U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LONI J. CLEVELAND and U.S. POSTAL SERVICE,
POST OFFICE, Reno, NV

Docket No. 99-82; Submitted on the Record;
Issued December 15, 2000

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation on the grounds that the selected position of dog groomer represented her wage-earning capacity.

The Office accepted that on November 8 and 10, 1993 appellant, then a 27-year-old acting injury compensation specialist, sustained post-traumatic stress disorder and an adjustment disorder with depressed mood after receiving death threats.[1] Appellant stopped work and did not return;[2] she was placed on the periodic rolls for receipt of compensation.

Vocational rehabilitation was instituted and appellant received additional training in dog grooming; she and her rehabilitation counselor developed a plan for her to return to work as a dog groomer when she completed her training on August 29, 1996. Appellant was advised throughout rehabilitation that her expected earning capacity would be $26,000.00 at the end of the training and placement process and that her compensation would be reduced based on that amount. Appellant began work as a dog groomer on a commission basis in September 1996.

The rehabilitation counselor indicated that dog-grooming jobs were available in appellant's area both on a commission basis and at an hourly wage and the Office's rehabilitation specialist recommended that appellant's wage-earning capacity be established after working 90 days.

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[1] A suspected package "bomb," a doll with a witch's head and a toy knife and hatchet in the body and a death threat letter were received by appellant through the inter-office mail.

[2] Appellant's Equal Employment Opportunity Commission (EEOC) claim was denied and her attorney filed suit in federal court. A previous coworker testified that there was no danger at work, but then he was shot down outside his office by a disgruntled employee.

On November 12, 1996 the counselor determined that from October 14 through 27, 1996 appellant's total billing as a contract groomer for 71 hours was $923.00, which, on a 50 percent commission, resulted in a paycheck of $461.00. From October 28 through November 9, 1996, gross billing was $1,311.00 for 78 hours of work, which yielded a paycheck to appellant of $655.50. Subsequent biweekly checks were $511.00 for 64 hours, $646.00 for 77 hours, $396.15 for 49.5 hours and $521.85 for 71.5 hours. The counselor estimated that appellant's gross income ranged from $1,100.00 to $1,200.00 per month.

On February 6, 1997 the Office noted that appellant's biweekly check for January 20 to February 2, 1997 was $537.41 and "represented her commission rate." On February 25, 1997 the Office noted that from December 8 to 21, 1996 appellant was paid $958.20 for 55 hours of work and from February 3 to 15, 1997 she received $792.24 for 43 hours of work.[3]

By report dated February 5, 1997, the rehabilitation counselor closed appellant's case noting that appellant's potential earnings would increase over time and thus a wage-earning capacity rating at that time would appropriately be based on a labor market survey. The counselor opined that appellant's estimated earnings would be between $25,000.00 and $27,000.00 annually, but that "[s]ome rough figures were completed that suggested that [appellant's] income at present would be less than this amount."

Based on the counselor's report, the Office selected the average annual earnings amount of $26,000.00, compared that amount with the current pay rate for appellant's date-of-injury job and calculated that she had a $247.53 loss of wage-earning capacity.

On March 21, 1997 the Office issued a notice of proposed reduction of compensation, finding that appellant was only partially disabled, that she had the ability to earn the wages of a dog groomer at the rate of $26,000.00 per year, that appellant's actual earnings from commissions did not represent her wage-earning capacity as she was working fewer than 80 hours per pay period and that the full-time selected position of dog groomer from the *Dictionary of Occupational Titles* did represent her wage-earning capacity.

In an accompanying memorandum, the Office noted that appellant remained under treatment for post-traumatic stress disorder, that she was capable of working full time, that her physician had opined that the position of dog groomer was medically suitable for her, that appellant's actual wages from commissions for four months amounted to $5,471.03, working fewer than 80 hours per pay period and that the labor market survey of wages paid in the local economy revealed that dog groomers in appellant's commuting area earned between $25,000.00 and $27,000.00 per year in salaried positions.

