U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES B. McCARTEN and DEPARTMENT OF THE TREASURY, OFFICE OF THE INSPECTOR GENERAL, Chicago, IL

Docket No. 03-1271; Submitted on the Record;
Issued October 28, 2003

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly adjusted appellant's wage-earning capacity based on his actual earnings effective May 21, 2000; and (2) whether the Office properly denied appellant's request for an oral hearing.

On September 15, 1993 appellant, then a 42-year-old criminal investigator, filed a notice of occupational disease, alleging that he suffered an emotional condition aggravated by factors of his federal employment. The Office accepted the claim for temporary aggravation of bipolar disorder and panic disorder. Appellant retired from the employing establishment on January 26, 1994 and began receiving compensation on the periodic rolls for temporary total disability. He was referred for vocational rehabilitation and accepted a position as an assistant professor of criminal justice effective August 28, 1997. In an August 19, 1997 letter, the Office advised appellant that his compensation was being reduced effective August 28, 1997, based on his actual earnings of $22,000.00 per year in the teaching position. The Office determined that appellant's weekly wages as an assistant professor amounted to $423.02 per week, and that he had a wage-earning capacity of 35 percent.

On January 23, 2000 appellant filed a claim alleging a recurrence of disability from January 20 through May 21, 2000. In a decision dated May 8, 2002, the Office determined that appellant sustained a recurrence of disability causally related to his work-related emotional condition.[1] In that same decision, the Office modified appellant's compensation to reflect that he

[1] In the summer of 1999, appellant relocated from Wisconsin to Tucson, Arizona and took a job as a college instructor for Park College. He also began working as a security guard for Burns Security and ProGuard Security. A report of earnings from the Social Security Administration (SSA) shows that from January 1 through 20, 2000 and May 21, 2000 to December 31, 2001 appellant had total actual earnings of $23,254.46 for part-time work in the positions of a junior college lecturer and a security guard.

had a 20 percent wage-earning capacity as of May 21, 2000.[2] In a letter postmarked on March 9, 2003, appellant requested a review of the written record by an Office hearing representative. In an April 9, 2003 decision, the Office denied appellant's request for a review of the written record on the grounds that it was untimely filed. The Office further noted that the hearing request was being denied since the issue in the case could equally well be addressed if appellant requested reconsideration.

The Board finds that the Office improperly modified appellant's wage-earning capacity based on his actual earnings as of May 21, 2000.

Where an employee sustains an injury-related impairment that prohibits the employee from returning to the employment held at the time of injury, or from earning equivalent wages, but that does not render the employee totally disabled for all gainful employment, the employee is considered partially disabled and is entitled to compensation for his or her loss of wage-earning capacity as provided under section 8115 of the Federal Employees' Compensation Act.[3] Thus, if an employee is not totally disabled for all gainful employment, the threshold question which must be addressed before a loss of wage-earning capacity determination is required is whether the employee is prohibited by his or her injury from returning to the employment held at the time of injury or from earning equivalent wages. In this case, appellant was prohibited by residuals of his accepted emotional condition from returning to his date-of-injury position with the employing establishment. Appellant, however, accepted a job as an Assistant Professor and the Office prepared a formal loss of wage-earning capacity determination based on actual earnings.

The Board discussed the necessity for payment of compensation where an employee has sustained a loss of wage-earning capacity, but has actual earnings, as in the case of *Albert C. Shadrick*,[4] which provides that appellant's wage-earning capacity shall be determined by actual earnings, if such actual earnings fairly and reasonably represent appellant's wage-earning capacity.[5] The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Shadrick* decision, has been codified by regulation at 20 C.F.R. § 10.616(a) and recognizes the basic premise that an injured employee who is unable to return to the position

[2] The Board notes that appellant's compensation benefits increased based on the Office's decision. On May 24, 2002 the Office paid a retroactive adjustment to appellant in the amount of $5,748.30 representing the difference between the compensation previously paid to appellant based on the wage-earning capacity of 35 percent and the new wage-earning capacity determination of 20 percent. On May 31, 2002 appellant also received a retroactive adjustment payment for the period May 21, 2000 to April 20, 2002 in the amount of $14,520.79.

[3] 5 U.S.C. § 8115.

