

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL A. WELLS and U.S. POSTAL SERVICE,
GENERAL MAIL FACILITY, Dallas, TX

*Docket No. 00-817; Submitted on the Record;
Issued September 26, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is Office of Workers' Compensation Programs properly determined appellant had no loss of wage-earning capacity.

On January 28, 1987 appellant, then a 28-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that on January 19, 1987 he injured his shoulders by keying on consoles which were defective.¹ On September 8, 1989 the Office accepted appellant's claim for right shoulder rotator cuff syndrome and authorized surgery.

In a decision dated April 5, 1990, the Office issued appellant a schedule award for a 23 percent permanent impairment of the right upper extremity.

On May 12, 1992 appellant filed an occupational disease claim (Form CA-2) alleging that on May 7, 1992 he first realized that keying on consoles aggravated his neck and back.² The Office accepted the claim for cervical strain and bilateral upper extremity radiculitis on June 23, 1992.

In a report dated December 2, 1993, Dr. Ronnie D. Shade, an attending Board-certified orthopedic surgeon, indicated he had released appellant to light duty on September 29, 1993 and appellant could perform the job offered in the Nixie section.

¹ This was assigned claim number A16-123018. Appellant appealed the denial of his claim to the Board which docketed his appeal as 88-856. On July 8, 1988 the Board granted the Director's motion to remand for the Office to issue a merit decision on appellant's reconsideration request. In a decision with Docket No. 88-1921 and dated February 28, 1989, the Board set aside an August 15, 1988 decision rejecting appellant's claim and remanded for further medical development.

² This was assigned claim number A16-207931.

On December 20, 1993 appellant accepted the limited-duty job of modified distribution clerk offered by the employing establishment. On March 3, 1994 the employing establishment informed appellant that he was being terminated for cause effective April 5, 1994.

In a decision dated October 30, 1995, the Office issued appellant a schedule award for a 15 percent permanent impairment of the left upper extremity.

In a decision dated August 18, 1998, the Office determined that appellant's wage-earning capacity was represented by his actual earnings as a modified distribution clerk for the employing establishment. The Office found that appellant had actual earnings of \$691.88 per week as of December 20, 1993 and a retroactive determination was made that this represented appellant's wage-earning capacity.

In a letter dated October 23, 1998, appellant requested reconsideration and submitted an October 1, 1998 report by Dr. Shade diagnosed chronic cervical strain with bilateral upper extremity radiculitis and chronic thoracic strain with bilateral parascapular myofascitis in May 15, 1992. He indicated that appellant received treatment for depression, chronic pain and anxiety and that the prognosis for returning him to work was poor.

In a merit decision dated November 9, 1998, the Office denied appellant's reconsideration request on the basis that evidence submitted was insufficient to warrant modification.

Appellant again requested reconsideration by letter dated July 29, 1999.

On August 18, 1999 the Office denied appellant's reconsideration request in a nonmerit decision as he failed to submit new evidence or raise a substantive legal question.

On August 24, 1999 appellant requested reconsideration and noted that he had previously requested reconsideration in April 1999 and submitted a report by Dr. Shade. Appellant subsequently submitted an undated letter from Dr. Shade in support of his request. This report reiterated Dr. Shade's October 1, 1998 report.

By merit decision dated October 7, 1999, the Office found the evidence submitted to be repetitive of evidence previously submitted and considered and denied his request for modification.

The Board finds that the Office properly determined that appellant had no loss of wage-earning capacity.

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 her wage-earning capacity.³ Generally, wages actually earned are the best measure of a wage-earning capacity and, in the absence of evidence showing that they do not

³ 5 U.S.C. § 8115(a).

fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.⁴

The Office's procedure manual provides that a retroactive determination may be made where the claimant has worked in the position for at least 60 days, the employment fairly and reasonably represents wage-earning capacity and the work stoppage did not occur because of any change in the claimant's injury-related condition affecting his ability to work.⁵

In this case, the record indicates that appellant worked in a full-time light-duty position from December 20, 1993 to March 3, 1994. Appellant's employment was terminated by the employing establishment for cause effective April 5, 1994.

The medical evidence indicates that on December 2, 1993, Dr. Shade reviewed the proposed job offer and concluded that appellant was capable of performing the job. In an undated report and an October 1, 1998 report, he diagnosed chronic cervical strain with bilateral upper extremity radiculitis and chronic thoracic strain with bilateral parascapular myofascitis and opined that the prognosis for returning him to work was poor. There is no medical evidence with respect to any disability for work commencing March 3, 1994, or an opinion that appellant's work stoppage was causally related to a change in his employment-related condition.

The record, therefore, indicates that appellant worked at the light-duty position for more than 60 days, with no probative evidence that the work stoppage was due to a change in the employment-related condition. There is no evidence that the light-duty position was part time, sporadic, seasonal or temporary work.⁶ As noted above, actual wages earned are generally the best measure of wage-earning capacity and the Board finds that the Office properly found that the actual earnings fairly and reasonably represented appellant's wage-earning capacity. The requirements for a retroactive wage-earning capacity determination have accordingly been met in this case. The employing establishment indicated that the actual wages were equal to the current date-of-injury position wages and thus the Office properly determined that appellant had no loss of wage-earning capacity.

⁴ *Dennis E. Maddy*, 47 ECAB 259 (1995).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(e) (May 1997).

⁶ *See Monique L. Love*, 48 ECAB 378 (1997).

The October 7, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.⁷

Dated, Washington, DC
September 26, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

⁷ The Board notes that the record contains some evidence erroneously associated with this appellant.