The Office justified its decision to base appellant's wage-earning capacity on this salary range by stating that she would have been rated at this salary range at the end of placement services whether she actually obtained employment in a salaried position and that she had chosen to work in this field on a commission basis. The Office noted that since appellant was not limited to less than full-time work, it was reasonable to rate her wage-earning capacity based on

[3] Appellant later claimed that she worked 87 hours for the period February 3 through 15, 1997.

full-time employment in the field, which was best reflected with earnings from a salaried position.

The Office selected $26,000.00 as an average of the range of dog groomer salaries for appellant's area and indicated that this determination considered the factors detailed in 5 U.S.C. § 8115. The Office determined the current pay rate for appellant's date-of-injury job, applied the *Shadrick*[4] formula and computed her loss of wage-earning capacity.

By letter dated April 4, 1997, appellant disagreed with the proposed reduction, arguing that it would be extremely difficult to earn $26,000.00 per year as a dog groomer and that her base salary at the employing establishment should be $42,065.00 instead of the $39,163.00 used by the Office to calculate her loss of wage-earning capacity.[5] Appellant argued that a range of $15,000.00 to $20,000.00 per year would be more accurate, noting that she charged $25.00 per dog and each dog took more than an hour to complete, with some larger or more complicated breeds taking four hours or more to complete. Appellant argued that a groomer could groom five to six dogs per day, which would result in a yearly income range of $15,937.00 to $19,125.00. She disputed the accuracy of the Office's labor market survey and stated that she would have to be salaried at $12.75 per hour to earn $26,000.00 per year. Appellant claimed that the one shop in the labor market survey that paid a salary paid the groomer about $20,000.00 per year.

Appellant also submitted a job description from "*The Enhanced Guide For Occupational Exploration*," (1995) which gave the average salary for a dog groomer as $14,000.00 to $16,999.00 per year and noted that it was based upon information from the Department of Labor, the Department of Commerce, the Census Bureau and other sources. A second dog groomer job description was submitted from the "*Encyclopedia of Careers and Vocational Guidance*" (1997) which noted the average salary as about $7.50 per hour.

Appellant submitted an undated statement from Leone Struthers, a dog grooming business owner, which stated:

> "[D]og grooming is a seasonal business with only some breeds groomed on a regular basis all year. Summer is usually busier than winter. The average price per dog is $25.00. The average number of dogs done per day per groomer is five. The employee typically receives 50 percent of the price of the dogs/cats that she/he grooms. Same for contracts."

Appellant additionally submitted two dog groomer job descriptions obtained from the Internet; one in Las Vegas which stated the salary as $350.00 per week and one from Red Bluff, California, with a salary of $5.00 per hour. Appellant argued that, based upon these facts, the realistic salary for a dog groomer was $15,000.00 to $20,000.00 per year with $20,000.00 being on the high end.

By memorandum dated June 12, 1997, the Office specialist noted:

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

[5] Appellant submitted a PS Form 50 dated January 4, 1997 indicating her base salary as $42,065.00.

> "It remains my judgment that $26,000.00 per annum fairly and reasonably represents the claimant's wage-earning capacity. There is information in the labor market survey and information presented by claimant, indicating that earnings could exceed $26,000.00 per year. It is anticipated that [appellant] would be making employment and business decisions which would maximize her wage-earning capacity. There is nothing to indicate that other factors would hinder her productivity when compared with the average worker. [Appellant] presented wage-earning information from the *Encyclopedia of Careers and Vocational Guidance*, Tenth Edition, 1977, which shows dog grooming business owners can earn up to $50,000.00 per year. Within this context and based upon the labor market survey, it remains my judgment that [appellant] has the capacity to earn $26,000.00 per year."

By decision dated August 6, 1997, the Office finalized the proposed reduction of compensation. The Office noted that appellant had been advised throughout rehabilitation that her expected earning capacity would be $26,000.00 and that her compensation would be reduced by that amount at the end of training. The Office found that the evidence of record established that $26,000.00 was a fair representation of appellant's wage-earning capacity.

