

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICK SCHULER and U.S. POSTAL SERVICE,
POST OFFICE, Baltimore, MD

*Docket No. 02-247; Submitted on the Record;
Issued August 15, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation benefits effective April 30, 2001 based on its determination that the selected position of modified tools and parts clerk fairly and reasonably represented his wage-earning capacity.

On May 1, 1997 appellant, then a 38-year-old automobile mechanic, was injured in the performance of duty when he was involved in an automobile accident while in route to pick up a vehicle for repair. The Office accepted the claim for bilateral knee strain with arthroscopic surgery and a right acromion fracture. Appellant received appropriate compensation for wage loss from May 1, 1997 until April 30, 2001, when he accepted a modified position as a tools and parts clerk.

Appellant's treating physician, Dr. John P. O'Hearn, a Board-certified orthopedic surgeon, stated, in an office note dated January 16, 2001, that appellant could return to work with restrictions and that he could perform no kneeling, squatting or climbing until reevaluation on February 8, 2001.

Appellant received Office approval for rehabilitation services and the employing establishment was contacted to ascertain whether or not it would accommodate appellant's work restrictions. On January 23, 2001 the employing establishment offered him a position as a modified tools and parts clerk. The physical requirements of the job noted the ability to lift items up to 25 pounds, perform sitting duties and occasionally walk and climb stairs. The record indicates that a "return to work interview" was conducted with appellant on January 22, 2001 and the employing establishment agreed to include temporary restrictions of no kneeling, squatting or climbing until appellant was reevaluated by Dr. O'Hearn on February 8, 2001. Appellant, however, declined the position.

In a March 19, 2001 report, Dr. Donn Teubner-Rhodes, a psychiatrist, indicated that appellant suffered from a pain disorder as a result of psychological problems and his general

medical condition. Dr. Teubner-Rhodes recommended that appellant work the first shift in light of his pain disorder.

On April 4, 2001 the Office advised appellant that the job of modified tools and parts clerk was considered to be suitable work. He was given 30 days to accept the job or provide additional evidence or argument to support rejection of the position.

Appellant accepted the job offer on April 30, 2001 and returned to work.

A rehabilitation action report indicates that appellant stopped work on May 8, 2001 alleging degenerative disc problems. The rehabilitation counselor noted that appellant had not been satisfied with his assigned job duties and complained that he should be on the day shift. Appellant advised that he would be staying off work until May 14, 2001.

On May 15, 2001 the Office advised appellant that he was required to submit medical evidence to support his absence from work. He was further informed that his psychiatric reports did not provide sufficient rationale for concluding that he was unable to work the first shift as assigned. Appellant was reminded that the last medical report from Dr. O'Hearn dated January 16, 2001 released him to work. He was given 30 days to return to the suitable work position or provide an explanation of his reasons for refusing the job; otherwise, he risked termination of his compensation.

Appellant subsequently filed a Form CA-7 claim for wage loss from June 8 through June 22, 2001, during which time he alleged that he was undergoing therapy as recommended by his treating physician. He returned to work on June 23, 2001.¹

In a September 21, 2001 decision, the Office determined that appellant had been working 60 days for the employing establishment as a modified tools and parts clerk and that position fairly and reasonably represented his wage-earning capacity. Accordingly, his compensation was terminated as his actual wages met or exceeded the wages of the job held at the time he was injured and there was no longer a loss of wage-earning capacity.

The Board finds that the position of tools and parts clerk fairly and reasonably represents appellant's wage-earning capacity; therefore, the Office acted properly in terminating appellant's compensation.²

¹ On July 30, 2001 appellant filed a claim for a recurrence of disability, alleging that while sitting at a desk he hurt his knees.

² In an October 11, 2001 decision, the Office denied appellant's claim for wage loss for the period of June 8 through June 22, 2001. The Board notes that it does not have jurisdiction to consider the Office's October 11, 2001 decision regarding appellant's claim for wage-loss compensation for the period of June 8 through June 22, 2001. The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.² In this case, appellant's appeal was filed September 28, 2001. Because the October 11, 2001 decision was issued subsequent to the date of filing of appellant's appeal, the Board's jurisdiction is limited to review of the Office's September 21, 2001 decision.

Once the Office accepts a claim, it has the burden of proof to establish that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.³

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 or her wage-earning capacity.⁴ Office procedures provide that when an employee cannot return to the date-of-injury job because of disability due to a work-related injury or disease, but does return to alternative employment, the Office must determine whether the earnings in the alternative employment fairly and reasonably represent the employee's wage-earning capacity.⁵ 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.⁶

In this case, appellant had actual earnings as a modified tools and parts clerk with the employing establishment on a full-time basis. It was proper for the Office to use actual earnings as the basis for his loss of wage-earning capacity, as there was no evidence that his actual earnings did not fairly and reasonably represent his wage-earning capacity. The evidence did not show that the tools and parts clerk position was an odd-lot or makeshift position designed for appellant's particular needs.⁷ Appellant worked in the modified position for 60 days before the Office's wage-earning capacity decision⁸ and he did not submit any evidence showing that the position was seasonal, part time or temporary or to otherwise establish that this position was not a suitable measure of his wage-earning capacity. Therefore, the Board affirms the Office's loss of wage-earning capacity determination and its decision to terminate appellant's compensation for wage loss.

³ *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); *David W. Green*, 43 ECAB 883 (1992).

⁴ 5 U.S.C. 8115(a); see *Keith Hanselman*, 42 ECAB 680 (1991).

⁵ See *Michael I. Moravec*, 46 ECAB 492 (1995).

⁶ *Walter R. Malena*, 46 ECAB 983 (1995); *Michael E. Moravec*, *supra* note 5.

⁷ See *James D. Champlain*, 44 ECAB 438 (1993).

⁸ Office procedures indicates that a determination regarding whether actual wages 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; see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.814.7c (December 1993).

The decision of the Office of Workers' Compensation Programs dated September 21, 2001 is hereby affirmed.

Dated, Washington, DC
August 15, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member