

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CLYDE D. GREEN and DEPARTMENT OF VETERANS AFFAIRS,
ATLANTA VETERANS HOSPITAL, Decatur, Ga.

*Docket No. 96-1435; Submitted on the Record;
Issued June 19, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly modified appellant's compensation to reflect his actual earnings as a supply technician.¹

The Board finds that the Office improperly modified appellant's compensation.

Once the Office accepts a claim, it has the burden to justify termination or modification of compensation benefits.² Because the Office accepted appellant's claim, it has the burden to justify its modification of his compensation for temporary total disability.

Section 8115(a) of the Federal Employees' Compensation Act provides that the wage-earning capacity of an employee is determined by actual earnings if actual earnings fairly and reasonably represent the wage-earning capacity. 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.³

¹ Appellant appeals to the Board a February 16, 1996 decision and submitted a notification of that date advising that the allegations contained in his Equal Employment Opportunity complaint had been accepted for further processing and investigation by the agency. The Board's jurisdiction is limited to reviewing final decisions of the Office in any case arising under the Federal Employees' Compensation Act. 20 C.F.R. § 501.2(c). The Board therefore has no jurisdiction to review the February 16, 1996 notification. The record contains no final decision of the Office dated February 16, 1996. Rather than dismiss appellant's appeal, the Board will review the Office's December 5, 1995 decision reducing his compensation based on actual earnings.

² *Harold S. McGough*, 36 ECAB 332 (1984).

³ *Don J. Mazurek*, 46 ECAB 447 (1995).

Chapter 2-814.7.c(1) of the Office's procedure manual, however, provides that the Office will determine whether the claimant's actual earnings fairly and reasonably represent his or her wage-earning capacity "after the claimant has been working for 60 days."⁴

Appellant returned to duty as a supply technician on October 24, 1995 for four hours a day at the same pay rate as his date-of-injury job. Forty-two days later, on December 5, 1995, the Office modified appellant's compensation to reflect his actual earnings. Because the Office prematurely determined, according to its own procedures, whether appellant's actual earnings fairly and reasonably represented his wage-earning capacity, the Board finds that the Office failed to meet its burden of proof to justify modification of appellant's compensation.

The December 5, 1995 decision of the Office of Workers' Compensation Programs is reversed.

Dated, Washington, D.C.
June 19, 1998

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2-814.7.c(1) (December 1993).