally, the Office must compute appellant's "wage-earning capacity in terms of dollars" by multiplying the pay rate for compensation purposes by the percentage of wage-earning capacity. This figure must be subtracted from the pay rate for compensation purposes to obtain the employee's loss of wage-earning capacity. The Office must then determine whether

[4] 5 U.S.C. § 8115.

[5] 5 ECAB 376 (1953).

[6] 20 C.F.R. § 10.303(a).

[7] 20 C.F.R. § 10.303(b).

[8] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computation of Compensation*, Chapter 2.900.4 (April 1995); *see also Fernando O. Valles*, 44 ECAB 776 (1993).

appellant has any dependents; if he does, he is entitled to three-fourths of the total amount. If appellant has no dependents, he is entitled to two-thirds of the total amount.[9]

The Board finds that the Office improperly computed appellant's compensation based on his loss of wage-earning capacity as of April 4, 1995, as it failed to set forth sufficient findings based on the procedure outlined above. In the instant case, the Office merely noted, in its April 4, 1995 decision, that appellant was currently working in a position that he had held since February 28, 1991, for a period over 60 days, and that therefore his actual wages fairly and reasonably represented his wage-earning capacity. The Office's decision does not contain an adequate discussion of how it applied the *Shadrick* formula to the facts of this case or verified the salary figures, matters appellant has contested on appeal. The Office, therefore, failed to determine appellant's wage-earning capacity in accordance with the procedures outlined in 20 C.F.R. § 10.303(b). Accordingly, the Office's April 4, 1995 wage-earning capacity determination will be set aside and remanded for a determination consistent with 20 C.F.R. § 10.303(b).

The decision of the Office of Workers' Compensation Programs dated April 4, 1995 is hereby set aside and remand for redetermination of appellant's wage-earning capacity in accordance with the above decision.

Dated, Washington, D.C.
August 19, 1998

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

[9] *See* 5 U.S.C. § 8106.