United States Department of Labor
Employees' Compensation Appeals Board

MARY MIKLOSZ, Appellant	)	
and	)	**Docket No. 05-1672**
	)	**Issued: June 9, 2006**
U.S. POSTAL SERVICE, GENERAL MAIL FACILITY, Colorado Springs, CO, Employer	)	

Appearances:
Mary Miklosz, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 1, 2005 appellant filed a timely appeal of the Office of Workers' Compensation Programs' decision, dated October 13, 2004, wherein the hearing representative affirmed the Office's October 30, 2003, decision finding that appellant's wage-earning capacity was represented by her actual earnings commencing September 7, 2003; the Office decision, dated January 20, 2005, finding that appellant had no loss of wage-earning capacity after February 12, 2004; and the Office's decision, dated June 30, 2005, wherein it denied appellant's request for reconsideration as she failed to establish clear evidence of error. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits and nonmerits of the claim. On appeal, appellant contests the rate by which the Office computed her compensation benefits.

ISSUES

The issues are: (1) whether the Office properly determined appellant's wage-earning capacity commencing September 7, 2003 based on her actual earnings; (2) whether the Office properly reduced appellant's wage-loss compensation to zero after appellant returned to work as a full-time modified automation clerk on February 12, 2004; and (3) whether the Office properly

denied reconsideration of the merits on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On December 10, 2000 appellant, then a 39-year-old automation clerk, filed an occupational disease claim alleging that she sustained a pain in her neck, headaches, watery eyes and coughing as a result of her federal employment. The Office accepted appellant's claim for right thoracic outlet syndrome, a cervical strain and right brachial plexus lesions. Appellant did not stop work upon acceptance of her claim, but as of April 30, 2001, did reduce her hours from eight to six per day and with restrictions. Appellant received compensation for wage loss for time lost due to her injury. Appellant increased her hours to full time in February 2004 and continues to work as a full-time modified clerk for the employing establishment.

By letter dated September 12, 2003, the Office indicated that as appellant has been employed in a light-duty position restricted to working six hours per day since August 2001, it reduced appellant's compensation effective September 7, 2003 based on her actual earnings to a new compensation rate of $68.75 per week.

In a letter dated October 16, 2003, the Office explained to appellant that, as the *Albert C. Shadrick* formula is a complete computation of wage loss,[1] appellant should no longer file CA-7s for the two hours per day that she did not work. The Office further noted that, as a permanent job offer has not been provided, the September 12, 2003 letter was not a formal loss of wage-earning capacity decision and therefore appeal rights were not attach.

By decision dated October 30, 2003, the Office explained its computation of compensation benefits. The Office noted that appellant's pay rate when her disability began was $672.53, that the current pay rate for the job and step when injured was $692.50, that appellant had actual earnings of $585.99 per week, that dividing $585.99 by $692.50 resulted in a loss of wage-earning capacity of 85 percent and that when $672.53 was multiplied by 85 percent appellant had a wage-earning capacity of $571.65. The Office then subtracted $571.65 from appellant's pay rate when disability began, $672.53 and determined that appellant had a loss of wage-earning capacity of $100.88. Multiplied by appellant's compensation rate of 66 2/3, this resulted in a new compensation amount of $67.25 per week.

By letter dated November 8, 2003, appellant requested an oral hearing.

By decision dated October 13, 2004, the hearing representative noted that appellant did not contest that the position of modified automation clerk fairly and reasonably represented her wage-earning capacity, but rather contended that the Office improperly calculated the amount of her compensation. The hearing representative found that the Office properly calculated appellant's pay rate.

By decision dated January 20, 2005, the Office noted that effective February 12, 2004 appellant was working as an automation clerk for the employing establishment with wages of

[1] 5 ECAB 376 (1953).

$825.32 per week and modified her wage-earning capacity finding that this position fairly and reasonably represented her wage-earning capacity. As her actual earnings met or exceeded the current wages of the job she held when injured, appellant's entitlement to compensation ended.

By letter dated May 30, 2005, appellant requested reconsideration of the October 13, 2004 hearing representative decision. By decision dated June 30, 2005, the Office denied appellant's request for reconsideration because it was not filed within one year of the last merit decision and failed to establish clear evidence of error.

