U. S. DEPARTMENT OF LABOR

# Employees' Compensation Appeals Board

In the Matter of DIM NJAKA and U.S. POSTAL SERVICE,
POST OFFICE, Minneapolis, Minn.

*Docket No. 96-1950; Submitted on the Record;*
*Issued June 18, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant had no loss of wage-earning capacity as of March 14, 1995, based on his capacity to perform the duties of a computer programmer/analyst.

On September 2, 1988 appellant, a 26-year-old mailhandler, injured his upper back while lifting a heavy sack. At the time of his employment injury, appellant was concurrently employed as a programmer analyst at Midwest Savings with earnings of $20,000.00 per year. He was employed at this position from July 18, 1988 to September 5, 1990. Appellant was also employed at General Mills, with annual earnings of $37,000.00 and reported earnings of $40,833.00 at General Mills over an 18-month period ending October 31, 1991. Appellant stopped working for General Mills in approximately November 1992.[1]

In a December 30, 1988 report, Dr. Eric Sturlaugson, a family practitioner, indicated that appellant could not work as of December 19, 1988 due to shoulder pain. Dr. Sturlaugson indicated in a Form CA-20, dated January 13, 1989, that appellant had persistent pain in his left shoulder and neck strain causally related to employment and was totally disabled beginning December 19, 1988.

The Office accepted appellant's claim for left shoulder and neck strain by letter dated May 22, 1989.[2]

[1] In addition, appellant was self-employed as a computer consultant beginning January 1989 under the company name of Alpha Data, Inc., although he claimed to have earned no income from this job.

[2] By letter dated September 23, 1991, the Office expanded its acceptance to include herniated discs at C4-5, T4-5, T6-7 and T7-8.

Appellant filed a claim for continuing compensation on July 28, 1989, claiming wage loss for the period December 19, 1988 through July 12, 1989, based on his employment-related back injury. He indicated on this form that he received $7,012.85 in wages for this period.[3] The employing establishment indicated on the claim form and in work sheets accompanying the form that appellant entered duty on April 23, 1988, worked an average of 37.43 hours a week, or 7.5 hours per day, 5 days per week prior to his injury and was earning $10.07 per hour as of the date of injury, September 2, 1988. He received additional salary from working on Sundays at the rate of 1.25 hours, and worked from the date of injury until December 19, 1988, at which time his salary was $10.32 per hour. After stopping work due to his employment injury on December 19, 1988, appellant did not return to work until January 21, 1989. He worked from January 21 through July 27, 1989; during this period, appellant averaged less than 7.5 hours per day, 5 days per week.

By letter dated November 27, 1989, the Office informed appellant that he was entitled to leave buy back from December 19, 1988 through January 20, 1989. The Office, however, in a second letter dated November 27, 1989, advised appellant that there was no medical evidence to establish that he was totally disabled due to his employment-related back injury subsequent to January 20, 1989 and that he needed to submit supporting medical documentation.

In a Form CA-17 duty status report dated February 5, 1990, appellant's treating physician, Dr. Rodney H. Peterson, a Board-certified orthopedic surgeon, indicated that appellant should be restricted from sitting more than four hours per day, standing and walking for two hours per day and should perform no heavy bending, lifting or twisting. In a report dated February 8, 1990, Dr. Peterson indicated that appellant would be able to perform work for eight hours per day within his recommended restrictions.

By memoranda dated February 7 and 16, 1990, the employing establishment advised appellant that it had authorized a temporary limited-duty assignment for him in the "tear-up" unit from February 7 through 22, 1990, based on the restrictions outlined by Dr. Peterson. In a report dated February 16, 1990, Dr. Peterson opined that appellant could perform light-duty work, although he did not think appellant was capable of performing the "tearing-up" job the employing establishment had selected for him. On April 10, 1990 the employing establishment issued a notice of removal to appellant on the grounds that he had failed to report for his limited-duty assignment and formally terminated him on May 21, 1990. Appellant has not worked for the employing establishment since February 2, 1990. Appellant subsequently filed several claims for continuing compensation, claiming loss of wages based on his employment-related back injury.

