

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JUDY A. SUDTELGTE and DEPARTMENT OF JUSTICE, FEDERAL
BUREAU OF INVESTIGATIONS, Los Angeles, CA

*Docket No. 97-2362; Submitted on the Record;
Issued January 10, 2000*

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs properly reduced appellant's compensation benefits based on its determination that appellant's actual earnings in the position of administrative assistant fairly and reasonably represented appellant's wage-earning capacity pursuant to 5 U.S.C. § 8115; and (2) whether the Office properly denied appellant's request for a hearing under 5 U.S.C. § 8124(b).

On April 1, 1985 appellant, then a 37-year-old special agent, filed a claim for an occupational disease (Form CA-2) alleging that she first realized that her "cumulative trauma" condition was caused or aggravated by her employment on February 22, 1985. Appellant stopped work on February 22, 1985.

The Office accepted appellant's claim for aggravation of atypical bipolar disorder and mixed personality disorder with borderline narcissistic and paranoid features.

On December 15, 1995 appellant was referred to a vocational rehabilitation counselor to obtain employment.¹ Appellant returned to full-time work at Western Adhesives as an administrative assistant on May 16, 1996.²

By decision dated August 29, 1996, the Office reduced appellant's compensation benefits commencing May 16, 1996 based on its determination that appellant's actual earnings in the

¹ By decision dated January 17, 1996, the Office reduced appellant's wage-loss compensation benefits on the grounds that appellant refused to undergo vocational rehabilitation services pursuant to 5 U.S.C. § 8113(b). In a February 9, 1996 letter, appellant, through her counsel, requested an oral hearing before an Office representative. By decision dated April 2, 1996, the hearing representative vacated the Office's decision and remanded the case to the Office for reinstatement of benefits on the grounds that the evidence of record established that appellant had resumed the vocational rehabilitation process.

² Appellant was separated from Western Adhesives due to a reduction-in-force on October 11, 1996.

position of administrative assistant fairly and reasonably represented appellant's wage-earning capacity pursuant to 5 U.S.C. § 8115. The Office computed appellant's wage-earning capacity based on the principles espoused in the *Albert C. Shadrick* decision.³ In a November 3, 1996 letter, appellant, through her counsel, requested an oral hearing before an Office representative.

By decision dated December 5, 1996, the Office denied appellant's request for a hearing as untimely filed pursuant to 5 U.S.C. § 8124. Appellant, through her counsel, requested reconsideration of the Office's August 29, 1996 decision in a letter dated March 5, 1997.

In an April 18, 1997 decision, the Office denied modification of its loss of wage-earning capacity determination.

The Board finds that the Office properly reduced appellant's compensation benefits during the period May 16 through August 17, 1996 based on its determination that appellant's actual earnings in the position of administrative assistant fairly and reasonably represented appellant's wage-earning capacity pursuant to 5 U.S.C. § 8115.

Once the Office accepts a claim and pays compensation, as here, it has the burden to justify termination or modification of compensation benefits.⁴ Pursuant to section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual earnings received by an employee if the earnings fairly and reasonably represent her wage-earning capacity.⁵ The Board has stated that "[g]enerally, 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."⁶

In the present case, the record establishes that appellant returned to work at Western Adhesives on May 16, 1996 in the full-time position of administrative assistant. Under the Office's procedures, after a claimant has been working in a position for 60 days, the Office will make a determination as to whether the actual earnings fairly and reasonably represent the

³ 5 ECAB 376 (1953).

⁴ *Harold S. McGough*, 36 ECAB 332 (1984).

⁵ 5 U.S.C. § 8115(a).

⁶ *Gregory A. Compton*, 45 ECAB 154 (1993); *Clarence D. Ross*, 42 ECAB 556 (1991); *Floyd A. Gervais*, 40 ECAB 1045, 1048 (1989); *Hubert F. Myatt*, 32 ECAB 1994 (1981); *Lee R. Sires*, 23 ECAB 12 (1971).

claimant's wage-earning capacity.⁷ In this case, the Office determined that actual earnings did fairly and reasonably represent appellant's wage-earning capacity, and there is no contrary evidence. There is, for example, no indication that the position was seasonal, temporary or less than full time.⁸ As noted above, wages earned are generally the best measure of wage-earning capacity. The Board, therefore, finds that the position of administrative assistant fairly and reasonably represented appellant's wage-earning capacity.

The formula for determining loss of wage-earning capacity based on actual earnings, developed in *Shadrick*, has been codified at 20 C.F.R. § 10.303. The Office first calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the "current" pay rate.⁹ In this case, the Office properly used earnings of \$538.46 per week and a current pay rate for the date-of-injury job of \$1,063.24 per week, for a 51 percent wage-earning capacity. The pay rate at the time of injury, \$743.76, is multiplied by the wage-earning capacity percentage, and the resulting dollar amount, \$379.31 is subtracted from the pay rate at time of injury to determine the loss of wage-earning capacity, which equals \$364.45. This amount is multiplied by the appropriate compensation rate, two-thirds in this case, totaling \$242.97. This amount is increased by the applicable cost-of-living adjustments which is \$337.75 and multiplied by four weeks totaling \$1,351.00.

The Board finds that the Office properly determined that appellant's actual earnings represented her wage-earning capacity, and properly reduced her compensation according to the *Shadrick* principles.

The Board further finds that the Office properly denied appellant's request for a hearing under 5 U.S.C. § 8124(b).

Section 8124(b)(1) of the Act provides that a "claimant for compensation not satisfied with the decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."¹⁰ As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.¹¹

The Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1993).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (July 1997).

⁹ 20 C.F.R. § 10.303(b). According to this section, current pay rate means the current pay rate for the job held at the time of injury.

¹⁰ 5 U.S.C. § 8124(b)(1).

¹¹ *Charles J. Prudencio*, 41 ECAB 499 (1990); *Ella M. Garner*, 36 ECAB 238 (1984).

hearings, and the Office must exercise this discretionary authority in deciding whether to grant or deny a hearing. Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right to a hearing, when the request is made after the 30-day period established for requesting a hearing, or when the request is for a second hearing on the same issue. The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.¹²

In this case, the Office issued its decision reducing appellant's compensation on the grounds that appellant's position as an administrative assistant fairly and reasonably represented appellant's wage-earning capacity on August 29, 1996. Subsequently, appellant, through her counsel, requested an oral hearing before an Office representative by letter dated November 3, 1996. The Board finds that appellant's request for a hearing was made more than 30 days after the Office's decision. Therefore, appellant was not entitled to a hearing under section 8124 of the Act as a matter of right.

The Office also exercised its discretion but decided not to grant appellant a discretionary hearing on the grounds that she could have her case further considered on reconsideration by submitting relevant medical evidence. Consequently, the Office properly denied appellant's hearing request.

The April 18, 1997, and December 5 and August 29, 1996 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, D.C.
January 10, 2000

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

¹² *Henry Moreno*, 39 ECAB 475 (1988).