U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CAROLINE H. SIEMERS and DEPARTMENT OF THE ARMY, U.S. CECOM, Fort Monmouth, NJ

Docket No. 02-352; Submitted on the Record;
Issued August 1, 2002

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly determined appellant's loss of wage-earning capacity based on her actual earnings in the position of a secretary.

On August 24, 1981 appellant, then a 33-year-old staffing assistant, was injured in the performance of duty when she hurt her back while lifting heavy boxes. The Office accepted her traumatic injury claim for a herniated disc at L4-5, lumbar laminectomy and disc excision with post-laminectomy scarring. Appellant stopped work at the time of injury and received compensation for wage loss. The record reflects that she was earning $19,631.00 per annum in the position of a GS-8 step 6 staffing assistant.

On June 7, 1999 appellant returned to work as a GS-5 step 10, secretary, which was a sedentary position offered to appellant by the employing establishment in order to accommodate her permanent work restrictions. After she was working 60 days, the Office calculated appellant's loss of wage-earning capacity. The Office noted that appellant's salary of her new position as a GS-5 step 10 secretary was $29,585.00 per year. According to the employing establishment, the current pay rate for the job appellant held at the time of her work injury paid $36,428.00 per year. Thus, the Office determined appellant's loss of wage-earning capacity to be $6,843.00 per year.

In a decision dated March 28, 2000, the Office determined that the position of a GS-5, step 10 secretary fairly and reasonably represented appellant's wage-earning capacity and reduced her compensation to reflect her loss of wage-earning capacity effective June 7, 1999.[1]

[1] Compensation benefits were based on 75 percent (3/4) of the difference between appellant's pay rate and her ability to earn wages in the new position.

Appellant requested a hearing, which was held on September 21, 2000. Her counsel argued at the hearing that the Office used an incorrect rate of pay in calculating appellant's loss of wage-earning capacity. He argued that the Office should have used the rate of pay associated with the position of a GS-9, step 5 staffing assistant, submitting documentation that appellant was promoted to that position effective September 6, 1981 during the next pay period that followed her work injury.

In a decision dated January 4, 2001, an Office hearing representative affirmed the Office's March 28, 2000 decision.

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]

Under section 8115(a) of the Federal Employees' Compensation Act,[3] wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity.[4] 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."[5] Office procedures provides that a determination regarding whether actual earnings fairly and reasonably represent wage-earning capacity should be made after an employee has been working in a given position for more than 60 days.[6]

In reaching its determination regarding appellant's loss of wage-earning capacity, the Office properly noted that appellant had received actual wages in the position of a secretary for 60 days beginning June 7, 1999. There is no evidence to demonstrate that appellant's position as a secretary does not fairly and reasonably represent her wage-earning capacity. Appellant, however, does not contend that she did not have actual wages. Rather, she challenges the Office's reliance on her GS-8, step 6 staffing assistant position as the pay rate for her date-of-injury job. She contends that she was entitled to have her pay rate calculated based on the promotion she received after her injury on September 6, 1981 to a GS-9, step 5 staffing assistant.

The Board finds that the Office used the correct rate of pay in determining appellant's compensation benefits.

[2] *Frederick C. Smith*, 48 ECAB 132 (1996).

[3] 5 U.S.C. § 8115(a).

[4] *Albert C. Shadrick*, 5 ECAB 376 (1953).

[5] *Joseph M. Popp*, 48 ECAB 624 (1997); *Monique L. Love*, 48 ECAB 378 (1997).

[6] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, Reemployment: *Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1993).

Section 8113(a) of the Act[7] provides:

> "If an individual: (1) was a minor or employed in a learner's capacity at the time of injury; and (2) was not physically or mentally handicapped before the injury; the Secretary of Labor, on review under section 8128 of this title after the time the wage-earning capacity of the individual would probably have increased but for the injury, shall recompute prospectively the monetary compensation payable for disability on the basis of an assumed monthly pay corresponding to the probable increased wage-earning capacity."