By decision dated May 22, 1992, the Office denied appellant continuing compensation for his employment-related back injury based on loss of wages after February 16, 1990, finding the evidence failed to demonstrate that he was totally disabled due to his accepted injury subsequent to that date.

[3] In a letter dated August 5, 1989, the employing establishment indicated that appellant had been placed on light duty from September 2 through December 19, 1988, when appellant stopped work and claimed compensation based on total disability.

By letter dated June 17, 1992, appellant requested an oral hearing before an Office hearing representative, which was held on October 27, 1992.

By decision dated January 8, 1993, an Office hearing representative found that appellant was entitled to compensation based on a loss of wage-earning capacity as of February 5, 1990. The Office hearing representative found that appellant had attempted to return to work following receipt of the February 16, 1990 job offer, but that the period of light-duty employment offered by the employing establishment was only temporary, lasting only until February 22, 1990, and that there was no evidence that suitable work was made available subsequent to that date. The hearing representative determined that appellant was not capable of returning to full-time work at his preinjury job; he found, however, that appellant was not totally disabled from all types of employment, and that his entitlement to compensation as of February 5, 1990 should be determined on the basis of his actual earnings until a formal determination was made regarding his wage-earning capacity. The hearing representative instructed the district Office to schedule appellant for a medical examination to determine the extent of appellant's employment-related disability.

The Office scheduled an examination for appellant with Dr. Robert A. Wengler, a Board-certified orthopedic surgeon, for May 21, 1993. Dr. Wengler advised that appellant had continuing symptoms which were related to the September 2, 1988 employment injury, and opined that he was unable to perform the duties of a mailhandler. He recommended that appellant not engage in activities which required him to lift material on a regular basis or lift more than 10 pounds, and that he refrain from engaging in activities which required repetitive bending, stooping, twisting, turning, pushing or pulling, or prolonged postural stresses. Dr. Wengler advised that he agreed with Dr. Peterson's suggestion that appellant could handle situations allowing him to assume positions of comfort. He concluded that the restrictions proposed by Dr. Peterson on February 5, 1990; *i.e.*, four hours of sitting, two hours of standing, and two hours of walking, seemed reasonable, so long as the restrictions on lifting were heeded.

By decision dated March 16, 1994, the Office modified the January 8, 1993 decision, finding that the Office erred in concluding that appellant's compensation as of February 5, 1990 should be paid based on his actual wages. The Office found that payment of compensation beginning February 5, 1990 should be paid based on a constructed loss of wage-earning capacity. The Office advised the district Office, in calculating the constructive award, to consider appellant's significant earnings in private industry working with computers and as a programmer/analyst.

The Office referred appellant's case file and medical records to a vocational rehabilitation counselor, who issued a May 23, 1994 report summarizing her efforts to find suitable alternate employment for appellant within Dr. Peterson's restrictions. The vocational counselor reviewed the labor market in appellant's geographical area and recommended two positions for appellant listed in the Department of Labor's *Dictionary of Occupational Titles*, which reasonably reflected his ability to earn wages: computer programmer, DOT No. 030.126.010 and programmer/analyst, DOT No. 030.162-014. She stated that the hourly wage for the first position was $15.20 and the hourly wage for the second position was $17.71. The vocational counselor noted that appellant reported ongoing actual employment at the

professional level in the computer science field, which indicated that he possessed the requisite skills for these and other similar jobs. She stated that both jobs were classified as sedentary, so that each one fell within his accepted medical restrictions. The vocational counselor noted that the median salary for a computer programmer in 1990 was $32,884.80 and that, based on her knowledge of the labor market, this figure reasonably represented appellant's wage-earning capacity on and around February 25, 1990, as such jobs were reasonably available in his commuting area at that time and as of the date of the report. She recommended a constructed loss of wage-earning capacity determination based on the position of computer programmer.

