

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAVID RUNDELL and DEPARTMENT OF THE ARMY,
Fort Polk, LA

*Docket No. 99-1974; Submitted on the Record;
Issued May 22, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant has established that the Office of Workers' Compensation Programs' August 15, 1996 wage-earning capacity decision should be modified.

This case has previously been before the Board. In a July 1, 1996 decision, the Board set aside the Office's March 9 and April 12, 1994 decisions denying modification of a March 4, 1992 wage-earning capacity determination.¹ In its March 4, 1992 decision, the Office determined that appellant's actual earnings as a supply clerk for eight hours per day fairly and reasonably represented his wage-earning capacity. Appellant stopped work on September 14, 1993 and filed a notice of recurrence of disability due to his June 24, 1986 employment injury of lumbar strain.² By decisions dated March 9 and April 12, 1994, the Office denied appellant's request for modification of its March 4, 1992 wage-earning capacity determination. The Board, however, found that the opinion of Dr. Robert Po, a Board-certified orthopedic surgeon and Office referral physician, established that appellant's condition had changed such that he could only work in the position of supply clerk for four to six hours per day. The Board, therefore, found that appellant had established that the Office's wage-earning capacity should be modified to reflect his change in condition in accordance with Dr. Po's findings. The findings of fact and conclusions of law from the Board's prior decision are hereby incorporated by reference.

By decision dated August 15, 1996, the Office modified its March 4, 1992 wage-earning capacity decision to reflect that, effective February 7, 1994, the position of supply clerk for six hours per day fairly and reasonably represented appellant's wage-earning capacity. The Office calculated the compensation due appellant from February 7, 1994 to August 17, 1996 by determining the amount of compensation to which he was entitled based on its finding that he could earn wages as a six-hour per day supply clerk and subtracting from this amount what he

¹ *David Rundell*, Docket No. 94-1836 (issued July 1, 1996).

² The Office of Personnel Management approved appellant's application for disability retirement effective December 17, 1993. Appellant elected to receive benefits from the Office.

was previously paid and the amount due for health insurance benefits from January 7, 1994 to August 17, 1996.

In a letter dated September 3, 1996, appellant requested reconsideration. Appellant contended that the Office should have modified its March 4, 1992 wage-earning capacity decision effective the date of his claimed recurrence of disability, September 14, 1993, rather than February 7, 1994, the date of Dr. Po's report. Appellant further contended that he was not aware that he could work a 30-hour a week position as a supply clerk with the employing establishment. He also argued that the Office erred in deducting his previously paid compensation from the recalculated amount.

By decision dated October 3, 1996, the Office denied modification of its August 15, 1996 decision.

Appellant appealed his case to the Board; however, the Office did not send the case record to the Board as requested. In an order remanding case dated November 27, 1997,³ the Board remanded the case for reassemblage of the case record to be followed by an appropriate decision to protect appellant's appeal rights.

In a decision dated May 4, 1999, the Office denied modification of its August 15, 1996 decision.

The Board finds that appellant has established that the Office's August 15, 1996 wage-earning capacity determination should be modified.

Once loss of wage-earning capacity is determined, 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.⁴ The burden of proof is on the party attempting to show the award should be modified.⁵ In this case, the evidence established that the Office's August 15, 1996 wage-earning capacity determination was erroneous.

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.⁶ If the actual earnings do not fairly and reasonably represent wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, his degree of permanent impairment, his usual employment, his age, his qualifications for other employment,

³ Docket No. 97-308.

⁴ *James D. Champlain*, 44 ECAB 438 (1993).

⁵ *Id.*

⁶ 5 U.S.C. § 8115(a).

the availability of suitable employment and other factors and circumstances which may affect his wage-earning capacity in his disabled condition.⁷

The formula for determining loss of wage-earning capacity, developed in the *Albert C. Shadrick* decision,⁸ 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 for the date-of-injury job.⁹

As the above language illustrates, there are two methods for determining wage-earning capacity: (1) determining that actual earnings fairly and reasonably represent wage-earning capacity; and then calculating loss of wage-earning capacity by applying the *Shadrick* formula to the actual earnings; and (2) if actual earnings do not fairly and reasonably represent wage-earning capacity, then a constructed position may be used, based on the factors enumerated under section 8115 and in accord with established procedures, followed by application of the *Shadrick* formula.

In this case, the Office modified its March 4, 1992 wage-earning capacity determination effective February 7, 1994 and found that the position of supply clerk for six hours per day fairly and reasonably represented appellant's wage-earning capacity.¹⁰ However, appellant did not have actual earnings as a supply clerk on February 7, 1994. Appellant retired from the employing establishment effective December 17, 1993. Additionally, there is no indication in the record that the Office sought information from the employing establishment regarding whether a position as a part-time supply clerk was available, as of the time the medical evidence established that appellant could no longer work eight hours a day and that appellant actually performed such position. As appellant did not have actual wages as a supply clerk at the time of the Office's redetermination of his wage-earning capacity determination, the Office cannot establish his wage-earning capacity using the actual earnings method.¹¹ The Office should proceed with the alternative method of using a constructed position, which includes referral of appellant to a rehabilitation specialist and selection of an appropriate position, based on proper evaluation of the medical and other relevant evidence.¹²

As the Office did not follow its procedures in this case, the Board finds that the Office failed to properly determine appellant's wage-earning capacity in its August 15, 1996 decision.

⁷ See *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); see also 5 U.S.C. § 8115(a).

⁸ 5 ECAB 376 (1953).

⁹ 20 C.F.R. § 10.303(b).

¹⁰ A part-time position is generally not appropriate for a wage-earning capacity determination when the claimant was a full-time employee on the date of injury. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (July 1997).

¹¹ *Ronald Litzler*, 51 ECAB ____ (Docket No. 99-35, issued July 14, 2000).

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8 (December 1993).

The decision of the Office of Workers' Compensation Programs dated May 4, 1999 is reversed.

Dated, Washington, DC
May 22, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member