LEGAL PRECEDENT -- ISSUE 1

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.[2] 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 wage-earning capacity, must be accepted as such measure.[3]

The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Shadrick* decision, has been codified at 20 C.F.R. § 10.403. Section 10.403(d) provides that the employee's wage-earning capacity in terms of percentage is obtained by dividing the employee's actual earnings by the current pay rate for the job held at the time of injury.[4] The employee's wage-earning capacity in dollars is computed by first multiplying the pay rate for compensation purposes by the percentage of wage-earning capacity. The resulting dollar amount is then subtracted from the pay rate for compensation purposes to obtain loss of wage-earning capacity. Compensation payable is then adjusted by applicable cost-of-living adjustments.[5] 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.[6]

ANALYSIS -- ISSUE 1

In the instant case, appellant does not contest that the position of modified automation clerk fairly and reasonably represents her wage-earning capacity. Rather, appellant contends that the calculation of her rate of compensation from September 2003 through February 2004 is in error. Specifically, appellant contends that the Office improperly failed to consider Sunday pay or the nighttime differential. Appellant also stated that the *Shadrick* formula was improperly

[2] 5 U.S.C. § 8115(a).

[3] *Dennis E. Maddy*, 47 ECAB 259 (1995).

[4] *Linda K. Blue*, 53 ECAB 653 (2002).

[5] *Id.*

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814(c) (December 1993).

based on a 30-hour week rather than a 40-hour week. However, the evidence indicates that the Office took into account both the Sunday premium and night differential when computing appellant's pay rate when the compensable disability began.

The Board finds that the Office properly applied the *Shadrick* formula in determining her loss of wage-earning capacity. The Office noted that the pay rate for appellant's current position was based on a weekly base rate of $713.12 for 40 hours. However, as appellant only worked 30 hours, the Office determined that she earned 3/4 of that amount a week, $585.99. The Office then took appellant's weekly pay rate when injured, including appellant's nighttime differential and Sunday premium pay and determined that appellant made $672.53 per week when injured and that the current pay rate for the job and step when injured was $692.50. The Office then divided these earnings by her current pay rate of $585.99 and determined that appellant had an 85 percent wage-earning capacity. The Office then multiplied the pay rate at the time of the injury, $672.53, by the 85 percent wage-earning capacity percentage. The resulting amount of $571.65 was then subtracted from appellant's date-of-injury pay rate of $672.53, which provided a loss of wage-earning capacity of $100.88 per week. The Office then multiplied this amount by the appropriate compensation rate of two-thirds, to yield $67.25. The Office found that cost-of-living adjustments increased this amount to $68.75. The Board finds that the Office properly determined that appellant's actual earnings fairly and reasonably represent her wage-earning capacity and the Office properly reduced appellant's compensation in accordance with the *Shadrick* formula.

LEGAL PRECEDENT -- ISSUE 2

In *Ronald M. Yokota*, the Board stated:

> "Once the wage-earning capacity of an injured employee is properly determined, it remains undisturbed regardless of actual earnings or lack of earnings. 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 is on the Office to establish that there has been a change so as to effect the employee's capacity to earn wages in the job determined to represent his earning capacity. Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn and not on actual wages lost."[7]

[7] *Ronald M. Yokota*, 33 ECAB 1629 (1982).

The Office's procedure manual provides guidelines as to the modification of loss of wage-earning capacity:

> "(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 agency 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.
>
> "(d). [*Claims Examiner*] *Actions.* If these earnings have continued for at least 60 days, the [claims examiner] should:
>
> > (1). *Determine the duration, exact pay, duties* and responsibilities of the current job.
> >
> > (2). *Determine whether the claimant* underwent training or vocational preparation to earn the current salary.
> >
> > (3). *Assess whether the actual job* differs significantly in duties, responsibilities, or technical expertise from the job at which the claimant was rated.
>
> "(e). *If the results of this investigation* establish that the claimant is rehabilitated or self-rehabilitated or if the evidence shows that claimant was retrained for a different job, compensation may be redetermined using the *Shadrick* formula…."[8]

ANALYSIS -- ISSUE 2

By letter dated September 12, 2003, the Office indicated that, as appellant had been employed in a light-duty position restricted to working six hours per day since August 2001, it reduced appellant's compensation effective September 7, 2003 based on her actual earnings. By decision dated October 30, 2003, the Office explained its computation of compensation benefits. The hearing representative found that the Office properly calculated appellant's pay rate in a decision dated October 13, 2004. In a decision dated January 20, 2005, the Office noted that effective February 12, 2004 appellant returned to work full time as a modified automation clerk.