By decision dated June 1, 1994, the Office found based on the vocational counselor's report that appellant's wage-earning capacity was fairly and reasonably represented by the position of programmer/analyst, DOT No. 030.162-014, with earnings of $32,884.80 per year, or $632.40 per week, beginning February 5, 1990. The Office determined that, as the weekly earnings of the selected position exceeded the weekly pay rate of the current pay rate of the job he held when injured, $490.79, appellant had no loss of wage-earning capacity. The Office noted that, pursuant to section 8115,[4] the Office was required to give due regard to an employee's qualifications for other employment, including the educational and employment background of the employee. The Office found that the selected position was within the restrictions outlined by Drs. Peterson and Wengler, and stated that the vocational counselor had noted that appellant had worked at the programmer position since 1988, and on a regular basis as a self-employed person since February 5, 1990.

By letter dated June 20, 1994, appellant requested an oral hearing, which was held on September 23, 1994. Appellant argued that the Office erred by substituting a constructed wage-earning capacity based on a computer programmer/analyst for the actual wages he earned in private employment, using the same jobs he actually held to justify its theoretical calculation. Appellant argued that the Office essentially used his concurrent private employment earnings, which were higher than his part-time postal job, to conclude that he had no loss of wage-earning capacity, which contradicted *Irwin E. Goldman.*[5] In *Goldman*, the Board held that, where an employee was working concurrently at dissimilar employment at the time of his injury, the employee's wage-earning capacity could not be based on actual wages where the employee's total earnings from dissimilar employment were not included in his pay rate.

By decision dated December 16, 1994, the Office hearing representative affirmed the Office's determination that appellant had no loss of wage-earning capacity based on the constructed position of programmer/analyst. The hearing representative stated that the Office had substituted the constructed capability of a selected position for the actual concurrent, dissimilar job held at the time of injury, and that this method of calculation was not in conflict with *Goldman,* section 8115, or the Board's decision in *Albert C. Shadrick*.[6] The hearing

[4] 5 U.S.C. § 8115.

[5] 23 ECAB 6 (1971), *petition for recon. denied,* 23 ECAB 46 (1971).

[6] 5 ECAB 376 (1953). This decision held that the sole criteria is the loss of the capacity to earn wages in that the wage-earning capacity of an injured employee shall be determined by his actual earnings if such actual earnings fairly and reasonably represent the wage-earning capacity, and that if the employee has no actual earnings or his actual earnings do not fairly represent the wage-earning capacity, such wage-earning capacity shall be determined

representative noted that the term "same or similar" employment stemmed from section 8114(d)(3) of the Federal Employees' Compensation Act,[7] which states that dissimilar earnings in the concurrent employment may not be used to calculate the pay rate for compensation purposes. The hearing representative also noted that *Goldman* states that where dissimilar earnings have not been included in the pay rate, the Office may not use the actual job held in concurrent employment to calculate his wage-earning capacity while section 8115 states that where the actual earnings do not represent the wage-earning capacity, then consideration must be given to several factors, including the employee's usual employment and qualification for other employment. The hearing representative determined that although the Office was precluded from calculating appellant's wage-earning capacity based on his actual wages from his concurrent, dissimilar employment with Midwest Savings, General Mills and Alpha Data, it was not prohibited from using appellant's general background and experience to determine his wage-earning capacity based on a constructed position, as long as this position was selected in accordance with the factors outlined in section 8115. The hearing representative stated that the record indicated that the position of programmer/analyst was consistent with appellant's background, education and experience, and was reasonably available within his geographical area. The hearing representative further noted that the position described was light or sedentary, consistent with the recommendations of Dr. Peterson, his treating physician. Based on these factors the hearing representative found that appellant's wage-earning capacity was reasonably represented by the position of programmer/analyst.

