

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FREDERICK L. FIELDS and DEPARTMENT OF AGRICULTURE,
NATIONAL FINANCE CENTER, New Orleans, La.

*Docket No. 96-2478; Submitted on the Record;
Issued February 5, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation benefits effective July 25, 1994 based on his actual earnings as an account technician.

This is the second appeal before the Board in this case. By decision and order issued April 10, 1996,¹ the Board reversed the Office's September 23, 1993 decision terminating his compensation benefits on the grounds that his work-related disability had ceased. The Board found that the reports of Dr. Montz, a Board-certified orthopedic surgeon and impartial medical examiner, were insufficient to resolve the conflict of medical opinion between Dr. Ruel, an attending Board-certified orthopedic surgeon, and Dr. Steiner, a Board-certified orthopedic surgeon and second opinion physician. The Board concluded that it was improper for the Office to have terminated appellant's compensation benefits while there was an outstanding conflict of medical evidence. The law and facts of the case as set forth in the Board's decision and order are incorporated by reference.²

The most recent medical opinion of record was provided by Dr. Robert E. Ruel, Jr., an attending orthopedic surgeon. In a December 5, 1993 report, Dr. Ruel noted objective findings of restricted lumbar motion with "tightness of the hamstring muscles." He stated that prior to the accepted injury, appellant "was working well" despite a preexisting spondylolisthesis. Dr. Ruel noted appellant's continuing symptoms of low back pain and mechanical dysfunction with activity, and that he could not return to his preinjury job, which required heavy lifting and frequent bending. In a March 11, 1994 form report, Dr. Ruel stated that appellant was "unable to resume regular working activities" due to unrelieved low back pain.

¹ Docket No. 95-136.

² The record indicates that a vocational rehabilitation effort begun in March 6, 1992 was placed in suspended status as Dr. Montz did not definitively opine that appellant could return to work.

On April 25, 1994 appellant accepted a temporary appointment at the employing establishment as a document processing clerk, a sedentary position designed to train him in skills leading to a permanent clerical position.

The record indicates that appellant began permanent employment as an accounting technician at the employing establishment on July 25, 1994, and continued in the position through May 1996 and beyond. A May 14, 1996 position description for the permanent accounting technician job noted duties of “examining, reconciling and correcting” a variety of personnel records. The job was described as “sedentary with some walking, bending, standing” and carrying documents in an office setting.³

By decision dated May 21, 1996, the Office reduced appellant’s wage-loss compensation based on his actual earnings as an account technician at the employing establishment beginning July 25, 1994, with wages of \$422.40 per week. The Office found that the account technician position fairly and reasonably represented appellant’s wage-earning capacity. The Office noted appellant’s weekly pay rate of \$399.60, with an adjusted earning capacity in the new position of \$387.61,⁴ resulting in an \$11.99 loss of wage-earning capacity per week. The Office then multiplied the \$11.99 amount by 75 percent, the rate for a claimant with a spouse or dependents, and increased it by cost of living adjustments to \$10.00 per week, resulting in a new compensation rate every four weeks of \$40.00 beginning July 25, 1994.⁵

The Board finds that the Office properly reduced appellant’s compensation benefits effective July 25, 1994 based on his actual earnings as an account technician.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.⁶ If an employee’s disability is no longer total, but the employee remains partially disabled, the Office may reduce compensation benefits by determining the employee’s wage-earning capacity.⁷ Under section 8115(a) of the Federal Employees’ Compensation Act,⁸ wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity.

³ On May 16, 1996 the Office referred appellant to Dr. Lawrence Russo, an orthopedist, for the purpose of resolving a conflict of medical opinion. The record indicates that following the Office’s May 21, 1996 decision, the final decision of record, Dr. Russo submitted a medical report. However, this report, and other evidence of file dated after May 21, 1996, may not be considered by the Board for the first time on appeal as it was not before the Office at the time it issued the final decision in this case on May 21, 1996. 20 C.F.R. § 501.2(c).

⁴ It is not clear from the record why appellant earned only \$387.61 per week although the weekly wage for the position was \$422.40.

⁵ Appellant was issued a check in the amount of \$929.85 for the period July 25, 1994 to May 25, 1996.

⁶ *Betty F. Wade*, 37 ECAB 556 (1986).

⁷ 20 C.F.R. § 10.303(a).

⁸ 5 U.S.C. §§ 8101-8193.

In the present case, appellant had actual earnings as an account technician beginning July 25, 1994, continuing through May 21, 1996, the date of the Office's determination of his wage-earning capacity. Generally, wages actually earned are the best measure of a wage-earning capacity, and, in the absence of evidence showing they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.⁹ In this case, the Office properly used appellant's actual earnings as the basis for his loss of wage-earning capacity.¹⁰

Appellant began work as a temporary document processing clerk beginning on April 25, 1994, and on July 25, 1994 began work in the permanent account technician position used in determining his wage-earning capacity. Thus, at the time the Office determined appellant's wage-earning capacity on May 21, 1996, he had been performing the duties of an account technician for approximately two years. During this period, appellant did not submit medical evidence indicating that the account technician position was not suitable work or otherwise beyond any prescribed work limitations. The Board notes that Dr. Ruel's December 5, 1993 and March 11, 1994 reports do not indicate that appellant was incapable of sedentary work such as the account technician position. Thus, appellant received earnings for nearly two years in the account technician position and there is no evidence the position was unsuitable.¹¹

Also, the Office properly applied the principles enunciated in *Albert C. Shadrick*¹² in determining appellant's loss of wage-earning capacity and accurately calculated the new rate of compensation. Thus, the Office properly determined appellant's wage-earning capacity based on his actual earnings as an account technician.

⁹ *Gary Don Young*, 45 ECAB 621 (1994); *Clarence D. Ross*, 42 ECAB 556 (1991).

¹⁰ See 5 U.S.C. § 8115(a); 20 C.F.R. § 10.303(a).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- *Claims, Reemployment and Determining Wage-Earning Capacity*, Chapter 2.814.7 (December 1993).

¹² 5 ECAB 376 (1953).

The decision of the Office of Workers' Compensation Programs dated May 21, 1996 is hereby affirmed.

Dated, Washington, D.C.
February 5, 1999

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member