

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NANCY DARMETKO and DEPARTMENT OF THE ARMY,
WATERVLIET ARSENAL, Watervliet, NY

*Docket No. 97-2539; Submitted on the Record;
Issued January 5, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined appellant's loss of wage-earning capacity effective August 23, 1993; and (2) whether the Office properly rescinded its acceptance of appellant's claim for compensation for total disability beginning October 31, 1995.

The Office accepted that appellant sustained a right shoulder strain by hitting a lead hammer against a wrench on December 7, 1989. Appellant received continuation of pay from December 16, 1989, when she stopped work, until January 30, 1990, after which the Office began payment of compensation for temporary total disability. She returned to light-duty employment on March 12, 1990 and worked in this capacity until she was separated in a reduction-in-force on November 2, 1990. After payment of severance pay ended on October 31, 1991, the Office resumed payment of compensation for temporary total disability.

On August 23, 1993 appellant returned to work pursuant to a career appointment as an identification clerk for four hours per day. By letter dated September 8, 1993, the Office advised appellant that it was reducing her compensation effective August 23, 1993 based on her actual earnings. Appellant continued to work in this position for four hours per day and receive compensation for partial disability. On October 31, 1995 appellant was released by the employing establishment in a reduction-in-force.

On January 30, 1996 appellant filed a claim for compensation for the period beginning October 31, 1995. Accompanying this claim form were documents showing that appellant was separated by the employing establishment effective October 31, 1995 in a reduction-in-force. By letter dated February 20, 1996, the Office advised appellant that her claim for a recurrence of disability beginning October 31, 1995 had been accepted; the Office began payment of compensation for temporary total disability on that date.

On November 7, 1996 the Office issued a notice of proposed reduction of compensation, stating that the evidence established that appellant was partially disabled and had the capacity to earn wages as an identification clerk. The Office stated that appellant's claim for a recurrence of total disability beginning October 31, 1995 had been erroneously accepted. By decision dated January 9, 1997, the Office reduced appellant's compensation effective January 5, 1997 based on her ability to perform the position of identification clerk. The Office also found that appellant had not shown that the Office's loss of wage-earning capacity determination should be modified.

By letter dated January 27, 1997, appellant requested reconsideration and submitted additional medical evidence. By decision dated April 24, 1997, the Office denied modification of its prior decision on the basis that the additional medical evidence did not show that appellant's employment-related condition had worsened. By letter dated May 27, 1997, appellant requested reconsideration and submitted additional medical evidence. By decisions dated June 30, 1997, the Office vacated its January 9, 1997 decision on the basis that a formal loss of wage-earning capacity decision was not issued on September 8, 1993, adjusted appellant's compensation effective the date she began to have actual earnings as an identification clerk and denied appellant's claim for additional compensation beginning October 31, 1995 on the basis that appellant had not shown that the Office's loss of wage-earning capacity determination should be modified.

The Board finds that the Office improperly determined appellant's loss of wage-earning capacity effective August 23, 1993.

Section 8115(a) of the Federal Employees' Compensation Act¹ provides: "In determining compensation for partial disability, ... the wage-earning capacity of an employee is determined by [her] actual earnings if [her] actual earnings fairly and reasonably represent [her] wage-earning capacity...." Actual wages are the preferred measure of wage-earning capacity, but only if they fairly and reasonably represent such capacity. 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 other position at retained pay not necessarily reflective of true wage-earning capacity.²

The Office's procedure manual provides:

"When an employee cannot return to the date[-]of[-]injury job because of disability due to work-related injury or disease, but does return to alternative employment with an actual wage loss, the CE [claims examiner] must determine whether the earnings in the alternative employment fairly and reasonably represent the employee's WEC [wage-earning capacity]. Following is an outline

¹ 5 U.S.C. § 8115(a).

² *Michael E. Moravec*, 46 ECAB 492 (1995).

of actions to be taken by the CE when a partially disabled claimant returns to alternative work:

“a. *Factors Considered.* To determine whether the claimant’s work fairly and reasonably represents his or her WEC, the CE should consider whether the kind of appointment and tour of duty (see FECA PM 2-900.3³) are at least equivalent to those of the job held on date of injury. Unless they are, the CE may not consider the work suitable.

“... [T]he reemployment may not be considered suitable when:

“(1) *The job is part-time* (unless the claimant was a part-time worker at the time of injury)....”⁴

In the present case, appellant was working full time as a machine tool operator at the time of her December 7, 1989 employment injury. Due to residuals of her employment injury, she was unable to return to work in this position. Beginning August 23, 1993, appellant was reemployed by the employing establishment as an identification clerk, a position whose physical requirements did not exceed her work tolerance limitations. However, this position was a part-time position affording appellant employment for four hours per day and the tour of duty does not appear equivalent to that appellant held on the date of her employment injury. The Office, under its procedure manual, erroneously determined that this part-time position “fairly and reasonably” represented appellant’s wage-earning capacity.⁵ The Board has held that make-shift work may not be used as a basis of a loss of wage-earning capacity determination.⁶

The Board further finds that the Office improperly rescinded its acceptance of appellant’s claim for compensation for total disability beginning October 31, 1995.

Once the Office accepts a claim, it has the burden of justifying the termination or modification of compensation benefits. This holds true where, as here, the Office later decides that it erroneously accepted a claim.⁷ To satisfy its burden, the Office cannot merely second-guess the initial set of adjudicating officials but must establish through new evidence, legal arguments or rationale, that its acceptance was erroneous.⁸

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.3 (December 1995) lists five kinds of tours of duty: full time, part time, intermittent, seasonal, and on call.

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (July 1997).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computing Compensation*, Chapter 2.901.15e (December 1995) provides that in such circumstances compensation may be reduced to reflect actual earnings during the period of the earnings only.

⁶ *E.g.*, *Mary Jo Colvert*, 45 ECAB 575 (1994); *Jack L. Woolever*, 29 ECAB 111 (1977).

⁷ *Alfonso Martinisi*, 33 ECAB 841 (1982); *Jack W. West*, 30 ECAB 909 (1979).

⁸ *Alfonso Walker*, 42 ECAB 129 (1990).

As the Office's June 30, 1997 loss of wage-earning capacity determination was erroneous, the Office's June 30, 1997 decision placing the burden of proof on appellant to show this determination should be modified is also erroneous. This is the theory upon which the Office rescinded its acceptance of appellant's claim for total disability beginning October 31, 1995. As the new legal argument or rationale used by the Office was erroneous, the Office did not meet its burden of proof to rescind acceptance of appellant's claim for total disability beginning October 31, 1995.

The decisions of the Office of Workers' Compensation Programs dated June 30, 1997, adjusting appellant's compensation effective the date she began to have actual earnings as an identification clerk and denying appellant's claim for additional compensation beginning October 31, 1995 on the basis that appellant had not shown that the Office's loss of wage-earning capacity determination should be modified, are reversed.

Dated, Washington, D.C.
January 5, 2000

Michael J. Walsh
Chairman

George E. Rivers
Member

Michael E. Groom
Alternate Member