The hearing representative further found that the Office had erred in not reinstating appellant's total disability compensation pending its resolution and proper determination of his selected wage-earning capacity. The hearing representative noted that since the Office was prohibited from basing appellant's wage-earning capacity on his actual wages, it was required to reinstate his compensation retroactive to February 5, 1990. The hearing representative stated that once appellant's compensation had been reinstated, the Office was required to provide a prereduction notice to appellant, allotting him 30 days in which to submit any evidence or additional argument prior to issuance of a final determination. The hearing representative therefore reversed the June 1, 1994 decision to the extent that appellant had not been provided due process, reinstated appellant's temporary total disability compensation retroactive to February 5, 1990, and found that the instant decision constituted a prereduction notice that the selected position of programmer/analyst met the criteria under section 8115 and therefore fairly and reasonably represented appellant's wage-earning capacity. The hearing representative allotted appellant 30 days in which to submit any evidence or additional argument prior to issuance of a final determination. Lastly, the hearing representative ordered the Office to recalculate appellant's pay rate based on a 40-hour week, in accordance with the above findings.

Appellant submitted letters dated January 11 and 16, 1995 which contested the Office's proposed reduction of compensation. Appellant also submitted a January 17, 1995 medical

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having due regard to the nature of his injury, the degree of his physical impairment, his usual employment and other factors.

[7] 5 U.S.C. § 8114(d)(3).

report from Dr. Peterson which restated the findings and conclusions contained in his July 20, 1990 report.

By decision dated March 14, 1995, the Office reduced appellant's compensation effective that date because the evidence of record showed that he was not totally disabled for work due to residuals of his September 2, 1988 employment injury, and that the constructed position of programmer/analyst fairly and reasonably represented his wage-earning capacity.

By letter dated April 5, 1995, appellant requested an oral hearing before an Office hearing representative, which was held on November 30, 1995. Appellant reiterated the arguments he advanced previously.

In a decision dated February 22, 1996, the Office hearing representative affirmed the Office's March 14, 1995 decision.[8]

The Board finds that the Office properly determined that appellant had no loss of wage-earning capacity as of March 14, 1995, based on his capacity to perform the duties of a computer programmer/analyst.

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction of benefits.[9] After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[10] As used in the Act, the term disability means incapacity because of an employment injury to earn the wages the employee was receiving at the time of injury; that is, a physical impairment resulting in a loss of wage-earning capacity.[11] The Office met its burden by establishing that appellant had no loss of wage-earning capacity and therefore was not disabled within the meaning of the Act after March 14, 1995.

In the present case, appellant was concurrently employed in the private sector as a computer programmer/analyst at the time of his September 2, 1988 employment injury. The actual earnings from this concurrent employment, however, may not be considered in determining his wage-earning capacity, since such earnings could not be considered in determining his pay rate. The Board has noted that Congress, in enacting the 1949 amendments

[8] By letter dated December 6, 1995, appellant requested reconsideration of the Office's March 14, 1995 decision, notwithstanding the fact that the Office decision based on his oral hearing was still pending. By nonmerit decision dated March 18, 1996, the Office denied appellant's application for review. The Board need not address this decision, as appellant's request for reconsideration was redundant given the fact that his case was pending before the Office at the time and was therefore already under review. Moreover, appellant did not submit any medical evidence or advance any additional legal argument in support of his request.

[9] *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

[10] *Id.*

[11] *Ralph W. Baker*, 39 ECAB 1413 (1988).

to the Act, stated that the Act was similar to the New York workers' compensation law, which has been interpreted as allowing earnings from concurrent employment to be combined in determining the pay rate for compensation purposes only if the concurrent employment were related.[12] Following the precedents of the New York courts and of this Board, and the majority rule in other jurisdictions, earnings from dissimilar private employment cannot be considered in computing appellant's pay rate for purposes of compensation.[13] *Goldman* established the principle that earnings from concurrent dissimilar employment would be excluded by the Office when determining an injured federal employee's pay rate and, consequently, his wage-earning capacity.[14] Appellant's duties as a mailhandler in his federal employment and as a computer programmer/analyst in his nonfederal employment involved dissimilar duties; therefore, the actual earnings from the positions could not be combined.

