United States Department of Labor
Employees' Compensation Appeals Board

R.L., Appellant	)	
and	)	**Docket No. 08-2024**
	)	**Issued: January 28, 2009**
DEPARTMENT OF HOMELAND SECURITY, CUSTOMS & BORDER PROTECTION, Douglas, AZ, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On July 13, 2008 appellant filed a timely appeal from an April 18, 2008 wage-earning capacity decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether the Office properly reduced appellant's compensation on the grounds that his actual earnings as a customs technician fairly and reasonably represented his wage-earning capacity.

FACTUAL HISTORY

On September 24, 1998 appellant, then a 52-year-old canine enforcement officer, sustained a left shoulder injury when he pulled a file cabinet from a van. The Office accepted his claim for a strain and impingement syndrome of his left shoulder.

In a June 1, 2001 duty status report, Dr. Michael Maricic, an attending physician, provided work restrictions. These included no lifting, climbing, kneeling, bending, stooping, twisting, pushing, pulling, simple grasping, driving a vehicle, sitting, fine manipulation, reaching above the shoulder, operating machinery for more than one hour continuously and standing or walking for more than one-half hour continuously. Appellant was able to work for eight hours a day. There are no medical reports after June 1, 2001 indicating a change in his work restrictions. Because appellant was unable to perform his regular job due to his work restrictions, on October 21, 2001 he began performing the position of a customs technician, GS-5, step 10. He received grade increases to GS-6, step 10 on September 8, 2002 and to GS-7, step 10 on September 7, 2003. Appellant's duties as a customs technician included preparing correspondence, receiving and delivering mail, maintaining office files and records, serving as timekeeper, answering telephones and other administrative tasks. There is no evidence that the position was temporary, part time or seasonal. Appellant's salary as of January 6, 2008 was $920.46 a week. On the date of injury, September 24, 1998, he was a Grade 9, step 10, earning $864.33 per week. Appellant's pay rate as of January 6, 2008 for his date-of-injury position was $1,126.09 a week.

In its April 18, 2008 decision, the Office found that the wages of the customs technician position fairly and reasonably represented appellant's wage-earning capacity as demonstrated by the fact that he had performed the position for several years. It found that appellant earned $920.46 per week in his customs technician position as of January 6, 2008, that the current pay rate for his date-of-injury position was $1,126.09 and that he had a wage-earning capacity of 82 percent ($920.46 divided by $1,126.09). The pay rate for compensation purposes, $864.33, his date-of-injury pay rate, was multiplied by the percentage of wage-earning capacity, 82 percent. The resulting dollar amount of $708.75 was then subtracted from the pay rate for compensation purposes, $864.33, to obtain $155.58 for the loss of wage-earning capacity as of January 6, 2008. The Office then determined that appellant, who has a dependent, was entitled to three-fourths of that amount or $116.69. Compensation payable was then adjusted by the applicable cost-of-living adjustments to $149.25. The Office multiplied $149.25 by four (weeks) which resulted in a reduced compensation rate of $597.00 for four weeks effective May 11, 2008. It reduced appellant's compensation on the grounds that his employment as a customs technician fairly and reasonably represented his wage-earning capacity.[1]

LEGAL PRECEDENT

Section 8102(a) of the Federal Employees' Compensation Act[2] provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty. Section 8106(a) provides in pertinent part:

> "If the disability is partial, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 of the difference

[1] Subsequent to the April 18, 2008 Office decision, additional evidence was associated with the file. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c). The Board may not consider this evidence for the first time on appeal.

[2] 5 U.S.C. §§ 8101-8193, 8102(a).

between his monthly pay and his monthly wage-earning capacity after the beginning of the partial disability, which is known as his basic compensation for partial disability."[3]

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.[4] Under section 8115(a) of the 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.[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] The formula for determining loss of wage-earning capacity, developed in the *Albert C. Shadrick* decision,[7] has been codified at 20 C.F.R. § 10.403. The Office calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the current pay rate for the date-of-injury job.[8]

ANALYSIS

Appellant began performing the position of customs technician on October 21, 2001. The contemporaneous medical evidence established that he could perform the duties of this position for eight hours a day. Appellant continued to earn wages in this position for several years, further supporting his capacity to earn such wages. As there is no evidence showing that these wages did not fairly and reasonably represent his wage-earning capacity, his actual earnings in this customs technician position must be accepted as the best measure of his wage-earning capacity.[9] The question for determination, therefore, is whether the Office properly calculated appellant's loss in wage-earning capacity (LWEC) based on his actual earnings in the customs technician position he began performing on October 21, 2001.

After reviewing the calculations in the Office's April 18, 2008 decision on appellant's LWEC, the Board finds that the Office properly applied the *Shadrick* formula. Under *Shadrick*, the Office's determination rests on three variables: (1) appellant's base annual pay at the time of injury, the time disability began or the time compensable disability recurs;[10] (2) the base annual pay for the same grade and step on January 6, 2008, the date the Office used to compare pay

[3] 5 U.S.C. § 8106(a).

[4] *Sherman Preston*, 56 ECAB 607, 609 (2005).

[5] 5 U.S.C. § 8115(a); *see Lottie M. Williams*, 56 ECAB 302, 305 (2005).

[6] *Lottie M. Williams*, *supra* note 5.

[7] *Albert C. Shadrick*, 5 ECAB 376 (1953).

[8] 20 C.F.R. § 10.403(d).

[9] *See supra* note 5.

[10] *See* 5 U.S.C. § 8101(4) (defining monthly pay); 5 U.S.C. § 8114(c) (when compensation is paid weekly).

rates under *Shadrick*; and (3) appellant's base annual pay on January 6, 2008 in his customs technician position.

In this case, the Office utilized appellant's weekly pay rate on September 24, 1998 as the base pay, which amounted to $864.33. It found that appellant earned $920.46 per week in his January 6, 2008 position, that the current pay rate for his date of injury position was $1,126.09 and that he had a wage-earning capacity of 82 percent ($920.46 divided by $1,126.09).

Appellant's wage-earning capacity in dollars is computed by first multiplying the pay rate for compensation purposes, $864.33, by the percentage of wage-earning capacity, 82 percent. The resulting dollar amount of $708.75 is then subtracted from the pay rate for compensation purposes to obtain $155.58 for the loss of wage-earning capacity as of January 6, 2008.[11] The Office then properly determined that appellant, who has a dependent, was entitled to three-fourths of that amount or $116.69. Compensation payable was then adjusted by the applicable cost-of-living adjustments to $149.25. Four times $149.25 equals a compensation rate of $597.00 for four weeks, appellant's reduced compensation rate. The Board finds that the Office's mathematical calculations are proper.

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation on the grounds that his actual earnings as a customs technician fairly and reasonably represented his wage-earning capacity.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 18, 2008 is affirmed.

Issued: January 28, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

[11] 20 C.F.R. § 10.403(e).