U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LOANN G. LEDET and DEPARTMENT OF THE TREASURY, INTERNAL REVENUE OFFICE, New Orleans, La.

Docket No. 96-526; Submitted on the Record;
Issued May 12, 1998

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's monetary compensation based on her actual earnings as an accounting technician.

The Board finds that appellant's actual earnings as an accounting technician fairly and reasonably represent her wage-earning capacity.

Once the Office accepts a claim, it has the burden to justify termination or modification of compensation benefits.[1] The Office accepted appellant's claim for lumbar strain and nerve root compression. Appellant received monetary compensation for temporary total disability on the periodic rolls beginning January 4, 1992. In a decision dated December 5, 1994, the Office reduced her monetary compensation to reflect her actual earnings as an accounting technician beginning May 3, 1994. Because the Office accepted appellant's claim, it has the burden to justify its reduction of her 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.[2]

In the present case, appellant's attending orthopedic surgeon, Dr. Warren R. Bourgeois, III, advised the employing establishment in a March 10, 1994 report that appellant was currently capable of part-time sedentary work. He did not specify how many hours she could work per

---

[1] *Harold S. McGough*, 36 ECAB 332 (1984).

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

day. The employing establishment offered her a position as an accounting technician working four hours a day, five days a week. Appellant returned to work in this position on April 25, 1994. On May 23, 1994, however, Dr. Bourgeois reported that appellant was able to work only three hours a day "when able." On July 21, 1994 the employing establishment reported appellant's actual earnings from April to July 1994 and advised that appellant was having trouble working three hours a day.

There is no evidence in this case showing that appellant's actual earnings in the position of accounting technician did not fairly and reasonably represent her wage-earning capacity. The medical evidence supported appellant's capacity to perform the duties of this position for three hours a day when able, and she performed these duties for an extended period of time.[3] The new employment was neither sporadic, seasonal nor temporary.[4] Because the wages appellant actually earned are the best measure of her wage-earning capacity, the Office properly accepted them as such.

The Board finds, however, that the Office improperly calculated appellant's pay rate for compensation purposes.

On July 21, 1994 the employing establishment advised that appellant was earning $23,827.00 a year at the time of injury and that the current pay rate of this position was $26,541.00 a year. In calculating appellant's wage-earning capacity, the Office erroneously compared appellant's wage-earning capacity in the new position to the former pay rate. The formula for determining loss of wage-earning capacity based on actual earnings was developed in the case of *Albert C. Shadrick*, 5 ECAB 376 (1953), and is codified by regulation at 20 C.F.R. § 10.303.[5] That formula requires that a claimant's actual wages be related to the wages the claimant would be earning if that claimant still held the job in which the injury was sustained. By failing to compare appellant's actual earnings in her new position to the current pay rate of the job she held at the time of injury, the Office misapplied the formula set forth in *Shadrick* and erroneously calculated appellant's entitlement to compensation.

In its December 5, 1994 decision, the Office found that appellant was recently reemployed as an accounting technician with wages of $161.64 per week effective May 3, 1994. This figure presumed that appellant worked 12 hours a week (three hours a day, four days a week), which is incorrect. Appellant did not work this schedule on a regular basis, as is evidenced by the employing establishment's July 21, 1994 report of actual earnings from May 3 through July 9, 1994.[6]

---

[3] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c)(1) (December 1993) (Office may determine wage-earning capacity after the claimant has been working for 60 days).

[4] *Id*. at Chapter 2.814.7.a.

[5] *See Robin Bogue*, 46 ECAB 488 (1995).

[6] Because the record establishes that appellant was capable of working three hours a day, four days a week when able, actual hours worked and wages earned in pay period 8, when appellant unsuccessfully attempted a schedule of four hours a day, five days a week, should not be used to determine her average actual earnings.

When a claimant has actual earnings that span a lengthy period of time (several months or more), the compensation entitlement should be determined by averaging the earnings for the entire period, determining the average pay rate, and comparing the average pay rate for the entire period to the pay rate of the date-of-injury job in effect at the end of the period of actual earnings.[7]

Though the Office found that appellant earned $161.64.00 per week in her new position, it listed her adjusted-earning capacity in the new position as $311.58. The Office also listed her loss in earning capacity per week as $311.58. The Office may have intended to list her adjusted-earning capacity in the new position as $146.63, but how the Office arrived at such a figure is unknown. Also, it is unclear whether appellant's actual earnings in the first two months of her return to work constitute "actual earnings that span a lengthy period of time." The Office should have determined her average pay rate over a period of at least several months, according to the Office procedure manual, and should have clearly set forth how it arrived at this determination.

The Board will set aside the Office's December 5, 1994 decision and remand the case for a proper calculation of appellant's pay rate, one that properly applies the formula developed in *Shadrick* and one that clearly explains how the figures were derived.

Appellant attempts to appeal the Office's correspondence of October 20, 1995. This letter advised appellant of the deficiencies of the evidence submitted to support her August 14, 1995 claim of recurrence as well as what evidence she needed to establish her claim. This letter was for informational purposes only and does not constitute a formal final decision on appellant's claim of recurrence.[8]

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, Reemployment: Determining Wage-Earning Capacity, Chapter 2.814.7(d)(4) (December 1993).

[8] 20 C.F.R. § 501.2(c) (the Board has jurisdiction to consider and decide appeals from the final decision of the Office in any case arising under the Act).

The December 5, 1994 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.[9]

Dated, Washington, D.C.
May 12, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[9] The Board notes that the pages of the record are not in their original numbered sequence and that a medical report at page M101, pertaining to a Norman Semien, appears to belong to another case file.