

**United States Department of Labor
Employees' Compensation Appeals Board**

Y.D., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Pittsburgh, PA, Employer**

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**Docket No. 09-595
Issued: December 18, 2009**

Appearances:

Alan J. Shapiro, Esq., for the appellant

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 31, 2008 appellant filed a timely appeal of a September 15, 2008 decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant is entitled to wage-loss compensation due to a change in positions from letter carrier to clerk on February 9, 2002.

FACTUAL HISTORY

On October 4, 1988 appellant, then a 25-year-old letter carrier, stepped in a pothole and injured her left knee and ankle while delivering mail. She was a GS-5 employee. The Office accepted the claim for left ankle sprain, left ankle reconstruction and partial tear of the left acromioclavicular ligament and chondromalacia. It authorized left knee arthroscopy that was performed on August 22, 1989, left ankle reconstruction that was performed on December 5,

1989 and additional surgery that was performed on March 2, 1992. Appellant did not immediately stop work but was assigned a sedentary limited-duty position.

On April 25, 1989 appellant filed a claim for compensation for total disability beginning April 21, 1989 when she stopped work. At that time she was a GS-5 employee with an annual salary of \$26,199.00. In a July 1, 1990 memorandum, the Office noted that appellant returned to work in a limited-duty position on February 5, 1990. On January 14, 1992 she filed a notice of recurrence of disability alleging that on January 3, 1992 she experienced right knee pain causally related to her work injury. Appellant stopped work on January 3, 1992. The employing establishment noted that she had returned to full duty on October 15, 1991. On January 30, 1992 the Office accepted the recurrence of disability claim.

In a telephone log dated May 6, 1992, the Office noted that appellant returned to light-duty work on May 6, 1992. In a report of termination of disability dated December 20, 1994, it noted that she stopped work on November 1, 1994 and returned to a temporary light-duty part-time modified rehabilitation clerk position on December 19, 1994 for four hours a day with a gradual increase to eight hours per day.

On February 7, 2002 the employing establishment offered appellant a rehabilitation job offer as a modified distribution clerk, GS-5 with an annual salary including cost-of-living increases of \$40,472.00 a year effective February 9, 2002. Appellant accepted the position on February 9, 2002 and returned to work the same day.

On August 15, 2002 appellant filed a Form CA-7, claim for compensation, for four hours on July 29, 2002. The employing establishment noted on the Form CA-7 that her pay as of July 29, 2002, GS-5, step 0 was \$41,679.00 per year.

On July 2, 2006 appellant filed a Form CA-7, claim for compensation for other wage loss, beginning January 1, 2002. She noted that there was a wage change in 2002 for letter carriers which did not include mail clerks. Appellant noted that in 1986 she was hired as a carrier and in 1993 she was forced to work as a rehabilitation clerk. She asserted that there was a carrier wage increase in 2002 which she was excluded from because she was classified as a clerk.

In a letter dated July 21, 2006, the Office requested the employing establishment to confirm that appellant was a GS-5, step B as of February 9, 2002 and provide the salary as of February 9, 2002. It noted that the effective date of her change in jobs from a carrier to a clerk was February 9, 2002. In a telephone log dated July 21, 2006, the employing establishment confirmed that appellant's annual wage as of February 9, 2002 was \$41,679.00 and she was a GS-5, step 0 as of July 27, 2002.

On October 23, 2006 appellant filed a claim for compensation for other wage loss for the period beginning November 18, 2000. She noted that she accepted a rehabilitation position as a letter carrier on May 1, 1993 and was forced to become a clerk. Appellant noted that letter carriers received a pay change in 2000 which did not include clerks.

In a telephone log dated November 8, 2006, the employing establishment confirmed that appellant's salary on February 8, 2002, the last day she was a letter carrier, was \$41,679.00. It noted that appellant accepted the modified clerk position on February 9, 2002 and her salary was also \$41,679.00.

In a decision dated November 8, 2006, the Office denied appellant's claim for compensation for wage loss effective February 9, 2002. It found her salary on February 8, 2002 while a letter carrier was \$41,679.00 which was equivalent to her salary starting February 9, 2002 as a clerk. The Office further noted that the annual wage increases for a clerk on February 9, 2002 was equivalent to that of a letter carrier.

On November 14, 2006 appellant requested an oral hearing which was held on February 9, 2007.

In a November 27, 2006 letter, the Office acknowledged receipt of appellant's claim for compensation for lost wages for the period beginning November 18, 2000 and her assertion that she lost wages because her position changed from a letter carrier to a clerk. However, the employing establishment confirmed that appellant's salary as a letter carrier on February 8, 2002 was \$41,679.00 and she continued to earn the same salary as a modified distribution clerk on February 9, 2002. The Office requested that appellant clarify her loss of wage claim and the period for which she was claiming compensation.

In a December 5, 2006 statement, appellant asserted that her rehabilitation job was abolished in February 2002 and management had to find her a new position. It issued her a rehabilitation job offer effective February 9, 2002. Appellant indicated that in 1993 a letter carrier and clerk made the same wages but on November 18, 2000 the letter carrier wages increased and reflected a salary which was two to three thousand dollars more than a clerk. She contended that in 1993 management informed her that her pay would always be that as a letter carrier and that if she did not accept the job offer the Office could "drop her case." On February 19, 2007 appellant submitted pay schedules for a clerk and a city carrier from May 15, 1991 to November 25, 2006 and asserted there was a difference in pay for a clerk and a carrier from November 18, 2000 to the present.

