United States Department of Labor
Employees' Compensation Appeals Board

J.C., Appellant	)	
and	)	**Docket No. 08-1046**
	)	**Issued: August 19, 2008**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Portland, OR, Employer	)	

Appearances:
Appellant, 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
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On February 25, 2008 appellant filed a timely appeal from a December 28, 2007 merit decision of the Office of Workers' Compensation Programs determining her wage-earning capacity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly determined that appellant had no loss of wage-earning capacity based on its finding that her actual earnings as a quality management technologist fairly and reasonably represented her wage-earning capacity.

FACTUAL HISTORY

On November 9, 2006 appellant, then a 38-year-old diagnostic radiologic technologist, filed a claim for an injury on that date when she slipped and fell after stepping in spilled coffee. At the time of her injury, she earned $50,691.00 per year as a General Schedule (GS) 8, Step 7.

The Office accepted the claim for lumbosacral strain. Appellant stopped work on November 9, 2006 and returned to full-time limited-duty employment on November 20, 2006.

On January 4, 2007 Dr. Ezra Rabie, Board-certified in preventative medicine, diagnosed a left hip trochanteric strain and a left low back strain. He found that she could not push or pull over 25 pounds or repetitively lift over 15 pounds. Dr. Rabie determined that appellant could perform minimal stooping, twisting and bending.

On January 9, 2007 the employing establishment informed the Office that appellant was working with permanent limitations under another claim number. The employing establishment indicated that her work restrictions had increased such that she was unable to perform her date-of-injury position.

On March 24, 2007 appellant described her history of work injuries to her lumbar, cervical and thoracic spine, her work limitations and her difficulties with the activities of daily living. She maintained that she could no longer perform her usual employment due to her physical condition.

In a June 18, 2007 work restriction evaluation, Dr. Rabie listed permanent work restrictions of no lifting over 15 pounds or pushing and pulling over 25 pounds. He found that appellant could work full time twisting, bending and stooping no more than two to three hours.

On July 5, 2007 appellant accepted a position as a GS 9, Step 6 quality management technologist earning $54,352.00 per year. The work requirements of the position were in accordance with the physician restrictions set forth by Dr. Rabie on June 18, 2007. By letter dated July 11, 2007, the employing establishment informed the Office that she had worked in the position of quality management technologist since February 15, 2007.

In a decision dated December 28, 2007, the Office found that appellant's actual earnings as a quality management technologist effective July 5, 2007 fairly and reasonable represented her wage-earning capacity. The Office determined that as her actual earnings met or exceeded the current wages for the position held on the date of injury she had no loss of wage-earning capacity.

LEGAL PRECEDENT

Section 8115(a) of the Federal Employees' Compensation Act[1] provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by her actual earnings if her actual 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 showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such a measure.[3] The

[1] 5 U.S.C. §§ 8101-8193.

[2] 5 U.S.C. § 8115(a); *Loni J. Cleveland*, 52 ECAB 171 (2000).

[3] *Lottie M. Williams*, 56 ECAB 302 (2005).

formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision,[4] has been codified at 20 C.F.R. § 10.403. The Office calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the current pay rate for the date-of-injury job.[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

The Board finds that appellant's actual earnings as quality management technologist effective July 5, 2007 fairly and reasonably represent her wage-earning capacity. Dr. Rabie, her attending physician, found that she could work full time with no lifting over 15 pounds, pushing or pulling over 25 pounds or twisting, bending and stooping over two to three hours. On July 2, 2007 the employing establishment offered appellant the position of quality management technologist in accordance with Dr. Rabie's restrictions. Appellant began working in the position on February 15, 2007 and formally accepted the position on July 5, 2007. At the time the Office issued its December 28, 2007 wage-earning capacity determination, she had worked in the position for more than 60 days and there is no evidence that the position was seasonal, temporary or make-shift work designed for her particular needs.[7] As there is no probative evidence that appellant's wages in her position did not fairly and reasonably represent her wage-earning capacity, they must be accepted as the best measure of her wage-earning capacity.[8]

As appellant's actual earnings in her position as quality management technologist fairly and reasonably represent her wage-earning capacity, the Board must determine whether the Office properly calculated her wage-earning capacity based on her actual earnings. The Board finds that the Office properly found that she had no loss of wage-earning capacity based on her actual earnings. Appellant's current weekly earnings met or exceeded the current weekly wages of her November 9, 2006 date-of-injury position. Therefore, she had no loss of wage-earning capacity under the *Shadrick* formula.

On appeal, appellant argues that it was a lumbar spine injury under file number 140320907 that resulted in the employing establishment changing her position. The Board's jurisdiction is limited to review of final decisions of the Office.[9] The Office has not issued a decision in file number 140320907 within one year of the filing date of this appeal. She asserted that the employing establishment told her to take the quality management technologist position

[4] 5 ECAB 376 (1953).

[5] 20 C.F.R. § 10.403(c).

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1993).

[7] *Elbert Hicks*, 49 ECAB 283 (1998); *id*. at Chapter 2.814.7(a) (July 1997).

[8] *See Loni J. Cleveland*, *supra* note 2.

[9] *See* 20 C.F.R. § 501.2(c).

or find other employment. The relevant issue, however, is whether appellant's actual earnings as a quality management technologist fairly and reasonable represent her wage-earning capacity. Wages actually earned are generally the best measure of a wage-earning capacity and, in the absence of showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.[10] She has not submitted any evidence that the Office erred in finding that her actual earnings did not represent her wage-earning capacity.

CONCLUSION

The Board finds that the Office properly determined that appellant had no loss of wage-earning capacity based on its finding that her actual earnings as a quality management technologist fairly and reasonably represented her wage-earning capacity.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 28, 2007 is affirmed.

Issued: August 19, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

[10] *Connie L. Portratz-Watson*, 56 ECAB 316 (2005).