

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MILDRED ALDER-JOHNSON and U.S. POSTAL SERVICE,  
POST OFFICE, Hempstead, NY

*Docket No. 97-1972; Submitted on the Record;  
Issued July 19, 1999*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to modify appellant's loss of wage-earning capacity determination.

In the present case, the Office accepted that appellant, a distribution clerk, sustained a low back injury requiring fusion of the L5-S1 spine on or about September 16, 1971. Appellant underwent vocational rehabilitation and obtained a masters degree in social work (MSW). On July 27, 1979, while appellant was working as a counselor for Nassau County Family Services, the Office found that appellant's actual earnings as a case worker fairly and reasonably represented her wage-earning capacity and that she had a 74 percent wage-earning capacity. The Office reduced appellant's compensation benefits accordingly. Appellant subsequently was under clinical supervision for a period of six years, following which she received an MSWR certification, which allowed her to charge for third-party reimbursements. Appellant also obtained further training in public speaking through Dale Carnegie course work. Appellant thereafter opened her own private practice in October 1991.

On January 11, 1996 the Office modified appellant's loss of wage-earning capacity determination to reflect that she no longer had a loss of wage-earning capacity. In a memorandum accompanying the decision, the claims examiner explained that appellant had been rehabilitated to a position of social worker/therapist and had demonstrated the capacity to earn the salary of a full-time professional in that field. The claims examiner stated that when the claimant is self-employed, the criteria for establishing his/her earnings is not net profit or loss from employment, but the amount of salary he/she would have to pay an employee to perform the same job duties. Therefore, the salary established by the labor market survey of social worker/therapist in her area remained the best method of establishing her wage-earning capacity. An Office hearing representative affirmed the Office's loss of wage-earning capacity modification by decision dated January 18, 1997.

The Board finds that this case is not in posture for decision.

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous. The burden of proof is on the party attempting to show a modification of the wage-earning capacity award.<sup>1</sup>

Neither the Federal Employees' Compensation Act, nor its applicable regulations specifically address the criteria for modification of a loss of wage-earning capacity determination. The Office's Procedure Manual provides instructional guidelines to be used in determining whether the wage-earning capacity determination should be modified. The Procedure Manual<sup>2</sup> specifically states as follows:

"b. (2) If the Office] is seeking modification (usually on the basis of a decrease in wage loss), the O[ffice] must establish that the original rating was in error, or that the injury-related condition has improved, or that the claimant has been vocationally rehabilitated.

"c. Increased Earnings. It may be appropriate to modify the rating on the grounds that the claimant has been vocationally rehabilitated if one of the following two circumstances applies:

(1) The claimant is earning substantially more in the job for which he or she was rated. This situation may occur where a claimant returned to part-time duty with the employing [establishment] and was rated on that basis, but later increased his or her hours to full-time work.

(2) The claimant is employed in a new job (*i.e.*, a job different from the job for which he or she was rated) which pays at least 25 percent more than the current pay of the job for which the claimant was rated."

In the present case, although appellant was substantially vocationally rehabilitated prior to the 1979 loss of wage-earning capacity determination, appellant did receive further training and certification thereafter, as a result of which she was able to operate her own private practice. Appellant was therefore further vocationally rehabilitated after 1979. As appellant was employed in a different job at the time of the loss of wage-earning capacity modification, the Office was

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<sup>1</sup> *Gregory A. Compton*, 45 ECAB 154 (1993).

<sup>2</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11 (June 1996).

required to establish that the new job paid at least 25 percent more than the current pay of the job in which the claimant was rated. Furthermore, the procedure manual clarifies that: “If these earnings have continued for at least 60 days, the claims examiner should:

“Determine the duration, exact pay, duties and responsibilities of the current job.

“Determine whether the claimant underwent training or vocational preparation to earn the current salary.

“Assess whether the actual job differs significantly in duties, responsibilities, or technical expertise from the job at which the claimant was rated.

“If the results of this investigation establish that the claimant is rehabilitated or self-rehabilitated, or if the evidence shows that the claimant was retrained for a different job, compensation may be predetermined using the *Shadrick* formula. Any modification of compensation should be preceded by a 30-day prereduction notice and then be made prospectively so that no overpayment results.”

The claims examiner is therefore directed to examine the earnings and the duties of the new job appellant is performing to determine whether modification of the loss of wage-earning capacity is justified on the grounds that appellant has increased earnings in the new position. The record indicates that the Office did undertake such examination; however, the Office determined that appellant’s earnings in the new position did not exceed, by 25 percent, earnings in the previous position. The Office then proceeded to determine earnings from a labor survey of similar positions. The Procedure Manual at no point directs the claims examiner to determine the wages of a similar position, pursuant to a labor market survey, to determine appellant’s self-employment earnings where in fact appellant had actual earnings in a new job.

In the case of *Thomas F. Jordan*,<sup>3</sup> the Board noted that it had not previously addressed how to determine the actual earnings of a claimant who was self-employed for purposes of determining his loss of wage-earning capacity. The Board noted that it would be inequitable to calculate a loss of wage-earning capacity on the basis of a claimant’s gross earnings from self-employment, without allowing for the costs of conducting business. The Board also recognized that net profit would not necessarily fairly and reasonably represent a claimant’s actual wage-earning capacity because some of the deductions made from business, such as depreciation, were merely accounting measures that were not direct expenses of the business. The Board therefore concluded that to determine actual earnings of a self-employed person, “deductions should be made from the self-employed claimant’s gross earnings of the direct expenses, such as cost of equipment and maintenance or repair of equipment, insurance, taxes, wages of any employees and other related office expenses, with the burden being upon appellant to establish the amount of direct expenses.” The Board explained that the burden of proof would be upon appellant to establish the amount of direct expenses, to be subtracted from gross earnings.

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<sup>3</sup> 47 ECAB 382 (1996).

While the Office noted that in reporting “self-employment” appellant was to report the salary she would have to pay an employee to perform the same job duties, this requirement arises from the periodic report of employment and earnings found in 20 C.F.R. § 10.125. In general, this type of self-employment earnings report is contemplated to occur in those situations where an appellant claims no earnings, but clearly engages in self-employment activities. The report of self-employment activities contemplated by 20 C.F.R. § 10.125 is not relevant to the issue at hand.

Pursuant to the guidelines set forth by the Office’s Procedure Manual to modify appellant’s loss of wage-earning capacity determination, the Office was required to establish that appellant was earning at least 25 percent more in her new job, as a private social worker practitioner, than the current rate of pay for the previous position she held at the time the loss of wage-earning capacity was initially determined. In the present case, the Office had been provided tax documents showing gross earnings as well as net earnings and business deductions taken. The Office should have utilized this documentation, pursuant to *Jordan*, to determine not appellant’s gross earnings or net earnings, but rather gross earnings less direct expenses, to calculate appellant’s actual earnings from self-employment. On remand, the Office shall proceed with such calculation. If appellant’s actual earnings from self-employment are more than 25 percent above the current pay rate of the position in which appellant’s loss of wage-earning capacity determination was made, the Office should then proceed to modify appellant’s loss of wage-earning capacity.

The decision dated January 18, 1997 is hereby set aside and the case is remanded to the Office of Workers’ Compensation Programs for further proceedings consistent with this opinion.

Dated, Washington, D.C.  
July 19, 1999

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Bradley T. Knott  
Alternate Member