U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VIRGINIA F. UPTON and DEPARTMENT OF THE ARMY, ARMY MISSILE COMMAND, Redstone Arsenal, AL

Docket No. 99-622; Submitted on the Record;
Issued February 2, 2001

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM, PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's actual earnings as a modified supply cataloger fairly and reasonably represented her wage-earning capacity effective December 12, 1994.

On February 23, 1989 appellant, then a 51-year-old cataloger, filed a claim for an injury occurring on that date in the performance of duty. The Office accepted her claim for low back strain and a generalized anxiety disorder. Appellant stopped work on February 23, 1989 and did not return.

By letter dated September 6, 1994, the employing establishment offered appellant a part-time modified supply cataloger position. Appellant accepted the position on October 27, 1994 and returned to work for four hours per day on December 12, 1994.

On December 28, 1994 the Office informed appellant that it was reducing her compensation benefits effective December 12, 1994 based on her actual earnings as a modified supply cataloger.

On July 5, 1995 appellant filed a notice of recurrence of disability alleging that on April 17, 1995 she sustained a recurrence of disability causally related to her February 23, 1986 employment injury. She indicated that she was working 8 to 12 hours per week at the time of her alleged recurrence of disability. Appellant did not stop work.

By decision dated September 15, 1995, the Office denied appellant's claim on the grounds that the evidence was insufficient to establish that she sustained a recurrence of disability on April 17, 1995 causally related to her February 23, 1986 employment injury. In another decision of the same date, the Office issued a formal wage-earning capacity determination based on its finding that appellant's actual earnings in her position of part-time

modified supply cataloger fairly and reasonably represented her wage-earning capacity effective December 12, 1994.

In a decision dated March 5, 1998, a hearing representative affirmed the Office's September 15, 1995 wage-earning capacity decision but set aside the Office's September 15, 1995 decision denying appellant's claim for a recurrence of disability. The hearing representative remanded the case for further development on the issue of whether appellant sustained a recurrence of disability causally related to her accepted employment injury.[1]

The Board finds that the Office improperly made a formal wage-earning capacity determination based upon appellant's part-time work.

Under section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity.[2] Generally, 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.[3]

The Office's procedure manual provides guidelines for determining wage-earning capacity based on actual earnings:

> "a. *Factors considered.* To determine whether the claimant's work fairly and reasonably represents his or her WEC [wage-earning capacity], the CE [claims examiner] should consider whether the kind of appointment and tour of duty (see FECA PM 2-0900.3) 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.
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> "For instance, reemployment of a temporary or casual worker in another temporary or casual [employing establishment] position is proper, as long as it will last at least 90 days, and reemployment of a term or transitional [employing establishment] worker in another term or transitions position is likewise acceptable. However, the reemployment may not be considered suitable when:
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> > (1) *The job is part-time* (unless the claimant was a part-time worker at the time of injury) or sporadic in nature;

[1] After obtaining second opinion evaluations, the Office determined that appellant was totally disabled and informed her that she would begin receiving compensation for total disability. The Office subsequently learned that appellant had not stopped work following her claim for a recurrence of disability. The Office wrote to the referral physicians asking whether the information that appellant worked four hours per day would change their opinions that she was totally disabled. The Office has not yet issued a final decision on appellant's claim for a recurrence of disability and thus the issue is not before the Board in this appeal.

[2] 5 U.S.C. § 8115(a).

[3] *Dennis E. Maddy*, 47 ECAB 259 (1995).

(2) *The job is seasonal* in an area where year-round employment is available…

(3) *The job is temporary* where the claimant's previous job was permanent."[4]

In this case, the Office has not explained why a formal wage-earning capacity determination was appropriate in view of the above provision in the Office's procedure manual. The language indicates that a part-time position may not be appropriate for a formal wage-earning capacity determination unless the claimant was a part-time worker at the time of injury. There is no indication that appellant was a part-time worker on the date of injury. The Office has failed to address whether a part-time position is appropriate for appellant. Accordingly, the Board finds that the wage-earning capacity determination must be reversed.[5]

The decision of the Office of Workers' Compensation Programs dated March 5, 1998 is hereby reversed on the issue of whether the Office properly determined appellant's wage-earning capacity.

Dated, Washington, DC
February 2, 2001

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member

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

[5] The Board notes that appellant submitted evidence subsequent to the Office's March 5, 1998 decision. The Board has no jurisdiction to review this evidence for the first time on appeal. 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35 (1992).