

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ROBERT RAUB and DEPARTMENT OF THE AIR FORCE,  
MOUNTAIN HOME AIR FORCE BASE, Idaho

*Docket No. 99-338; Submitted on the Record;  
Issued November 21, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, A. PETER KANJORSKI,  
VALERIE D. EVANS-HARRELL

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective October 12, 1997 based on his actual earnings as a medical clerk at the employing establishment.

The Office accepted that appellant's January 6, 1988 employment injury, sustained while lifting a Christmas tree as a tractor operator, resulted in a cervical strain, aggravation of preexisting foraminal stenosis, a fusion at C5-6 performed in March 1989, and a foraminotomy performed on March 25, 1997. Appellant received compensation for total disability from June 28, 1988 until he returned to work on April 20, 1994 as a housing clerk. Effective April 1, 1997 appellant was reassigned to a position as a child development clerk.

Effective October 12, 1997 appellant was reassigned to a position as a medical clerk at the employing establishment. By decision dated August 24, 1998, the Office found that this position fairly and reasonably represented appellant's wage-earning capacity, and it terminated his compensation effective October 12, 1997 on the basis that the actual wages he was earning on and after that date equaled or exceeded the wages of the job he held when he was injured.

Section 8115(a) of the Federal Employees' Compensation Act<sup>1</sup> provides that 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 a 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.<sup>2</sup> The Office's procedure manual provides that, after a claimant has been working in a position for 60 days, the

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<sup>1</sup> 5 U.S.C. § 8115(a).

<sup>2</sup> *Hubert F. Myatt*, 32 ECAB 1994 (1981); *Lee R. Sires*, 23 ECAB 12 (1971).

Office will determine whether the claimant's actual earnings fairly and reasonably represent his or her wage-earning capacity.<sup>3</sup>

The Board finds that the Office properly determined that the position of medical clerk fairly and reasonably represents appellant's wage-earning capacity.

At the time of the Office's August 24, 1998 decision, appellant had been performing the duties of a medical clerk at the employing establishment for over nine months, and the employing establishment stated that this was a permanent position. There is no evidence that appellant did not have the skills, education or experience needed to perform this position.

The medical evidence does not show that appellant was not physically capable of performing the position of medical clerk. In a report dated November 21, 1997, appellant's attending physician, Dr. Robert H. Friedman, noted that appellant was performing light duty and "recommended, at this time, that he continue to work full time." In this report, Dr. Friedman stated that appellant "should do no over the shoulder work, no head flexion or extension or repetitive motion-type activities with his cervical spine." The physical requirements of the position of medical clerk do not exceed these restrictions, but instead incorporate them. In a report dated January 6, 1988, Dr. Friedman stated that he had written appellant a prescription to limit him to four hours of work per day based on appellant's complaints. However, in another report of the same date, Dr. Friedman stated that appellant felt that eight hours per day was too much, but that "there is no medical reason why he should n[ot] be able to work eight hours [per] day." Most pertinent to appellant's ability to perform this position is Dr. Friedman's January 16, 1998 review of the physical requirements of the position of medical clerk, in which Dr. Friedman indicated that appellant, could perform the work described on a full-time basis.

On appeal, appellant acknowledges that the wages he receives as a medical clerk are the same as those of the position of tractor operator he was performing when he was injured. Appellant contends that he lost pay increases that he would have received as a tractor operator. However, the Board has held that the probability that an employee, if not for his injury-related condition, might have had greater earnings is not proof of a loss of wage-earning capacity and does not afford a basis for payment of compensation under the Act.<sup>4</sup>

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<sup>3</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1993).

<sup>4</sup> *Paul D. Farnsley*, 46 ECAB 341 (1994).

The decision of the Office of Workers' Compensation Programs dated August 24, 1998 is affirmed.

Dated, Washington, DC  
November 21, 2000

Michael J. Walsh  
Chairman

A. Peter Kanjorski  
Alternate Member

Valerie D. Evans-Harrell  
Alternate Member