In interpreting this section of the Act the Board has held that "the Act contemplates but one increase in wage-earning capacity upon the learner's completion of training or the minor's reaching the age of majority; but it does not contemplate such factors as future promotions, increases in salary or advancements, as these rest upon a number of indefinite and uncertain contingencies which place the happening of an event in the realm of possibility, not probability."[8]

In later cases, the Board continued to interpret section 8113 of the Act as providing that appellant is only entitled to compensation at the pay rate he would have received when he would have completed his training.[9] To reflect this interpretation of the Act the Office issued FECA Program Memorandum No. 122 (issued May 19, 1970) which stated:

> "In effect, the compensation rate of a learner should be adjusted if the pay rate increased as a result of a change in his learner's status which would have brought him either: (1) to a new level within; or (2) to completion of his learner's program."

In the present case, appellant was injured at work on August 24, 1981 while in the position of a GS-8, step 6 staffing assistant. On September 6, 1981 appellant received a "noncompetitive promotion" to the position of a GS-9, step 5 staffing assistant.

The Board finds that appellant was not in a learner's capacity at the time of her work injury. Because there is no evidence of record to show that a staffing assistant position is considered by the employing establishment to be a training program, the Office properly calculated appellant's loss of wage-earning capacity based on the salaried position of a GS-8, step 6 staffing assistant. The Board has long held that the possibility of future promotions or greater earnings, but for the employment injury, does not support a loss of wage-earning capacity.[10] Contrary to appellant's allegation, she was not entitled to a pay rate based on a promotion she received subsequent to the work injury as she was disabled from work effective

[7] 5 U.S.C. § 8113(a).

[8] *John Olejarski*, 39 ECAB 1138 (1988); *Robert H. Merritt*, 11 ECAB 64 (1959).

[9] *See Lawrence A. Garner*, Docket No. 81-1519 (issued March 26, 1982); *Bruce E. Hickey*, 19 ECAB 98 (1967).

[10] *See Bobbie P. Beck*, 33 ECAB 146 (1981); *Judith Henderson*, 32 ECAB 501 (1981); *Daniel T. Morisky*, 30 ECAB 350 (1979).

the date of injury.[11] The Board concludes that appellant's pay rate at the time of injury or disability was the salary she received as a GS-8, step 6 staffing assistant.

The Board initially discussed the necessity for payment of compensation where an employee has sustained a loss of wage-earning capacity, but has actual earnings, in the case of *Albert C. Shadrick*.[12] As discussed previously, *Shadrick* provides that appellant's wage-earning capacity shall be determined by actual earnings, if such actual earnings fairly and reasonably represent appellant's wage-earning capacity.[13]

The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Shadrick* decision, has been codified by regulation and recognizes the basic premise that an injured employee who is unable to return to the position held at the time of injury (or to earn equivalent wages) but who is not totally disabled for all gainful employment is entitled to compensation computed on loss of wage-earning capacity.[14] The Office computed appellant's loss of wage-earning capacity based on the *Shadrick* formula as explained in the March 21, 2000 Office decision. The Office properly adjusted appellant's wage-earning capacity to reflect the receipt of actual wages in the position of a GS-5 step 10 secretary effective June 7, 1999.[15]

[11] Compensation in disability cases is computed based on pay rates in effect on the date of injury, the date disability began or the date of recurrence of disability if the recurrence of disability began at least six months after the worker returned to regular, full-time employment. The dates when "disability began" or "compensable disability recurred" are the dates the employee stopped work, not the dates pay stopped. An increase of pay during the continuation of pay (COP) period does not change the pay rate for compensation purposes. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, Reemployment: *Determining Pay Rates*, Chapter 2.900.5a(1) (April 1995).

[12] *Albert C. Shadrick*, 5 ECAB 376 (1953).

[13] *Id*.

[14] 20 C.F.R. § 10.403 (1999).

[15] The Board affirms the loss of wage-earning capacity determination as reflected in the March 21, 2000 decision. The Office hearing representative incorrectly stated that there was zero percent loss of wage-earning capacity based on appellant's actual earnings.

The decision of the Office of Worker's Compensation Programs dated January 4, 2001 is hereby affirmed as modified.

Dated, Washington, DC
August 1, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member