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

[5] Where the Office learns of actual earnings that span a lengthy period of time (*e.g.*, several months or more), the compensation entitlement should be determined by averaging the earnings for the entire period, determining the average pay rate, and applying the *Shadrick* formula (comparing the average pay rate for the entire period to the pay rate of the date-of-injury job in effect at the end of the period of actual earnings). Federal Employees' Compensation Act (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(d)(4) (February 2001).

held at the time of injury (or to earn equivalent wages) but who is not totally disabled for all gainful employment is entitled to compensation computed on loss of wage-earning capacity.[6]

Once the wage-earning capacity of an injured employee is properly 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.[7] In this case, the Office decided it was appropriate to modify appellant's wage-earning capacity because he sustained a recurrence of disability and had only been able to work in part-time positions as a professor and security guard. On appeal, appellant argues that only those wages he received as a part-time professor working three hours per week should have been used to determine his wage-earning capacity under the *Shadrick* formula. Appellant contends that his work as a security guard was sporadic and intermittent employment and therefore should not be used to calculate his wage-earning capacity.

The record establishes that appellant held his part-time positions as a college professor and a security guard for over one year by the time the Office decided to modify his loss of wage-earning capacity. The Office found that, over the period from January 1 to 20 and May 21 to December 31, 2001, appellant had actual earnings of $23,254.46. The Board finds that the Office incorrectly modified appellant's wage-earning capacity based on his part-time employment. The Office's procedure manual provides in relevant part as follows:

> "*Factors Considered*. To determine whether the claimant's work fairly and reasonably represents his or her wage-earning capacity, the claims examiner should consider whether the kind of appointment and tour of duty (see FECA PM 2-0900.3) are at least equivalent to those of the job held on date of injury. Unless they are, the [claims examiner] may not consider the work suitable.
>
> "For instance, reemployment of a temporary or casual worker in another temporary or casual [employing establishment] position is proper, as long as it will last at least 90 days and reemployment of a term or transitional [the employing establishment] worker in another term or transitional position is likewise acceptable. However, the reemployment may not be considered suitable when:
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> > (1) *The job is part-time* (unless the claimant was a part-time worker at the time of injury) or sporadic in nature;
> >
> > (2) *The job is seasonal* in an area where year-round employment is available. If an employee obtains seasonal work voluntarily in an area where year-round work is generally performed, the [claims examiner] should carefully determine whether such work is truly representative of the claimant's [wage-earning capacity]; or

[6] 20 C.F.R. § 10.616(a) (1999).

[7] *See Doris J. Wright*, 49 ECAB 230 (1997); *Elmer Strong*, 17 ECAB 226, 228 (1965).

(3) *The job is temporary* where the claimant's previous job was permanent."[8]

Appellant's part-time jobs as either an assistant professor or security guard are not considered to fairly or reasonably represent his wage-earning capacity since appellant's date of injury job was a full-time position. The Office procedures indicate that when a claimant has earnings of sporadic or intermittent nature which do not fairly or reasonably represent his wage-earning capacity, the claimant's earnings should be deducted from continuing compensation payments using the *Shadrick* formula, with past earnings being declared an overpayment. The Office procedures provide that the sporadic or intermittent earnings should not be used as the basis for a loss of wage-earning capacity determination but should be used to help establish the kind of work appellant could perform.[9] The procedures state that any worksheet used to calculate the deduction of sporadic earnings should be marked clearly with the words "actual earnings calculation, not a loss of wage-earning capacity determination."[10] Because the Office's wage-earning capacity determination in this case is inconsistent with the Office procedure manual, the Board concludes that the Office erred in modifying appellant's loss of wage-earning capacity based on his actual wages of a part-time employee.[11]

Because the Board finds that the Office's May 21, 2000 loss of wage-earning capacity decision was in error, the Board declines to address the propriety of the Office's April 9, 1993 decision. The issue of whether the Office correctly denied appellant's hearing request is rendered moot.

[8] FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a)(1)-(3) (February 2001).

[9] FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(d)(3) (February 2001).

[10] *Id*.

[11] *Cheryl Dicavitch*, 50 ECAB 397 (1999).

The decisions of the Office of Workers' Compensation Programs dated April 9, 2003 and May 21, 2002 are hereby reversed.

Dated, Washington, DC
October 28, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member