

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KENNETH R. LOVELACE and DEPARTMENT OF THE AIR FORCE,
OKLAHOMA CITY AIR LOGISTICS CENTER, TINKER AIR FORCE BASE, Okla.

*Docket No. 96-2101; Submitted on the Record;
Issued July 20, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether appellant has met his burden of proof to establish that his loss of wage-earning capacity determination should be modified.

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

In the present case, the Office of Workers' Compensation Programs has accepted that appellant, an aircraft engine mechanic, sustained a contusion and fracture of the left wrist as a result of an employment injury on July 18, 1990. The record indicates that appellant received temporary total disability benefits until he returned to work in a light-duty, temporary position as a supply clerk with retained pay on August 18, 1994. On November 7, 1994 the Office issued a decision finding that appellant had been reemployed as a supply clerk with wages of \$565.96 per week, effective August 18, 1994; that this position fairly and reasonably represented appellant's wage-earning capacity; and that as his actual wages met or exceeded the wages of the position held when injured "no loss of wages has occurred."

On August 28, 1995 appellant's representative wrote to the Office advising that appellant had been working in a temporary position and that as his temporary position had been abolished, appellant was requesting payment of wage-loss compensation benefits. An August 16, 1995 CA-7 claim for wage-loss compensation completed by appellant was also submitted to the Office at this time, as was a notice of separation indicating that appellant's employment would terminate on August 17, 1995 due to expiration of appointment. By letter dated September 1, 1995, the Office advised appellant as follows:

"Please be advised that according to the FECA Act 5 U.S.C. [§] 8106 that the claimant has not met the criteria for modifying a formal loss of wage-earning capacity (LWEC) decision (issued on November 7, 1994). [Appellant's] job was found suitable and was rated on this approved job as stated above.

“Even though his temporary job is now being abolished; our Office cannot pay compensation for the reason being that his job is no longer effective.

“Should [appellant] not agree with our decision issued on November 7, 1994, he may exercise the appeal rights enclosed in that letter.”

The Federal Employees’ Compensation Act provides pursuant to 5 U.S.C. § 8128 that the Office may review an award for or against payment of compensation any time on its own motion or on application by the claimant. In accordance with the facts found on review the Office may end, decrease or increase the compensation previously awarded; or award compensation previously refused or discontinued.

The Board finds that in the September 1, 1995 letter decision, the Office exercised its discretionary authority under 5 U.S.C. § 8128 to reopen appellant’s claim for further merit review by reviewing appellant’s August 1995 Form CA-7 request for wage-loss benefits and supporting documents. The September 1, 1995 document is more than a mere informational letter from the Office to appellant concerning the status of his claim or the exercise of possible appeal rights, as the Office apprised appellant of the deficiencies in the evidence he submitted in support of his claim for wage-loss benefits. By this letter, the Office considered the additional evidence submitted against the evidence already of record and made findings that pursuant to 5 U.S.C. § 8106 appellant had not met the criteria for modifying a formal loss of wage-earning-capacity determination. The Office’s September 1, 1995 letter contains findings of fact -- that appellant’s position was temporary and had been abolished; and a statement of reasons -- that even though his position had been abolished, appellant was not entitled to wage-loss benefits as appellant had not met the criteria for modifying a formal wage-earning capacity determination. These are the basic elements of a “decision” as required by the Office’s implementing federal regulations.¹

The Board finds that the Office’s September 1, 1995 decision did not properly evaluate appellant’s request for modification of his wage-earning capacity determination.

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous. The burden of proof is on the party attempting to show a modification of the wage-earning capacity award.²

Section 8115(1) of the Federal Employees’ Compensation Act,³ titled “Determination of wage-earning capacity” states in pertinent part: “In determining compensation for partial disability, ... 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....”

¹ 20 C.F.R. § 10.130 states in part: “The decision shall contain findings of fact and a statement of reasons.”

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

³ 5 U.S.C. § 8115.

In this regard, the Board has stated that 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.⁴ Loss of wage-earning capacity is, however, a measure of loss of capacity to earn wages and not merely a measure of actual wages lost.⁵ Therefore actual wages are the preferred measure of wage-earning capacity only if they fairly and reasonably represent such capacity.⁶ The Board has explained that this view constitutes a natural extension of the general principle of workers' compensation law that wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions, rather than in an artificial setting such as a make-shift position or other position at retained pay not necessarily reflective of true wage-earning capacity.⁷

Therefore, while the Office's procedures require that the claims examiner determine whether the claimant's actual earnings fairly and reasonably represent his or her wage-earning capacity after the claimant has been working in a position for 60 days,⁸ actual earnings will be presumed to fairly and reasonably represent wage-earning capacity only in the absence of contrary evidence.⁹

In evaluating whether actual earnings fairly and reasonably represent wage-earning capacity, the Board has previously considered such factors as whether the earnings are from a makeshift position designed for a claimant's particular needs,¹⁰ whether the position was temporary or seasonal in nature,¹¹ and whether the medical evidence indicates that the claimant's work tolerance limitations are exceeded by the requirements of the position.¹² In the present case, the Office did not properly evaluate the contrary evidence of record that the November 7, 1994 wage-earning capacity determination was issued in error. This case must therefore be remanded to the Office for further development of the evidence as to whether the November 7, 1994 wage-earning capacity determination should be modified as it was in error when issued. After such further development of the evidence as necessary, the Office shall issue a *de novo* decision.

⁴ *Clarence D. Ross*, 42 ECAB 556 (1991).

⁵ *See Billy R. Beasley*, 45 ECAB 244 (1993).

⁶ *Michael E. Moravec*, 46 ECAB 492 (1995); *see also* 20 C.F.R. § 10.303(a).

⁷ *Id.*

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-earning Capacity*, Chapter 2.814.7 (April 1995).

⁹ *See Mary Jo Colvert*, 45 ECAB 575 (1994).

¹⁰ *James D. Champlain*, 44 ECAB 438 (1993).

¹¹ *Id.*

¹² *Mary Jo Colvert*, 45 ECAB 575 (1994).

The decision of the Office of Workers' Compensation Programs dated September 1, 1995 is hereby set aside and the case is remanded to the Office for further proceedings consistent with this opinion.

Dated, Washington, D.C.
July 20, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member