On May 2, 2007 the hearing representative affirmed the November 8, 2006 decision finding that appellant had no wage-loss decision.

On May 10, 2007 appellant appealed her claim to the Board. In an order dated August 8, 2008, the Board remanded the case for reconstruction and proper assemblage of the record and a merit decision in order to preserve her appeal rights.¹

In a decision dated September 15, 2008, the hearing representative affirmed the November 8, 2006 decision.

¹ Docket No. 07-1519 (issued August 8, 2008).

LEGAL PRECEDENT

A claimant has the burden of proving by a preponderance of the evidence that he or she is disabled for work as a result of an accepted employment injury and submit medical evidence for each period of disability claimed.² Whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues.³ The issue of whether a particular injury causes disability for work must be resolved by competent medical evidence.⁴

Under the Federal Employees' Compensation Act, the term disability means incapacity because of an injury in employment to earn the wages the employee was receiving at the time of the injury.⁵ The general test of disability is whether an injury-related impairment prevents the employee from engaging in the kind of work she was doing when injured.⁶

The Office does not have the authority to enlarge the terms of the Act nor to make an award of benefits under any terms other than those specified in the statute.⁷ The Board has consistently held that there is no provision which entitles a claimant to receive additional compensation for grade and step increases which the employee might have received if she had remained in her position with the employing establishment.⁸

ANALYSIS

The Office accepted appellant's claim for left ankle sprain, left ankle reconstruction and partial tear of the left acromioclavicular ligament and chondromalacia and authorized surgery. It paid appellant compensation for various periods of disability after October 4, 1988. On July 2, 2006 appellant filed a CA-7, claim for compensation for other wage loss, beginning January 1, 2002, contending that in 1986 she was hired as a letter carrier and in 1993 she was forced to work as a rehabilitation clerk. As she was a clerk, she was precluded from receiving a wage increase for letter carriers that became effective in 2002.

² See *Fereidoon Kharabi*, 52 ECAB 291 (2001).

³ *Id.*

⁴ See *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

⁵ *Carl R. Benavidez*, 56 ECAB 596 (2005); *Paul E. Thams*, 56 ECAB 503 (2005); *Sean O'Connell*, 56 ECAB 195 (2004).

⁶ *Elmer R. Poland*, 39 ECAB 1367 (1988); see *David H. Goss*, 32 ECAB 24 (1980).

⁷ *Timothy A. Liesenfelder*, 51 ECAB 599, 602 (2000).

⁸ The Board has held that the probability that an employee, if not for his work-related condition, might have had greater earnings is not proof of a loss of wage-earning capacity and does not afford a basis for payment of compensation under the Act. See *Dan C. Boechler*, 53 ECAB 559, 561 (2002); *Dempsey Jackson, Jr.*, 40 ECAB 942, 947 (1989).

In the present case, appellant has not submitted sufficient evidence to establish that she sustained wage loss as a result of changing from a letter carrier position to a modified distribution clerk position on February 9, 2002. On February 7, 2002 the employing establishment offered her a rehabilitation job offer as a modified distribution clerk, GS-5 with an annual salary including cost-of-living increases of \$40,472.00 per year effective February 9, 2002. Appellant voluntarily accepted the position and returned to work on February 9, 2002. In a telephone logs dated July 21 and November 8, 2006, the employing establishment confirmed that her annual wage as of February 8, 2002, the last day she was a letter carrier, was \$41,679.00. The establishment noted that appellant accepted the modified clerk position on February 9, 2002 and clarified that her salary was also \$41,679.00. The employing establishment noted that the annual wage increases for a clerk were equivalent to that of a letter carrier.

In support of her claim, appellant submitted copies of pay schedules for a clerk and a city carrier from May 15, 1991 to November 25, 2006 and asserted there was a difference in pay for a clerk and a carrier from November 18, 2000 to the present. However, this evidence is insufficient to establish that she sustained any wage loss. The record reveals and the employing establishment verified that at the time appellant accepted the modified clerk position her pay was the same as that of a letter carrier. Appellant did not submit any evidence to refute this information. She was employed in the modified clerk position at a retained pay rate and there is no evidence that she had wage loss at the time she changed positions effective February 9, 2002.⁹ Additionally, the Board has held that there is no provision which entitles a claimant to receive additional compensation for grade and step increases which the employee might have received if he or she remained in the position with the employing establishment.¹⁰ Similarly, appellant's assertion that had she continued working in the letter carrier position her income would have increased two to three thousand dollars more than clerks in 2002 is without merit. As noted above, there is no provision which entitles a claimant to receive additional compensation for such raises.¹¹ The Office does not have the authority to enlarge the terms of the Act nor to make an award of benefits under any terms other than those specified in the statute.¹² The Board finds that appellant did not submit sufficient evidence to support wage loss beginning February 9, 2002.

⁹ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c)(4) (July 1997) (wages lost because step increases and/or cost-of-living increases were not applied to the retained pay rate do not constitute a loss of wage-earning capacity, and claims based on this premise should be denied). This provision also notes that such claims for wage loss may be denied even if no formal loss of wage-earning capacity decision was made at the time of reemployment.

¹⁰ See *E.G.* 59 ECAB __ (Docket No. 07-1562, issued July 2, 2008).

¹¹ *Id.*; see also *Dan C. Boechler*, *supra* note 8.

¹² See *Timothy A. Liesenfelder*, *supra* note 7.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she is entitled to compensation for wage loss due to a change in positions from a letter carrier to a clerk on February 9, 2002.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' September 15, 2008 decision is affirmed.

Issued: December 18, 2009
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board