The Office, however, did not rely on the actual wages of the dissimilar concurrent employment. Rather, the Office, pursuant to section 8115 of the Act, determined appellant's wage-earning capacity as of February 5, 1990 in a constructed position with due regard to his injury and physical impairment, his usual employment, his age, his qualifications, and the availability of suitable employment. The Office properly found that although it was precluded from determining appellant's wage-earning capacity based on his actual wages from his concurrent, dissimilar private employment, there is no prohibition from using appellant's general background and experience to determine his wage-earning capacity based on a constructed position so long as this position was selected pursuant to the factors outlined in section 8115. The Board finds that the Office acted in accordance with Board case law and Office regulations in determining appellant's wage-earning capacity based on a constructed position.

The Office then properly followed established procedures for determining appellant's employment-related loss of wage-earning capacity.

Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions given the nature of the employee's injuries and the degree of physical impairment, his or her usual employment, the employee's age and vocational qualifications and the availability of suitable employment.[15] Accordingly, the evidence must establish that jobs in the position selected for determining wage-earning capacity are reasonably available in the general labor market in the commuting area in which the employee lives. In determining an employee's wage-earning capacity, the Office may not select a makeshift or odd lot position or one not reasonably available on the open labor market.[16]

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[12] *See Clifford F. Russell*, 37 ECAB 567 (1986); *Pasqual Torna*, 35 ECAB 1110 (1984).

[13] *Goldman, supra* note 5; *Leo Clouser*, 5 ECAB 366 (1953); *see* Larson's *The Law of Workers' Compensation* § 60.31(a) *et seq* (1993)*; see also Wendell Alan Jackson*, 37 ECAB 118 (1985); *Cecile Barrett*, 26 ECAB 112 (1974).

[14] *Steven J. Rose*, 44 ECAB 211 (1992); *Goldman, supra* note 5.

[15] *Samuel J. Chavez*, 44 ECAB 431 (1993); *Hattie Drummond*, 39 ECAB 904 (1988); *see* 5 U.S.C. § 8115(a); A. Larson, *The Law of Workers' Compensation* § 57.22 (1989).

[16] *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

Through contact with the vocational counselor, the Office determined that the constructed position of computer programmer/analyst reasonably represented appellant's wage-earning capacity. The vocational counselor identified the computer programmer/analyst position listed in the Department of Labor's *Dictionary of Occupational Titles*, DOT No. 030.162-014, and provided the required information concerning the position descriptions, the availability of the positions within appellant's commuting area and pay ranges within the geographical area, as confirmed by state officials. She determined that this position was in accord with appellant's background, education, and experience, and reasonably available within his geographical area in February 1990, and found that it was appropriate for appellant based on Dr. Peterson's accepted work tolerance limitations as set forth by the Office. Based on these restrictions and on the vocational counselor's recommendations, the Office selected the position of computer programmer/analyst which it found suitable for appellant. The Office noted that the position described was light or sedentary, which was consistent with the recommendations of both Dr. Peterson, appellant's treating physician, and Dr. Wengler, the Office referral physician, and used the information provided by the rehabilitation counselor regarding the prevailing wage rate in the area of a computer programmer/analyst to ascertain the wages of the position. It then compared these wages to the current pay rate of the position appellant held when injured. As the wages of the selected position were greater, the Office properly found that appellant has no loss of wage-earning capacity.[17]

The Office used the information provided by the vocational counselor in selecting the constructive position and then properly determined that appellant had no employment-related loss of wage-earning capacity. The Board therefore finds that the Office has met its burden of proof in terminating appellant's compensation for total disability.

[17] *Baker*, *supra* note 11.

The decision of the Office of Workers' Compensation Programs dated February 22, 1996 is hereby affirmed.

Dated, Washington, D.C.
June 18, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member