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11(c)-(e) (June 1996, July 1997).

An increase in pay, by itself, is not sufficient evidence that there has been a change in an employee's capacity to earn wages.[9] Without a showing of additional qualifications obtained by appellant through retraining, it is improper to make a new loss of wage-earning capacity determination based on increased earnings.[10] As indicated in the Office's procedure manual, quoted above, it may be appropriate to modify the wage-earning capacity determination on the grounds that appellant has been vocationally rehabilitated if he or she increases his or her part-time hours to full time. Prior to such modification, however, the Office is required to determine the duration, exact pay, duties and responsibilities of the new job; determine whether the claimant underwent training or vocational preparation to earn the current salary; and assess whether the actual job differs significantly in duties, responsibilities, or technical expertise from the job at which the claimant was rated.[11]

In the instant case, the Office determined that appellant's pay had increased due to the increase in the number of hours she worked, but did not demonstrate that she underwent any training or vocational rehabilitation or that her full-time job differed significantly in duties, responsibilities or technical expertise from the part-time job at which she was initially rated. As this case does not show any retraining or other rehabilitation or a significantly different job, the Office did not meet its burden of proof to modify her prior wage-earning capacity determination.

This does not mean, however, that appellant is entitled to continuing wage-loss compensation. Rather, the Office should apply the *Shadrick* formula to the wages received for the number of hours worked. To the extent that appellant is earning wages equal to or greater than those received at the time of injury, she has no disability as the term is generally defined under the Act with regard to wage-loss compensation.[12]

LEGAL PRECEDENT -- ISSUE 3

Section 8128(a) of the Act does not entitle a claimant to a review of an Office decision as a matter of right.[13] This section vests the Office with discretionary authority to determine whether it will review an award for or against payment of compensation.[14] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).[15] One such limitation is that the application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.[16] In those instances when a

[9] *Penny L. Baggett*, 50 ECAB 559 (199); *Odessa C. Moore*, 46 ECAB 681 (1995).

[10] *William N. Chuey*, 34 ECAB 1018 (1983).

[11] *Marie Gonzales*, 55 ECAB ___ (Docket No. 03-1808), issued March 18, 2004).

[12] *See Gregory A. Compton*, 45 ECAB 154 (1993).

[13] 5 U.S.C. § 8128(a); *see Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[14] Section 8128 of the Act provides: "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

[15] 20 C.F.R. § 10.607 (1999).

[16] *Id.* at § 10.607(a) (1999).

request for reconsideration is not timely filed, the Office will undertake a limited review to determine whether the application presents clear evidence of error on the part of the Office.[17] In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.[18]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.[19] The evidence must be positive, precise and explicit and it must be apparent on its face that the Office committed an error.[20] Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[21] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[22] The evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish clear procedural error, but must of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.

ANALYSIS -- ISSUE 3

In appellant's request for reconsideration dated May 30, 2005 and received by the Office on Jun 17, 2005, she stated that she was appealing the October 13, 2004 decision with regard to loss of wage-earning capacity. By decision dated June 30, 2005, the Office denied appellant's request for reconsideration finding that it was not timely filed and failed to demonstrate clear evidence of error. However, appellant's May 30, 2005 request was clearly filed within the one year time limitation as it was filed eight months after the October 13, 2004 decision. The case must therefore be remanded for the Office to review the evidence that appellant submitted and make the proper analysis pursuant to section 10.606(b). The Office shall then issue an appropriate decision.

CONCLUSION

The Board hereby finds that the Office properly determined appellant's wage-earning capacity commencing September 7, 2003 based on her actual earnings. However, the Board further finds that the Office improperly reduced appellant's wage-loss compensation to zero after appellant returned to work as a full-time modified automation clerk on February 12, 2004. Additionally, the Board finds that the Office improperly denied reconsideration of the merits on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

---

[17] *Id.* at § 10.607(b).

[18] *See Nelson T. Thompson*, 43 ECBA 919 (1992).

[19] *See Dean D. Beets*, 43 ECAB 1153 (1992).

[20] *See Leona N. Travis*, 43 ECAB 227 (1991).

[21] *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

[22] *See Leona N. Travis, supra* note 20.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 13, 2004 is affirmed. The decision of the Office dated January 20, 2005 is reversed. The Office's decision dated June 30, 2005 is vacated and this case is remanded for further consideration consistent with this opinion.

Issued: June 9, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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