

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARIA OSORIO and U.S. POSTAL SERVICE,
POST OFFICE, Aromas, CA

*Docket No. 00-2723; Submitted on the Record;
Issued April 8, 2002*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that the position of receptionist represented appellant's wage-earning capacity and reduced her compensation benefits to zero based on her actual earnings in this position; and (2) whether the Branch of Hearings and Review properly denied appellant's request for an oral hearing as untimely.

Appellant, a 46-year-old window clerk, filed a claim, alleging that on July 28, 1983 she injured her back in the performance of duty. The Office accepted appellant's claim for herniated disc, thigh sprain and depression. Appellant alleged that she sustained a recurrence of disability on January 31, 1984 causally related to her accepted employment injury. The Office accepted this claim and entered her on the periodic rolls. The Office based appellant's compensation benefits on the claim for compensation completed by the employing establishment on April 20, 1984, which indicated that appellant's pay rate was \$10.61 on the date of injury, \$10.49 on the date of recurrence and that appellant worked 18 hours a week.

Appellant underwent vocational rehabilitation beginning in April 1996. On March 1, 1999 appellant began working 40 hours a week as a receptionist earning \$8.00 an hour. On June 2, 1999 the vocational rehabilitation counselor reported that appellant's attending physician, Dr. Gerald F. Wahl, a Board-certified neurologist, reduced appellant's work hours to six hours a day in April 1999. Appellant submitted pay stubs indicating that she worked 67 hours from March 26 to April 8, 1999 and 60 hours from April 2 to 24, 1999. The rehabilitation counselor reported that appellant lost her job due to staff reductions on June 12, 1999.

The Office requested additional information regarding appellant's claimed recurrence of disability on November 16, 1999.

By decision dated March 25, 2000, the Office determined that appellant's actual earnings as a full-time receptionist represented her wage-earning capacity. The Office noted that appellant worked full time from March 1 to April 1999 and that she continued in this position

until June 12, 1999. The Office found that appellant had not established a recurrence of disability limiting her work hours. The Office further found that as appellant was earning \$320.00 per week in the position of receptionist, she had no loss of wage-earning capacity as she was only working 18 hours a week earning \$308.41 in the date-of-injury position.

Following the Office's March 25, 2000 decision, appellant stated that she wished to appeal her case in a letter dated March 17, 2000. She requested that her case be reopened in an undated petition. In a letter dated April 12, 2000, the Office requested that appellant indicate which form of appeal she wished to follow. In a letter postmarked June 17, 2000, appellant requested an oral hearing. By decision dated July 28, 2000, the Branch of Hearings and Review denied appellant's request for a hearing as untimely.¹

The Board finds that the Office improperly terminated appellant's compensation benefits based on her wage-earning capacity.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.² Section 8115 of the Federal Employees' Compensation Act,³ titled "*Determination of wage-earning capacity*," states in pertinent part:

"In determining compensation for partial disability, ... the wage-earning capacity of an employee is determined by his actual earnings if his earnings fairly and reasonably represent his wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity as appears reasonable under the circumstances is determined with due regard to --

- (1) the nature of his injury;
- (2) the degree of physical impairment;
- (3) his usual employment;
- (4) his age;
- (5) his qualifications for other employment;
- (6) the availability of suitable employment; and
- (7) other factors or circumstances which may affect his wage-earning capacity in his disabled condition."

¹ The Board notes that following the Office's February 25, 2000 merit decision, appellant submitted additional new evidence not considered by the Office. As the Office did not consider this evidence in reaching a final decision, the Board will not review it for the first time on appeal; *see* 20 C.F.R. § 501.2(c).

² *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

³ 5 U.S.C. § 8115.

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.⁴

The formula for determining loss of wage-earning capacity, developed in the *Albert C. Shadrick* decision,⁵ has been codified at 20 C.F.R. § 10.403. 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.⁶

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 reasonable 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 the present case, the Office stated that appellant's full-time position as a receptionist fairly and reasonably represented her wage-earning capacity. The Board notes that the issue is whether the actual earnings fairly and reasonably represented appellant's wage-earning capacity. If the Office makes a determination that actual earnings fairly and reasonably represent wage-earning capacity, then a calculation is made as the loss of wage-earning capacity, applying the *Shadrick* formula to the actual earnings.

The record contains no support for the conclusion that appellant's actual wages met or exceeded her date-of-injury wages. It is evident that appellant's actual wages during the period from March 26 to April 24, 1999 were not based on 40 hours a week. Appellant submitted pay stubs indicating that she worked a total of 60 hours during the two-week period of April 2 to 24, 1999 and 67 hours during the two-week period from March 26 to April 8, 1999.

In reviewing the Office's decision dated February 25, 2000 it appears that the Office did not use actual wages earned, but instead determined that appellant could have worked full time, because the position was full time and she worked full time from March 9 to 25, 1999.⁷ The Office then found that the wages appellant could have earned would meet or exceed date-of-injury wages. This determination is inconsistent with the underlying prior conclusion that the actual wages fairly and reasonably represented appellant's wage-earning capacity. In determining that appellant could have worked full time, but did not, the Office quite clearly is concluding that actual earnings did not represent her wage-earning capacity.⁸ In that case, the

⁴ *Elbert Hicks*, 49 ECAB 283, 284 (1998).

⁵ 5 ECAB 376 (1953).

⁶ 20 C.F.R. § 10.403.

⁷ The Office found that appellant had not submitted sufficient medical evidence to establish a recurrence of disability in the form of a worsening of her condition such that she could only work part time.

⁸ *Ronald Litzler*, 51 ECAB ____ (Docket No. 99-35, issued July 14, 2000).

Office must proceed with the alternative method of using a constructed position and follow established procedures for a wage-earning capacity determination based on a constructed position.⁹

The Board accordingly finds that the Office failed to properly determine appellant's wage-earning capacity. It is the Office's burden of proof to terminate compensation and it did not meet its burden to terminate.¹⁰

The decision of the Office of Workers' Compensation Programs dated February 25, 2000 is hereby reversed.

Dated, Washington, DC
April 8, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.8 (May 1997).

¹⁰ Due to the disposition of this issue, it is not necessary for the Board to consider whether the Branch of Hearings and Review properly denied appellant's request for an oral hearing.