U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BRIDGETT T. DAVIS and DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, St. Petersburg, Fla.

Docket No. 96-1951; Submitted on the Record;
Issued June 23, 1999

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly determined appellant's wage-earning capacity.

On March 31, 1983 appellant, then a 23-year-old revenue officer trainee, sustained injury when the vehicle she was driving was struck from behind. The Office accepted appellant's claim for cervical and lumbosacral strains.[1] Appellant returned to work on May 23, 1983, claiming intermittent disability. The record reflects that she resigned from her employment on July 6, 1983. Compensation benefits were paid from July 30, 1983 through June 10, 1984.

Appellant returned to work at the employing establishment on June 11, 1984 under a probationary training period to end June 8, 1985. She stopped work from February 25 through April 22, 1985 and subsequently filed notice of a recurrence of disability on May 2, 1985.[2] Appellant was removed from employment at the end of her probationary term as she had been on sick leave or leave without pay for over 50 percent of the training period. The Office accepted the conditions of post-traumatic depression and pain syndrome resulting from the March 31, 1983 injury. Thereafter, she continued to receive reimbursement for medical expenses incurred for her accepted employment-related conditions.

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[1] Appellant was hospitalized April 2 to 20, 1983. Hospital records reveal that diagnostic testing of the cervical and lumbar spine were negative for abnormalities and electrocardiogram, electroencephlogram and computerized axial tomography scans were within normal limits. Neurological consultation was reported as normal. On discharge, appellant was placed on physical therapy. Appellant was readmitted June 28 to July 8, 1983 for further evaluation for continuing complaint of back pain.

[2] Compensation was paid for this period. The Office subsequently accepted that appellant sustained a post-traumatic depression due to the March 31, 1983 injury. Cervical and lumbar myelograms were obtained on February 22, 1984 which were reported as negative for the cervical spine and essentially negative for the lumbar spine, with a slight extradural defect at the L5-S1 subarachnoid space.

On March 18, 1987 appellant's attorney advised the Office as to a third-party recovery stemming from the March 31, 1983 injury in the amount of $15,000.00.

In 1990 appellant made a claim for wage-loss compensation for the period after July 1, 1985. Appellant was requested to provide information pertaining to any employment following her departure from federal service. Appellant listed employment as a substitute teacher in Tampa, Florida from August 1985 to March 1986 earning $38.00 to $40.00 daily; in Germany from April to June 1987 earning $52.00 daily; in Bartow, Florida from August to December 1987 earning $45.00 daily; in Germany from February to June 1988 earning $52.00 daily; in Bartow, Florida from September to December 1988 earning $52.00 daily and from August to December 1989 earning $52.00 daily; in North Carolina from March to August 1990 earning $52.00 daily; and from August 1990 to June 1992 at $56.00 daily as an instructional assistant at the Fort Bragg Schools. Thereafter, appellant became an instructor at a Florida Community College in January 1993 to May 1994. It was confirmed with the community college that appellant worked as a part-time instructor in its high school diploma program and taught an early childhood curriculum.

The Office secured appellant's social security earnings records for the period April 1985 to 1994. Wages from employment were listed as $4,300.78 in 1985; zero in 1986; $1,467.75 in 1987; $4,411.00 in 1988; $598.66 in 1989; $6,765.31 in 1990; $11,212.20 in 1991; $7,904.95 in 1992; $3,708.70 in 1993; and $3,298.00 in 1994.

In memoranda dated between October 1994 and February 1995, the Office found that appellant had worked intermittently after leaving employment with the employing establishment in 1985 which demonstrated that she was not totally disabled for work. The Office noted that appellant was a college graduate certified to teach senior high school by the state of Florida. The Office obtained pay rate information for Tampa, Hillsborough County, noting the starting salary for a secondary school teacher, step one, for the 1985 to 1986 school year was $16,001.00. As to the availability of work, an Office rehabilitation specialist noted:

> "I spoke with Marilyn Wittner, General Director of Human Resources for the Hillsborough County School Board ... on October 20, 1994, regarding job availability for teachers during the 1985 to 198[6] school year. Ms. Wittner advised that Hillsborough County School District was the 12th largest school district in the Nation. According to Ms. Wittner there is always a great need for certified secondary teachers in the fields of physics, science and mathematics. However, for the area of [appellant's] area of concentration [sic], criminal justice with a minor in sociology and psychology, there is always a surplus of teachers.
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> "With respect to teachers aides and substitute teachers, there is always a surplus of applications for teachers aides. However, there is always a need for substitute teachers. If a substitute teacher is good, (s)he could be recalled on a regular and continuous basis three to four days per week...."

By decision dated July 25, 1995, the Office determined that wage-loss compensation was not payable to appellant based on her qualification to perform the work of a secondary school teacher since August 1, 1985. The Office determined that, as of August 1, 1985, the position of

secondary school teacher in Hillsborough County, Florida had a salary of $16,001.00 per year and that appellant's former position as a revenue officer trainee paid a salary of $14,390.00 per year so there was no loss of wage-earning capacity.

The Board finds that the case is not in posture for decision.

Once the Office accepts a claim, it has the burden of proving that an employee's disability has ceased or lessened in order to justify termination or modification of compensation benefits.[3]

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 or her wage-earning capacity. If actual earnings do not fairly and reasonably represent the employee's wage-earning capacity, or if the employee has no actual earnings, wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, the employee's usual employment, age, qualifications for other employment, the availability of suitable employment, and other factors and circumstances which may affect wage-earning capacity in his or her disabled condition.[4] Wage-earning capacity is the measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[5]

In this case, the Office has made a retroactive determination of appellant's wage-earning capacity utilizing the constructed position of secondary school teacher. In making retroactive determinations, the Office's Federal (FECA) Procedure Manual provides that a retroactive constructed loss of wage-earning capacity should be considered only when the evidence clearly shows that partial rather than total disability existed prior to the adjudication and no compensation has been paid for the period of disability in question.[6] In cases meeting these criteria, the claims examiner must first determine whether the claimant has had any actual earnings and, if so, is then referred to the provisions for determining wage-earning capacity based on actual earnings.[7]

In the present appeal, the record establishes that appellant had actual earnings from self-employment as a substitute teacher and community college instructor, thereby evidencing a partial disability for the period in question prior to the Office's wage-earning capacity adjudication. In making the July 25, 1995 loss of wage-earning capacity determination, however, it does not appear that the claims examiner properly followed the applicable provisions of the Office's procedure manual. The memoranda prepared by the Office do not contain a

[3] *James B. Christenson,* 47 ECAB 775 (1996); *Bettye F. Wade,* 37 ECAB 556 (1986).

[4] 5 U.S.C. § 8115(a); *see Wilson L. Clow, Jr.,* 44 ECAB 157 (1992); *Pope D. Cox,* 39 ECAB 143 (1987).

[5] *Dennis D. Owen,* 44 ECAB 475 (1993).

[6] *See* Federal (FECA) Procedure Manual, Part 2 -- *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(f) (December 1995); *see also* Chapter 2.814.8(f) (December 1993).

[7] *Id.*

discussion of appellant's actual earnings or an explanation as to why they should not be used to compute her entitlement to compensation. For this reason, the Board will set aside the July 25, 1995 loss of wage-earning capacity determination. On remand, the Office should further develop the evidence as appropriate and thereafter issue an *de novo* decision on appellant's wage-earning capacity.

The July 25, 1995 decision of the Office of Workers' Compensation Programs is hereby set aside and the case remanded for further action in conformance with this decision on the Board.

Dated, Washington, D.C.
June 23, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member