U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DEWEY A. FUTCH and DEPARTMENT OF THE NAVY, NAVAL AVIATION DEPOT, Jacksonville, Fla.

Docket No. 96-2286; Submitted on the Record;
Issued May 21, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that the position of clerk fairly and reasonably reflected appellant's wage-earning capacity effective April 8, 1996, the date that it adjusted his compensation.

The Board has duly reviewed the case record in the present appeal and finds that the Office properly determined that the position of clerk fairly and reasonably reflected appellant's wage-earning capacity effective April 8, 1996, the date that it adjusted his compensation.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[1] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[2]

Section 8115(a) of the Federal Employees' Compensation Act 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."[3] The Board has stated, "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]

[1] *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

[2] *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

[3] 5 U.S.C. § 8115(a).

[4] *Floyd A. Gervais*, 40 ECAB 1045, 1048 (1989); *Clyde Price*, 32 ECAB 1932, 1934 (1981).

In reaching its determination of appellant's wage-earning capacity, the Office properly noted that appellant had received actual earnings as a clerk for more than 60 days in that he had been working in the position since April 8, 1996 when the Office issued its June 10, 1996 decision.[5] The record does not contain any evidence showing that the clerk position constitutes part-time, sporadic, seasonal or temporary work.[6] Moreover, the record does not reveal that the position is a make-shift position designed for a claimant's particular needs.[7] On appeal appellant argued that the duties of the clerk position were not adequately tailored to his medical condition, but the record does not contain evidence supporting this assertion.[8] After determining that the position of clerk fairly and reasonably reflected appellant's wage-earning capacity effective April 8, 1996, the Office properly applied the principles set forth in the *Shadrick* decision to determine that appellant did not have any loss of wage-earning capacity effective April 8, 1996.[9]

On appeal appellant alleged that the Office did not pay certain medical bills and overlooked the fact that he had a herniated disc at T7. However, the record does not contain a final decision of the Office concerning these matters and, therefore, they are not currently before the Board.[10]

[5] Office procedure provides that a determination regarding whether actual earnings fairly and reasonably represent wage-earning capacity should be made after an employee has been working in a given position for more than 60 days; *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1993).

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (December 1993). The clerk position was a light-duty position of a sedentary nature which did not require heavy lifting.

[7] *But see, e.g., Michael A. Wittman*, 43 ECAB 800 (1992) (where the Board found that the evidence did not support a finding that a position with the National Guard fairly and reasonably represented the claimant's wage-earning capacity based on the fact that the claimant only performed limited duties and did not appear every month as normally required); *Elizabeth E. Campbell*, 37 ECAB 224 (1985) (where the Board found that the evidence did not support a finding that the position of "baseball cover sorter" fairly and reasonably represented the claimant's wage-earning capacity based on the fact that the position tended to be seasonal and appeared to have been make-shift work designed for the claimant's particular needs).

[8] The Office accepted that appellant sustained employment-related lumbar, thoracic and cervical strains and a herniated nucleus pulposus at C5-6. The record contains medical evidence which indicates that appellant could perform a light-duty position such as the clerk position.

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

[10] *See* 20 C.F.R. § 501.2(c). It should be noted that it has not been accepted appellant sustained an employment-related herniated nuclues pulposus at T7.

The decision of the Office of Workers' Compensation Programs dated June 10, 1996 is affirmed.

Dated, Washington, D.C.
May 21, 1998

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member