

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WARDELL COOPER and U.S. POSTAL SERVICE,
POST OFFICE, Denver, CO

*Docket No. 99-1973; Submitted on the Record;
Issued July 17, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant's wage-earning capacity was represented by his actual earnings; and (2) whether appellant has established entitlement to compensation for total disability from March 9 to 12, 1998, or November 15 to 19, 1998.

In the present case, the Office accepted that appellant sustained a herniated nucleus pulposus L5-S1 in the performance of duty. Appellant returned to work in a modified distribution clerk position on September 1, 1998. By decision dated May 29, 1998, the Office determined that the position represented his wage-earning capacity. In a decision dated June 30, 1998, the Office determined that appellant had not established an employment-related total disability from March 9 to 12, 1998. By decision dated February 23, 1999, the Office determined that appellant had not established a recurrence of disability from November 15 to 19, 1998, or submitted evidence requiring modification of the wage-earning capacity determination.

The Board finds that the Office properly determined that appellant's wage-earning capacity was represented by his actual earnings in the modified clerk position.

Under section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity.¹ 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.²

¹ 5 U.S.C. § 8115(a).

² *Dennis E. Maddy*, 47 ECAB 259 (1995).

In this case, the record indicates that appellant returned to full-time work in the modified distribution clerk position as of September 1, 1997. At the time of the May 29, 1998 decision, appellant had been working for more than 60 days.³ There is no indication that the position was temporary, part time, seasonal, or otherwise inappropriate for a wage-earning capacity determination.⁴ The Board accordingly finds that the modified distribution clerk position was appropriate for a wage-earning capacity determination. The record indicates that the actual wages were equal to or above the wages of the date-of-injury position and therefore the Office properly determined that appellant had no loss of wage-earning capacity.⁵

The Board further finds that appellant has not established entitlement to compensation from March 9 to 12, 1998 or November 15 to 19, 1998.

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that light duty can be performed, the employee has the burden to establish by the weight of reliable, probative and substantial evidence a recurrence of total disability. As part of this burden of proof, the employee must show either a change in the nature and extent of the injury-related condition, or a change in the nature and extent of the light-duty requirements.⁶

With respect to the prior wage-earning capacity determination, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.⁷ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁸

In this case, appellant filed a Form CA-7 (claim for compensation on account of traumatic injury or occupational disease) for the period March 9 to 12, 1998. An attending physician, Dr. J. Scott Bainbridge, a physiatrist, indicated in a March 13, 1998 report that appellant had been having increased back pain and had taken time off work. He did not discuss causal relationship with the accepted employment injury. In a report (Form CA-20) dated March 23, 1998, Dr. Bainbridge indicated that appellant was disabled from March 9 to 12, 1998. He did not, however, provide additional details and reported “unknown” in response to a question as to whether the condition was employment related. The Board finds that appellant did not establish an employment-related total disability from March 9 to 12, 1998.

³ Office procedures state that a wage-earning capacity determination based on actual earnings should not be made until the employee has been working for 60 days. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1993).

⁴ See *Monique L. Love*, 48 ECAB 378 (1997).

⁵ See 20 C.F.R. § 10.303 (currently 20 C.F.R. § 10.403).

⁶ *Terry R. Hedman*, 38 ECAB 222 (1986).

⁷ *Sue A. Sedgwick*, 45 ECAB 211 (1993).

⁸ *Id.*

With respect to the period commencing November 15, 1998, appellant filed a notice of recurrence of disability and a Form CA-8 (claim for continuing compensation on account of disability). The record again, however, does not contain a reasoned opinion on causal relationship between any disability and the employment injury. In a report dated November 19, 1998, Dr. Bainbridge reported that appellant had a flare-up of symptoms, without providing an opinion on disability for work and its relationship to the accepted employment injury. In the absence of such evidence, the Board finds that appellant has not met his burden of proof in establishing a recurrence of disability or a modification of the wage-earning capacity determination.

The decisions of the Office of Workers' Compensation Programs dated February 23, 1999, June 30 and May 29, 1998 are affirmed.

Dated, Washington, DC
July 17, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Priscilla Anne Schwab
Alternate Member