United States Department of Labor
Employees' Compensation Appeals Board

D.A., Appellant	)	
and	)	**Docket No. 07-249**
	)	**Issued: June 12, 2007**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Poplar Bluffs, MO, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 6, 2006 appellant filed a timely appeal from the September 22, 2006 decision of the Office of Workers' Compensation Programs determining his wage-earning capacity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUE

The issue is whether the Office properly determined that appellant's actual earnings as a modified maintenance mechanic fairly and reasonably represented his wage-earning capacity.

FACTUAL HISTORY

On August 10, 2004 appellant, then a 54-year-old maintenance mechanic, filed a traumatic injury claim, Form CA-1, alleging that he injured his lower back while climbing a ladder. Dr. M.G. Michael, a chiropractor, diagnosed subluxation of the spine at L5-S1 and the sacroiliac joint and removed him from work from August 10 to 15, 2004. He released appellant

to light-duty work on August 16, 2004 with the restrictions of limited bending and twisting and 10 pounds of lifting.

The Office accepted appellant's claim for subluxation of the L5-S1 joint and the sacroiliac joint.

On January 27, 2005 the Office referred appellant for a second opinion evaluation by Dr. David A. West, a Board-certified osteopath in orthopedic surgery. Dr. West found that while appellant showed signs of malingering he was physically unable to return to his regular-duty job. He recommended permanent work restrictions against more than four hours of pushing, pulling or lifting 20 pounds and all squatting, kneeling, climbing, twisting, bending or stooping. Dr. West recommended a 20-minute break for each hour of work. He also recommended a work-hardening program to allow appellant to perform sedentary or light-duty work.

On April 1, 2005 appellant was examined by Dr. Brian C. Schafer, a Board-certified orthopedic surgeon, found that appellant had spinal stenosis, which put him at heightened risk for back injury. Dr. Schafer placed appellant on a work-hardening physical therapy program five days a week for three weeks and recommended lumbar epidural steroid injections. On April 19, 2005 he extended the work hardening for two weeks. On May 10, 2005 Dr. Schafer discontinued physical therapy and recommended a functional capacity evaluation. He noted that appellant reported no relief from the epidural shots and did not seem to have "much interest in improvement beyond this point." A functional capacity evaluation was conducted on May 19, 2005. On review of the findings, Dr. Schafer found that appellant had some distinct limitations in his range of motion and abilities in his lower back. He released appellant for full-time light-duty work, with permanent limitations of occasional lifting of 30 to 40 pounds, no frequent lifting from the floor, occasional low level positions such as squatting, bending and kneeling and occasional climbing. Dr. Schafer stated that appellant would have a permanent whole person impairment of eight percent for his low back injuries. He released appellant from his care on June 7, 2005.

On June 23, 2005 the employing establishment offered appellant a permanent position as a modified maintenance mechanic. The position was modified to meet Dr. Schafer's work restrictions and did not change his grade or salary. Appellant accepted the position on June 24, 2005.[1] The employing establishment informed the Office that appellant was at grade WG-9, step five, on the date of injury and received a salary of $18.89 per hour. It stated that the salary for that grade and step had since increased to $19.58 per hour. The employing establishment reported that appellant's current modified position was at the WG-9, step five level and that he received $19.58 per hour.

In a progress report dated July 16, 2005, Kris Fricke, a nurse assigned to appellant's case, stated that appellant had returned to work and that the employing establishment was respecting his work restrictions. On August 16, 2005 she reported that appellant had been working within his new restrictions for approximately seven weeks with no change in status.

[1] The Board notes that appellant dated the offer "June 24, 2006." This is presumed to be a typo, as the document was date stamped June 24, 2005 and received by the Office on June 28, 2005.

By decision dated September 22, 2006, the Office determined that appellant's actual wages as a modified maintenance mechanic fairly and reasonably represented his wage-earning capacity. It found that the position was suitable to his partially disabled condition because he had demonstrated his ability to perform the work for more than two months. The Office terminated appellant's entitlement to wage-loss benefits because his actual earnings, $785.84 per week,[2] met the wages of the job he held when he was injured and thus, he had no loss of wage-earning capacity.

LEGAL PRECEDENT

Section 8115(a) of the Federal Employees' Compensation Act[3] provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his actual earnings if they 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 showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such a measure.[5] The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision,[6] has been codified at 20 C.F.R. § 10.403. The Office 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.[7] Office procedures provide 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.[8]

ANALYSIS

The Board finds that appellant's actual earnings as a modified maintenance mechanic fairly and reasonably represent his wage-earning capacity. On June 23, 2005 the employing establishment offered appellant a permanent position based on the restrictions set by his treating physician, Dr. Schafer. Appellant accepted the position on June 24, 2005. In a report dated August 16, 2005, Ms. Fricke, the assigned nurse, stated that the employing establishment was respecting appellant's work restrictions and that he had been working in the position for seven weeks with no change in status. Appellant continued working in the position through

[2] This figure may be a typo: The employing establishment reported that appellant was earning $19.58 per hour (the same amount he would have earned under his date-of-injury position); however this amount equals $783.20 when multiplied by 40 hours per week.

[3] 5 U.S.C. §§ 8101-8193.

[4] 5 U.S.C. § 8115(a); *Loni J. Cleveland*, 52 ECAB 171 (2000).

[5] *Lottie M. Williams*, 56 ECAB ___ (Docket No. 04-1001, issued February 3, 2005).

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

[7] 20 C.F.R. § 10.403(c).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment*: *Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (July 1997).

September 22, 2006, the date the Office issued its formal loss of wage-earning capacity determination. The record establishes that he was in the modified maintenance mechanic position for well over 60 days and does not indicate that the position was seasonal, temporary or make-shift work designed for his particular needs.[9]

Finding that appellant's actual earnings in his modified maintenance mechanic position fairly and reasonably represent his wage-earning capacity, the Board must determine whether it was properly calculated based on his actual earnings. The Board finds that the Office properly determined that appellant had no loss of wage-earning capacity based on his actual earnings. The grade, step level and salary of his current modified position were identical to those of his date-of-injury position. Therefore, under the *Shadrick* formula, he had no loss of wage-earning capacity. There is no evidence that appellant's wages in his position does not fairly and reasonably represent his wage-earning capacity and must be accepted as the best measure of his wage-earning capacity.[10]

CONCLUSION

The Board finds that the Office properly determined that appellant's actual earnings as a maintenance mechanic fairly and reasonably represented his wage-earning capacity.

[9] *Elbert Hicks*, 49 ECAB 283 (1998); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment*: *Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (July 1997).

[10] *Hayden C. Ross*, 55 ECAB 455 (2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 22, 2006 is affirmed.

Issued: June 12, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board