

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM A. FIELDS and DEPARTMENT OF VETERANS AFFAIRS,
MEDICAL CENTER, Cincinnati, Ohio

*Docket No. 97-905; Submitted on the Record;
Issued February 12, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant had no loss of wage-earning capacity.

On December 7, 1995 appellant, then a 59-year-old nursing assistant, filed a notice of occupational disease, claiming that on November 13 through November 15, 1995 he experienced severe pain in his back and legs while lifting and transporting patients in the emergency room. The Office accepted the claim for a herniated disc at L5-S1.

Appellant returned to light duty on January 18, 1996 and then voluntarily transferred to a new job as a medical file clerk on April 29, 1996. On September 10, 1996 the Office referred appellant, together with the medical records, a statement of accepted facts, and a list of questions, to Dr. Arnold R. Penix, a Board-certified orthopedic surgeon, for a second opinion evaluation.

In a report dated September 30, 1996, Dr. Penix stated that appellant continued to suffer residuals of his low back strain and disc herniation, which was still causing compression of the nerve root that was aggravated by the prolonged standing associated with his medical records job. He added that appellant could "engage in some very sedentary type of work," could stand for 30 minutes maximum at a time, sit intermittently, walk up to half a mile, and occasionally lift up to 10 pounds. Dr. Penix proscribed climbing, bending, and stooping and stated that appellant's restrictions were permanent.

On October 15, 1996 the Office determined that the position of medical file clerk fairly and reasonably represented his wage-earning capacity. The Office stated that appellant's actual weekly wages of \$391.73 exceeded his weekly wages as a nursing assistant (\$381.98) and that therefore he was not entitled to wage-loss compensation.

The Board finds that the Office properly found that appellant had no loss of wage-earning capacity.

Under the Federal Employees' Compensation Act,¹ once the Office has accepted a claim and paid compensation benefits, it has the burden of proof to establish that an employee's disability has ceased or lessened, thus justifying termination or modification of those benefits.² An injured employee who is unable to return to the position held at the time of injury or to earn equivalent wages but who is not totally disabled for all gainful employment is entitled to compensation computed on the loss of wage-earning capacity.³

Wage-earning capacity is the measure of the employee's ability to earn wages in the open labor market under normal employment conditions.⁴ Section 8106(a)⁵ of the Act provides for compensation for the loss of wage-earning capacity during an employee's disability by paying the difference between his monthly pay and his monthly wage-earning capacity after the beginning of the partial disability.⁶

Section 8115 provides that the wage-earning capacity of an employee is determined by his actual earnings if these fairly and reasonably represent his or her wage-earning capacity.⁷ Office procedures require that whether actual earnings fairly and reasonably represent wage-earning capacity should be determined after an employee has been working in a given position for more than 60 days.⁸

In this case, appellant returned to light duty on January 18, 1996 as a nursing assistant with a lifting restriction of 30 pounds for 3 months. Appellant started his file clerk position on April 29, 1996, and the Office's wage-earning capacity determination was done on October 15, 1996.

In fact, appellant has earned more as a file clerk than he did as a nursing assistant.⁹ Therefore, inasmuch as actual wages earned are the best indication of wage-earning capacity, the

¹ 5 U.S.C. §§ 8101-8193 (1974).

² *James B. Christenson*, 47 ECAB 775 (1996); *Wilson L. Clow, Jr.*, 44 ECAB 157, 170 (1992).

³ 20 C.F.R. § 10.303(a); *Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

⁴ *Dennis D. Owen*, 44 ECAB 475, 479 (1993); *Hattie Drummond*, 39 ECAB 904, 907 (1988).

⁵ 5 U.S.C. § 8106(a).

⁶ An employee's wage-earning capacity in terms of percentage is obtained by dividing the pay rate of the selected position by the current pay rate for the date-of-injury job; the wage-earning capacity in terms of dollars is computed by multiplying the pay rate for compensation purposes, as defined at 20 C.F.R. § 10.5(a)(20), by the percentage of wage-earning capacity and subtracting the result from the pay rate for compensation purposes to obtain the employee's loss of wage-earning capacity. 20 C.F.R. § 10.303(b).

⁷ 5 U.S.C. § 8115(a); *Lawrence D. Price*, 47 ECAB 120 (1995).

⁸ *Monique L. Love*, 48 ECAB ____ (Docket No. 95-188, issued February 28, 1997).

⁹ See *Monique L. Love*, *supra* note 8 (finding that appellant's wages as a distribution clerk (modified) were

Board finds that the Office properly reduced appellant's wage-loss compensation to zero based on his ability to work as a file clerk.¹⁰

The October 15, 1996 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
February 12, 1999

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

greater than the current pay for the position she held when injured and therefore she had no loss of wage-earning capacity).

¹⁰ See *Dennis E. Maddy*, 47 ECAB 259 (1995) (finding that actual earnings from appellant's self-taught job as a tax preparer/bookkeeper for about two hours a day fairly and reasonably represented his wage-earning capacity).