

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of IDA BALDWIN and DEPARTMENT OF VETERANS AFFAIRS,
LIVERMORE VETERANS HOSPITAL, Palo Alto, CA

*Docket No. 02-1537; Submitted on the Record;
Issued September 4, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined appellant's loss of wage-earning capacity on or after May 17, 2001; and (2) whether the Office correctly determined that appellant was overpaid compensation in the amount of \$3,932.50.

On June 5, 1987 appellant, then a 50-year-old nurse, filed a notice of traumatic injury, Office form CA-1, claiming that she twisted her right thumb while working with a patient. On appellant's CA-1 the employing establishment listed her salary as \$32,195.00 per year. On appellant's January 13, 1998 Office Form CA-7, the employing establishment listed her salary on the date of injury as \$34,420.00 per year, and noted that she received a 25 percent premium for Sunday pay and a 10 percent premium for night pay.

The Office accepted the claim for right thumb sprain and right hand tendinitis and subsequently authorized right thumb surgery. Appellant stopped work on April 2, 1988, returned to a modified light-duty position on July 17, 1989 and worked intermittently until leaving the position on July 26, 1991. Appellant returned to part-time work on June 21, 1999, but again stopped work on July 20, 1999, and the Office resumed payment of compensation for temporary total disability.

On January 10, 2001 the employing establishment offered appellant the position of light-duty registered nurse (RN), Nurse Grade 2, Step 6 at an annual salary of \$66,377.00. The employing establishment informed appellant that she would be earning 50 percent of the \$66,377.00 annual salary as she would be working 20 hours per week instead of the normal 40 hours. Appellant accepted the position and returned to work on March 12, 2001.

By decision dated May 17, 2001, the Office determined that appellant's wage-earning capacity was represented by the four-hour-per-day position she had been performing since March 12, 2001. Her loss of wage-earning capacity was determined to be \$363.75. In reaching this determination the Office relied upon a January 30, 2001 form from the employing

establishment which noted appellant's date-of-injury salary as \$28,086.00 per year, her grade as Nurse 2, step 3 and the current salary as \$61,184.00. In a prior form dated December 20, 2000 the employing establishment indicated appellant's current salary for her date-of-injury position was \$64,646.00 and her grade was Nurse 2, step 5.

On June 21, 2001 the Office issued a preliminary determination that an overpayment in the amount of \$3,932.50 existed. The overpayment occurred due to appellant receiving compensation for total disability after she returned to light-duty work for four hours per day for the period March 12 through May 19, 2001.

On June 27, 2001 appellant's counsel responded to the Office's overpayment letter. Appellant agreed that an overpayment existed, but disputed the amount owed. She contended that the amount owed was \$2,496.31 and not \$3,932.50 as calculated by the Office. In support of her contention, she provided copies of her earnings and leave statements for the period March 12 through May 19, 2001. The earnings and leave statement showed that appellant earned \$1,333.20 for 40 hours worked during a two-week period. The salary rate for her position was listed as \$69,336.00 for full-time employment as an RN, Grade 2, Step 6.

In a decision dated April 18, 2002, the Office concluded that appellant had received an overpayment in the amount of \$3,932.50 due to appellant receiving compensation for total disability after she returned to light-duty work for the period March 12 through May 19, 2001. The Office calculated the overpayment using the amount of compensation she received for total disability at a weekly rate of \$757.00 or \$7,570.00 for the 10-week period and subtracted earnings of \$363.75 per week or \$3,637.50 for the 10-week period. This resulted in an overpayment of \$3,932.50.

The Board finds that the Office did not properly determine appellant's wage-earning capacity.

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction of benefits.¹

Under section 8115(a), wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity or the employee has no actual earnings, her wage-earning capacity is determined with due regard to the nature of the employee's injuries and the degree of physical impairment, his or her usual employment, the employee's age, qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect wage-earning capacity in her disabled condition.²

¹ *Luis R. Flores*, 54 ECAB ____ (Docket No. 01-1148, issued December 18, 2002).

² *Ralph A. Nettles*, 54 ECAB ____ (Docket No. 02-1386, issued March 3, 2003)

Generally, wages actually earned are the best measure of one's 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

The formula for determining loss of wage-earning capacity, developed in the *Albert C. Shadrick* decision,⁴ 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, then multiplies this percentage by the pay rate for compensation purposes as defined by section 8114 of the Act.⁵

In the instant case the Office determined current pay rate for her date-of-injury job was \$61,184.00 annually with a 25 percent Sunday pay for 8 hours or \$1,235.45 based upon a January 30, 2001 employing establishment form. However, the employing establishment provided contradictory information regarding appellant's grade and step as of her date of injury. It stated on December 20, 2000 that she was at Step 5 but on January 30, 2001 stated she was at Step 3. As the Step 3 pay for the date of injury of \$28,086.00 is significantly less than the date-of-injury pay listed by the employing establishment at the time of and seven months after the injury. It appears that the Office based its loss of wage-earning capacity determination upon an incorrect current date-of-injury pay rate. For this reason, the case will be remanded for the Office to obtain the correct current date-of-injury salary information from the employing establishment, and to recalculate her loss of wage-earning capacity.

The Board finds that this case is not in posture for a decision regarding the amount of the overpayment of compensation.

Appellant does not dispute that an overpayment of compensation occurred because she received compensation for total disability after she returned to light-duty work for four hours per day for the period March 12 through May 19, 2001. The record establishes that she received wages following her return to work while at the same time receiving compensation for total disability from March 12 through May 19, 2001. She does dispute the amount of the overpayment contending that the Office failed to use her actual earnings in determining the amount of the overpayment.

It is unclear from the case record how the Office calculated the overpayment or how it determined her weekly earnings were \$363.75. Appellant submitted copies of her earnings and leave statement indicating she earned \$1,330.20 over a two week period or \$665.10 per week. Furthermore, in view of the disposition regarding the Office's incorrect loss of wage-earning capacity determination, the overpayment calculation requires modification due to the Office's incorrect loss of wage-earning determination. The case will be remanded to the Office to issue an appropriate decision on the amount of the overpayment.

³ 5 U.S.C. § 8115(a); see *Penny L. Baggett*, 50 ECAB 559 (1999).

⁴ 5 ECAB 376 (1953).

⁵ 20 C.F.R. § 10.403.

The April 18, 2002 and May 17, 2001 decisions of the Office of Workers' Compensation Programs are hereby set aside and the case remanded for further development consistent with the above decision of the Board.

Dated, Washington, DC
September 4, 2003

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member