

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LINDA FALLON and DEPARTMENT OF THE NAVY,
NAVAL SHIPYARD, Portsmouth, N.H.

*Docket No. 96-256; Submitted on the Record;
Issued February 6, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined appellant's wage-earning capacity effective April 19, 1993; and (2) whether the Office properly refused to modify its determination of appellant's wage-earning capacity.

The Board has duly reviewed the case on appeal and finds the Office failed to properly determine appellant's wage-earning capacity effective April 19, 1993.

Appellant filed a claim alleging on February 22, 1993 she injured her lower back, thighs and groin in the performance of duty. The Office accepted appellant's claim for low back strain on March 17, 1993. Appellant returned to light-duty work on April 19, 1993. The employing establishment separated appellant due to a reduction-in-force on February 25, 1994. Appellant filed a notice of recurrence of disability on February 22, 1994 alleging that she was separated from duty due to her employment-related injury. By decision dated April 4, 1994, the Office found that appellant had no loss of wage-earning capacity based on the light-duty position of shipwright worker. Appellant requested an oral hearing on April 27, 1994. By decision dated July 28 and finalized July 31, 1995, the hearing representative affirmed the Office's April 4, 1994 decision.

In the present case, the Office in its April 4, 1994 decision based appellant's loss of wage-earning capacity on a determination that her actual earnings in the Reserve Manpower Shop performing limited duties at the employing establishment April 19, 1993 through February 25, 1994 represented her wage-earning capacity.

Section 8115(a) of the Federal Employees' Compensation Act¹ which provides that the "wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity." The Board has stated,

¹ 5 U.S.C. § 8115(a).

“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.”² However, the burden is on the Office to justify termination or modification of compensation benefits.³

Appellant argues that the actual earnings do not fairly represent her wage-earning capacity as she did not have specific duties and was only occasionally utilized in this position. Appellant described the reserve manpower shop and a pool for light-duty and full-duty people. She stated that if an employee required light duty and his section could not accommodate these requirements then employees were transferred to reserve manpower to be utilized by other sections within the physical restrictions. Appellant stated that she sat in a room all day and did nothing, answering the telephone, delivering papers or acting as a supervisor for one day at a time.

The record does not contain a copy of the limited-duty job description and any indication from the employing establishment of whether appellant performed any duties in the limited-duty position. The Office cannot use this employment as the basis of appellant’s wage-earning capacity without first investigating the nature of the position to determine if it was makeshift work designed for appellant’s particular needs.⁴ Appellant’s testimony and the lack of a job description lead the Board to conclude that appellant’s actual earnings in the manpower reserve shop did not fairly and reasonably represent her wage-earning capacity.

On remand the Office should undertake further development and issue an appropriate decision regarding appellant’s loss of wage-earning capacity.

² *Don J. Mazurek*, 46 ECAB 447 (1995).

³ *Mary Jo Colvert*, 45 ECAB 575, 579 (1994).

⁴ *Id.* at 580; *Elizabeth E. Campbell*, 37 ECAB 224, 228 (1985);

The decision of the Office of Workers' Compensation Programs dated July 28, 1995 is hereby set aside and remanded for further development consistent with this opinion.

Dated, Washington, D.C.
February 6, 1998

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member