

**United States Department of Labor
Employees' Compensation Appeals Board**

S.G., Appellant)	
)	
and)	Docket No. 09-942
)	Issued: November 17, 2009
DEPARTMENT OF AGRICULTURE,)	
PERSONNEL OPERATIONS, Washington, DC,)	
Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 23, 2009 appellant filed a timely appeal from the November 17, 2008 merit decision of the Office of Workers' Compensation Programs, which determined that she had no loss of wage-earning capacity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.¹

ISSUE

The issue is whether the Office properly reduced appellant's compensation for wage loss to zero on the grounds that her actual earnings demonstrated no loss of wage-earning capacity due to her accepted employment injury.

¹ The Board has no jurisdiction to review evidence that was not before the Office at the time of its November 17, 2008 decision, such as the Rehabilitation Plan and Award appellant signed on February 13, 2009, which she submits on appeal.

FACTUAL HISTORY

On October 31, 1991 appellant, then a 39-year-old equal opportunity specialist, sustained a traumatic injury in the performance of duty when she was involved in a motor vehicle accident. The Office accepted her claim for cervical strain, lumbosacral strain, left shoulder strain, cervical radiculopathy and herniated nucleus pulposus at C5-6. Appellant received compensation for temporary total disability on the periodic rolls.

On September 15, 2008 appellant returned to full-time work as an employment complaints investigator and examiner. She continued to work and advised the Office rehabilitation counselor that she was doing fine.

In a decision dated November 17, 2008, the Office found that appellant's actual earnings fairly and reasonably represented her wage-earning capacity. Appellant had demonstrated her ability to perform the duties of the position for more than two months, and her actual earnings were equal to the current pay of her date-of-injury position. Pursuant to 5 U.S.C. §§ 8106 and 8115, the Office reduced her compensation for wage loss to zero.²

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.³ "Disability" means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.⁴

In determining compensation for partial disability, the wage-earning capacity of an employee is determined by the employee's actual earnings if the employee's actual earnings fairly and reasonably represent her 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 the case of *Albert C. Shadrick*,⁷ the Board set forth the principle that, if current actual earnings are used as one of the factors in computing an employee's wage-earning capacity, then the current increased wage for the employee's original job should also be used to avoid any distortions caused by changes in business conditions since the injury. Following this principle,

² On February 2, 2009 the Office made clear that the reduction of appellant's compensation would be effective September 14, 2008.

³ 5 U.S.C. § 8102(a).

⁴ 20 C.F.R. § 10.5(f) (1999).

⁵ *Id.* at § 8115(a).

⁶ *Don J. Mazurek*, 46 ECAB 447 (1995).

⁷ 5 ECAB 376 (1953).

the Office established the *Shadrick* formula as the method of computing compensation when determining an injured worker's wage-earning capacity.⁸

Wages lost because step increases or cost-of-living increases were not applied to the retained pay rate do not constitute a loss of wage-earning capacity, and claims based on this premise should be denied.⁹ The threshold requirement is that in order to claim compensation for loss of wage-earning capacity, an employee must be unable to return to the position held at the time of injury or earn equivalent wages.¹⁰

ANALYSIS

The October 31, 1991 employment injury caused disability for work. For many years after the accident, appellant was incapable of earning the wages she was receiving at the time of injury and the Office paid compensation for that incapacity on the periodic rolls.

Appellant returned to work on September 15, 2008 and successfully fulfilled the duties of that position for at least 60 days, a period of time sufficient to demonstrate her capacity to earn wages. Because her actual earnings as an employment complaints investigator and examiner were equal to the current pay rate of her date-of-injury position as an equal opportunity specialist, she was, by definition, no longer disabled for work. Appellant now had the capacity to earn the wages she was receiving at the time of injury.

The Office properly found that appellant's actual earnings fairly and reasonably represented her wage-earning capacity. Those earnings were the best measure of her wage-earning capacity, and there was no evidence to the contrary. The record does not show that the position was merely part time, seasonal or temporary. The Office also properly compared appellant's actual earnings with the current pay rate for the job and step she held when injured. As the *Shadrick* formula showed no loss in wage-earning capacity, the Office properly reduced appellant's compensation for wage loss to zero. The Board will affirm the Office's November 17, 2008 decision.

On appeal, appellant contends that she was denied rights and benefits under the Civil Service Retirement System and the classification of position. She states that, when she requested the possibility of regular retirement from the retirement and benefits officer, she was advised that she was ineligible, a conclusion with which she disagrees. Appellant also states that she had requested that a personnel action be submitted to correct the classification of her position from the 930 series to the 260 series, equal opportunity specialist. These are matters outside the scope of the Federal Employees' Compensation Act and the jurisdiction of this Board.¹¹

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.2 (December 1993). For the formula itself, see *id.*, *Computation of Compensation*, Chapter 2.900.16.c (January 1991).

⁹ *Id.* at § 2.814.7.c(4) (October 2009).

¹⁰ *Domenick Pezzetti*, 45 ECAB 787 (1994) (holding that the claimant had no loss of wage-earning capacity at the time he was in retained pay because he had at least equivalent earnings to his date-of-injury position).

¹¹ 20 C.F.R. § 501.2(c).

Appellant also contends that the Office's decision adversely affects her by denying her within-grade increases, restoration of leave and other rights and benefits based on length of service: "But for the injury, I would be at the Step 8 level, instead of Step 1." As a legal matter, the point is well settled. The Board has held that the probability that an employee, if not for the injury-related condition, might have had greater earnings is not proof of a loss of wage-earning capacity and does not afford a basis for payment of compensation under the Act.¹² The test is whether appellant had the capacity to earn the wages she was receiving at the time of injury, or under *Shadrick*, the current pay rate of her date-of-injury position. Because appellant demonstrated that capacity through actual earnings over a period of time, the Office properly reduced her compensation for disability to zero.

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation for wage loss to zero on the grounds that her actual earnings demonstrated no loss of wage-earning capacity due to her accepted employment injury.

ORDER

IT IS HEREBY ORDERED THAT the November 17, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 17, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹² *Pezzetti*, *supra* note 10 at 791, n.7.