U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICHARD E. SMITH and DEPARTMENT OF JUSTICE,
DRUG ENFORCEMENT AGENCY, Detroit, Mich.

Docket No. 97-2051; Oral Argument Held January 20, 1999;
Issued May 12, 1999

Appearances: *Michael W. Beasley, Esq.*, for appellant; *Catherine P. Carter, Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined appellant's loss of wage-earning capacity as of October 1986 based on actual earnings.

The case has been before the Board on a prior appeal. In a decision dated February 7, 1997, the Board reversed an Office decision dated August 29, 1994, finding that the Office had failed to meet its burden of proof in determining appellant's wage-earning capacity based on a selected position in the Department of Labor's *Dictionary of Occupational Titles*.[1] The history of the case is contained in the prior decision and is incorporated herein by reference.

In a decision dated June 4, 1997, the Office determined that appellant's wage-earning capacity was represented by his actual earnings as a laborer in private employment. The Office found that appellant had actual earnings of $460.00 per week as of October 1986, and a retroactive determination was made that this represented appellant's wage-earning capacity.

The Board finds that the Office properly determined that appellant's wage-earning capacity was represented by his actual earnings as a laborer.

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.[2]

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[1] Docket No. 97-281.

[2] *Gregory A. Compton*, 45 ECAB 154 (1993).

When an individual sustains an employment-related injury that prevents return to the employment held at the time of injury, 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 capacity as provided for under section 8115 of the Federal Employees' Compensation Act.[3] Under section 8115(a), wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity.[4] 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.[5]

As noted above, the history of the case indicates that the Office had previously attempted to determine appellant's wage-earning capacity based upon selected positions identified in the *Dictionary of Occupational Titles*. When a selected position in the labor market is used, the Office must establish, for example, that the position is reasonably available and the appellant is medically and vocationally capable of performing the position. The Board's prior decision was limited to review of the August 29, 1994 Office decision, which based a wage-earning determination on the selected position of laborer. The current decision under review is the June 4, 1997 Office decision, which bases a wage-earning capacity determination on actual earnings. This raises separate and distinct issues that will be discussed below. The Board also notes that in the June 4, 1997 decision the Office states that the Office has the right to review an award under 5 U.S.C. § 8128(a), and that the Office has a "new legal argument" on wage-earning capacity in the form of a 1994 FECA Transmittal. There is no requirement under 5 U.S.C. § 8128(a) that the Office have a new legal argument to review a case.[6] Moreover, the prior wage-earning capacity determinations had been reversed, and therefore there was no valid existing wage-earning capacity determination. The only issue is whether the June 4, 1997 decision was proper under the Act and its implementing regulations.

The Office's procedures indicate that the Office may perform a retroactive wage-earning capacity determination based on actual earnings, provided: (1) the claimant worked in the position for at least 60 days; (2) the employment fairly and reasonably represents the wage-earning capacity; and (3) the work stoppage did not occur because of a change in the claimant's employment-related condition.[7] In this case, all of the above conditions have been met. There does not appear to be any dispute that appellant worked in private employment as a laborer with Coca-Cola from June 1984 to October 1986. Appellant stated in a November 24, 1990 letter that he initially was paid $7.00 per hour as a seasonal laborer, but by October 1986 he was earning

[3] 5 U.S.C. § 8115.

[4] 5 U.S.C. § 8115(a).

[5] *Dennis E. Maddy*, 47 ECAB 259 (1995).

[6] Section 8128(a) provides that the "Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.7(e) (May 1997).

$11.50 an hour for a 40-hour week. A full-time wage of $11.50 per hour is consistent with the reported annual earnings from Coca-Cola of $21,223.00 for 1986.

Accordingly, the record indicates that appellant worked in the full-time laborer position for well over 60 days in 1986. There is no probative evidence contrary to a finding that as of October 1986 his actual earnings fairly and reasonably represented his wage-earning capacity. As noted above, actual wages are the best measure of wage-earning capacity and will be accepted absent other probative evidence. In addition, the record indicates that appellant stopped working due to a nonemployment-related right knee injury, and therefore the work stoppage did not occur because of an employment injury.

Based on the facts of the case, the Board finds that the Office met the requirements for a retroactive wage-earning capacity and reasonably concluded that appellant's actual earnings of $11.50 an hour fairly and reasonably represented his wage-earning capacity as of October 1986.

The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision,[8] has been codified at 20 C.F.R. § 10.303. The Office first calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the "current" pay rate.[9] In this case, the Office indicated that the pay rate on the last day of employment, April 22, 1993 was a GS-12, step 5 ($33,290.00) plus a 10 percent premium pay, for a pay rate of $704.21 per week. This pay rate is then made current to the retroactive date used of October 14, 1986, when the annual pay for GS-12 step 5 was $35,835.00, plus 10 percent premium pay, totaling $758.04. The actual earnings are $460.00 per week, based on $11.50 per hour at 40 hours per week. The Office then properly divided the actual earnings by the current pay rate to determine the wage-earning capacity percentage. Appellant's wage-earning capacity in terms of dollars is computed by multiplying that pay rate at date of injury by the percentage of wage-earning capacity, and the resulting dollar amount is subtracted from the pay rate to obtain appellant's loss of wage-earning capacity.[10]

The Board finds that the Office properly made a retroactive determination that as of October 14, 1986 appellant had a wage-earning capacity based on his actual earnings as a laborer. The Office then properly used the *Shadrick* formula to reduce appellant's compensation to reflect his wage-earning capacity.

The decision of the Office of Workers' Compensation Programs dated June 4, 1997 is affirmed.

Dated, Washington, D.C.
May 12, 1999

[8] 5 ECAB 376 (1953).

[9] "Any convenient date may be chosen by the Office for making the comparison as long as the two wage rates are in effect on the date used for comparison." 20 C.F.R. § 10.303(b). In this case, the date used for comparison would be October 14, 1986, the last day appellant worked as a laborer.

[10] *See* 20 C.F.R. § 10.303(b)

George E. Rivers
Member

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member