U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT W. NEWSOME and DEPARTMENT OF THE NAVY, NAVAL COASTAL SYSTEMS CENTER, Panama City, FL

Docket No. 00-255; Submitted on the Record;
Issued September 13, 2001

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's reemployment as a supply clerk, fairly and reasonably represents his wage-earning capacity.

On January 29, 1986 appellant, then a 38-year-old security guard, filed a traumatic injury claim, alleging that on January 27, 1986 he sustained a back injury when he bent to pick up a portable heater in the performance of duty. Appellant stopped work on January 29, 1986. The Office accepted appellant's claim for a herniated lumbar disc at L4-5 and subsequently authorized a lumbar hemilaminectomy. Appellant received appropriate compensation for all periods of temporary total disability.

On February 2, 1998 appellant returned to work in a light-duty position as a supply clerk for the employing establishment. Appellant stopped work on February 9, 1998 in order to undergo surgery for an abdominal aortic aneurysm. After a period of recovery, appellant returned to work on April 15, 1998. By decision dated August 11, 1998, the Office determined that appellant was reemployed as a supply clerk effective February 2, 1998 and that his actual wages in this position fairly and reasonably represent his wage-earning capacity.

The Board has duly reviewed the entire case record on appeal and finds that the Office properly determined that appellant's actual wages as a supply clerk fairly and reasonably represent his wage-earning capacity.

It is well established that once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.[1] After it has determined that an employee has a disability causally related to his or her federal employment, the Office may not

[1] *See Lawrence D. Price*, 47 ECAB 120 (1995); *Charles E. Minniss*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

reduce compensation without establishing that the disability ceased or that it is no longer related to the employment. Section 8115(a) of the Federal Employees' Compensation Act 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.[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] After the Office determines that appellant's actual earnings fairly and reasonably represent his or her wage-earning capacity, application of the principles set forth in the *Albert C. Shadrick*[4] decision will result in the percentage of the employee's loss of wage-earning capacity.[5] Office procedures indicate that a determination regarding whether actual wages fairly and reasonably represent wage-earning capacity should be made after a claimant has been working in a given position for more than 60 days.[6]

In this case, appellant returned to work on February 2, 1998 as a supply clerk with some physical restrictions. He stopped work on February 9, 1998, in order to undergo surgery, but resumed work on April 15, 1998. The supply clerk position is permanent and full time, and does not constitute part-time, sporadic, seasonal or temporary work.[7] Moreover, appellant worked in the position for more than 60 days prior to the Office's initial wage-earning capacity determination and the record does not reveal that the position was a makeshift position designed for appellant's particular needs.[8] The Board, therefore, finds that the Office properly determined that appellant's position as a supply clerk fairly and reasonably represents his wage-earning capacity.

The formula for determining the loss of wage-earning capacity based on actual earnings, developed in the *Shadrick* decision, has been codified at 20 C.F.R. § 10.303. The Office first calculates the employee's wage-earning capacity in terms of a percentage by dividing his actual earnings by his current date-of-injury pay rate. In this case, the Office properly used appellant's actual earnings of $385.96 per week and a current pay rate for his date-of-injury job of $431.00 per week to determine that he had a 90 percent wage-earning capacity.[9] The Office then multiplied the pay rate at the time of the injury, $285.45, by the 90 percent wage-earning

[2] 5 U.S.C. § 8115(a); *Clarence D. Ross*, 42 ECAB 556 (1991).

[3] *Hubert F. Myatt*, 32 ECAB 1994 (1981).

[4] 5 ECAB 376 (1953).

[5] *See Hattie Drummond*, 39 ECAB 904 (1988); *Shadrick, supra* note 4.

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (December 1993); *see William D. Emory*, 47 ECAB 365 (1996).

[7] *See William D. Emory, supra* note 6.

[8] *Id.*

[9] In determining the current pay rate for appellant's date-of-injury job, the Office properly included premium pay consisting of any Sunday pay, holiday pay and night differential pay; *see* 5 U.S.C. § 8114(e); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900(5)(b)(1), (2) (September 1980).

capacity percentage. The resulting figure of $256.90 is subtracted from appellant's date-of-injury pay rate of $285.45, and appellant's loss of wage-earning capacity is $28.55. The Office multiplied this amount by the appropriate compensation rate of 75 percent, to yield $21.41, and then the applicable cost-of-living adjustments were added to reach the final compensation figure of $31.50 per week, or $126.00 every four weeks.[10] The Board finds that the Office properly determined that appellant's actual earnings fairly and reasonably represent his wage-earning capacity and the Office properly reduced appellant's compensation in accordance with the *Shadrick* formula.

With respect to appellant's argument that had he not been injured, he would now be a GS-6 step 10, rather than a GS-4 step 3, 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.[11] In addition, contrary to appellant's arguments, he is not entitled to more compensation because he can no longer work overtime, as the Act specifically excludes overtime pay as a factor in calculating the pay rate for compensation purposes.[12] Moreover, unlike the theory of damages underlying a tort action, workmen's compensation statutes, such as the Act, are not intended to compensate an injured employee for what may be termed "fringe benefits."[13] The Board has held consistently that there is no authority for computing compensation on any basis other than the employee's "monthly pay" as defined in the Act.[14]

[10] The Board notes that appellant's current pay rate, $20,070.00, or $385.96 per week, is exactly the same as the current basic pay rate for the job appellant held when injured. Prior to his injury, however, appellant also earned Sunday pay and night differential pay, in addition to his basic pay, which would have raised his weekly wage to $431.00. Therefore, the compensation of $126.00 every four weeks essentially represents appellant's lost Sunday pay and night differential pay.

[11] *Donald R. Johnson*, 48 ECAB 455 (1997).

[12] 5 U.S.C. § 8114(e)(1).

[13] *Helen A. Pryor*, 32 ECAB 1313 (1981). Appellant asserted that his prior position afforded him additional privileges, now lost, such as 18 minutes a day of "dress time," and a clothing allowance.

[14] *See* 5 U.S.C. § 8101(4).

The decision of the Office of Workers' Compensation Programs dated August 11, 1998 is hereby affirmed.[15]

Dated, Washington, DC
September 13, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member

[15] On February 26, 1998 appellant filed a claim for a schedule award, which was denied by the Office by decision dated December 24, 1998. The Board notes that, as appellant filed his appeal with the Board on November 30, 1998, the Board does not have jurisdiction over the December 24, 1998 Office decision.