

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BRUCE G. WALL and DEPARTMENT OF THE ARMY,
NATIONAL GUARD BUREAU, Natick, Ma.

*Docket No. 97-953; Submitted on the Record;
Issued January 12, 1999*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined appellant's wage-earning capacity.

In the present case, the Office accepted that appellant, an aircraft electrician, sustained an allergic reaction which caused disability commencing August 31, 1992. Appellant returned to work in a motor vehicle operator position, under a pipeline funding program on November 2, 1993, as a motor vehicle operator. He sustained a thoracic strain on December 6, 1993 and fell on January 13, 1994 in the performance of his federal employment sustaining low back and neck injuries. Appellant was detailed to a computer assistant position and subsequently detailed to a position as a military personnel clerk.

By decision dated June 10, 1996, the Office determined retroactively that the position of military personnel clerk fairly and reasonably represented appellant's wage-earning capacity. In an accompanying memorandum to the director, the Office found that appellant had been detailed to the position of military personnel clerk effective March 2, 1994, that appellant worked 40 hours a week in the position, earning a salary of \$10.79 per hour which was equal to his salary on the date of injury; and that appellant had worked in this position for a period well over 60 days. The Office concluded that appellant had a zero percent loss of wage-earning capacity. The Office denied appellant's request for reconsideration, after merit review, on August 16, 1996.

The Board concludes that this case is not in posture for a decision.

Section 8115(1) of the Federal Employees' Compensation Act,¹ titled "Determination of Wage-Earning Capacity" states in pertinent part:

"In determining compensation for partial disability, ... 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...."

Generally, wages actually earned are the best measure of 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.² Loss of wage-earning capacity is, however, a measure of loss of capacity to earn wages and not merely a measure of actual wages lost.³ Therefore actual wages are the preferred measure of wage-earning capacity only if they fairly and reasonably represent such capacity.⁴ The Board has explained that this view constitutes a natural extension of the general principle of workers' compensation law that wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions, rather than in an artificial setting such as a make-shift position or another position at retained pay not necessarily reflective of true wage-earning capacity.⁵

Therefore, while the Office's procedures encourage the claims examiner to determine whether the claimant's actual earnings fairly and reasonably represent his or her wage-earning capacity after the claimant has been working in a position for 60 days,⁶ actual earnings will be presumed to fairly and reasonably represent wage-earning capacity only in the absence of contrary evidence.⁷ In the present case, the Board is unable to ascertain from the record whether appellant's earnings in his military personnel clerk position fairly and reasonably represented his wage-earning capacity, as of March 2, 1994.

Appellant has alleged that his actual wages in his military personnel clerk position did not fairly and reasonably represent his wage-earning capacity as the position was a temporary position with temporary funding and because he continued to receive the wages of a motor vehicle operator, at Grade 8, step 3, while performing the duties of military personnel clerk, Grade 5, a position which was of a lower grade and salary. The Board is unable to ascertain from the record whether the military personnel clerk position would have paid appellant at the

¹ 5 U.S.C. § 8115.

² *Clarence D. Ross*, 42 ECAB 556 (1991).

³ *See Billy R. Beasley*, 45 ECAB 244 (1993).

⁴ *Michael E. Moravec*, 46 ECAB 492 (1995); *see also* 20 C.F.R. § 10.303(a).

⁵ *Id.*

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-earning Capacity*, Chapter 2.814.7 (April 1995).

⁷ *See Mary Jo Colvert*, 45 ECAB 575 (1994).

rate of \$10.79 per hour, or whether appellant simply continued to receive his date of injury pay while detailed from his motor vehicle operator position.

Further, the evidence of record establishes that on March 8, 1994 the employing establishment informed the Office that appellant had been reemployed on November 2, 1993 in a motor vehicle operator position under the pipeline funding program. Due to appellant's January 13, 1994 injury it was then necessary to detail appellant to the position of computer assistant, which was effective March 8, 1994. In a memorandum dated September 29, 1995, however, the employing establishment stated that in December 1993 appellant injured his back and was unable to perform the full duties of his assigned position of motor vehicle operator. He was then detailed to a computer assistant and later a military personnel clerk position, effective March 2, 1994. Another memorandum of record notes that appellant was assigned to a computer assistant position on March 2, 1994 and detailed to the military personnel clerk position in May 1994. The Board is unable to ascertain from the record exactly when appellant was detailed to the military personnel clerk position and whether in fact he was in this position after March 2, 1994, the date the Office determined that his actual earnings as a military personnel clerk fairly and reasonably represented his wage-earning capacity. The record is also unclear as to whether this position was a temporary detail or was a permanent position. In a letter to the Office dated July 22, 1994, the employing establishment advised that appellant had several assignments since he returned to work under the pipeline funding program. This letter suggested that appellant had been temporarily detailed and was not placed in a permanent position.

The Board is also unable to ascertain whether appellant had the qualifications to perform the position of military personnel clerk. In the July 22, 1994 letter, the employing establishment advised that appellant was not qualified for any position, which was available and which his medical restrictions would allow him to perform. The employing establishment advised that it was currently requesting additional funding to keep appellant employed for an additional year, in the hopes that appellant could be retrained as a computer repair technician. In an memorandum to appellant dated August 30, 1995, appellant's supervisor advised appellant that he was not adequately performing his duties as a clerk. This memorandum stated in part: "I have been trying to be patient with you due to your current medical condition and you not understanding nor having the knowledge to accomplish the job function of a 75B20 Unit Clerk at a MP Company." The memorandum concluded: "... to be quite honest, you are not capable of accomplishing this job nor do you show the drive or determination required to accomplish the job requirements of a 75B. At this time, I think you should request to speak with the BnAO, BDE AO and SPMO concerning your future with the RIARNG and possible reassignment possibly to a job such as 71L at HQ STARC or another organization with smaller workload or place where you would work under the closer supervision of someone in the Admin[istrative] field." This letter further suggests that appellant was not qualified to perform the duties of the military personnel clerk position. The record also reflects that appellant applied for a vacant position as military personnel clerk in September 1994 and was denied the position on the grounds that he did not meet the minimum qualification of the position as he lacked the minimum six months of specialized experience. Appellant again applied for a vacant position of military personnel clerk in September 1995 and was denied the position the grounds that he did not submit a complete application package.

The Board finds that the record does not establish that appellant's actual earnings as of March 2, 1994 fairly and reasonably represented his wage-earning capacity. On remand the Office shall clarify whether appellant continued to be paid the wages of a motor vehicle operator while detailed to other positions of a lower grade and salary; whether appellant was actually performing the duties of a military personnel clerk on March 2, 1994; whether appellant had been placed in a permanent or temporary position as military personnel clerk; and whether appellant had the qualifications to perform the position of military personnel clerk. After such further development as necessary, the Office shall issue a *de novo* decision.

The decision of the Office of Workers' Compensation Programs dated August 16, 1996 is hereby set aside and this case is remanded to the Office for further proceedings consistent with this opinion.

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

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member