By letter dated September 1, 1997, appellant requested reconsideration, arguing that $26,000.00 was not reasonable. In support she submitted 11 attachments, again taking issue with the labor market survey. Appellant also argued that the job description of dog groomer and manager, which was used by the Office in its determination, gave identical salary ranges of $25,000.00 to $27,000.00, which did not seem realistic since a dog groomer was an employee and a manager was a manager. Appellant included a copy of a dog groomer job description with the same DOT number, which showed a national salary range of $17,000.00 to $20,000.00.

By decision dated October 30, 1997, the Office denied modification of its August 6, 1997 decision. The Office listed each of appellant's attachments and concluded that appellant's arguments were unpersuasive.

By letter dated March 29, 1998, appellant again requested reconsideration of the October 30, 1997 decision and presented her own labor market survey. Appellant found that at Barks and Bubbles, the average groomer's annual earnings including overtime were $19,500.00; that at Animal Attic the average annual earnings were $16,000.00 to $19,500.00; that at Launder Mutt the average annual earnings were $16,000.00 to $21,000.00; that at Noah's Arc the average groomer's annual earnings were $13,000.00 to $16,000.00; that at Pet Revue the average yearly salary was $22,000.00; and that at PetSmart the average salary was $19,000.00. Appellant also provided PS Form 50s showing that the present salary for her date-of-injury position was $42,065.00.

In response to clarification requested by the Office, the employing establishment reiterated that appellant's pay rate, had she continued working, would be $39,163.00. The employing establishment noted that all increases for merit pay and performance were withheld from the calculations and that appellant's PS Form 50s included these increases.

By decision dated August 31, 1998, the Office denied modification of the October 30, 1997 decision. The Office noted appellant's labor market research but indicated that "this issue has previously been addressed on two prior occasions" and incorporated by reference the memorandum from the previous denial of reconsideration.

The Board finds that the Office did not meet its burden of proof in determining appellant's wage-earning capacity because it incorrectly discounted appellant's actual earnings.

The Federal Employees' Compensation Act[6] at section 8106(a), provides that "If the disability is partial, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of the difference between his monthly pay and his monthly wage-earning capacity after the beginning of the partial disability, which is known as his basic compensation for partial disability."

Section 8115(a) of the Act[7] provides that in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such a measure.[8] This principle is premised upon the theory that wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions and is thus best measured by actual wages earned.[9]

The Office's procedure manual cautions the claims examiner that, in determining whether the claimant's earnings fairly and reasonably represent his or her wage-earning capacity, the claims examiner should not consider the factors set forth in 5 U.S.C. § 8115(a).[10] The Board has further held that it is only appropriate for the Office to consider the factors enumerated in section 8115(a) when it has been shown that actual wages do not fairly and reasonably represent wage-earning capacity.[11]

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[6] 5 U.S.C. §§ 8101-8193.

[7] 5 U.S.C. § 8115(a); *Clarence D. Ross*, 42 ECAB 556 (1991).

[8] *Dennis E. Maddy*, 47 ECAB 259 (1995); *Hubert F. Myatt*, 32 ECAB 1994 (1981). Regarding the selection of actual earnings or a selected position as the basis for the wage-earning determination, section 8115(a) provides: "If the actual earnings of the employee do not fairly and reasonably represent his wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity as appears reasonable under the circumstances is determined with due regard to: (1) the nature of his injury; (2) the degree of physical impairment; (3) his usual employment; (4) his age; (5) his qualifications for other employment; (6) the availability of suitable employment; and (7) other factors or circumstances which may affect his wage-earning capacity in his disabled condition.

[9] *See Albert L. Poe*, 37 ECAB 684 (1986).

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

[11] *Monique L. Love*, 48 ECAB 378 (1997).

The Board has long recognized that actual earnings are generally the best measure of wage-earning capacity as they more reasonably reflect appellant's employment capacity in the open labor market. The Board explained in *Billie S. Miller*,[12] that "[g]enerally, actual wages earned in the open labor market more accurately represent an employee's earning capacity and constitute a more reliable gauge than a secondary method such as an opinion of a vocational rehabilitation adviser."

In keeping with this principle, the Office must identify a deficiency in appellant's actual earnings before concluding that those earnings do not fairly and reasonably represent wage-earning capacity. Because the Office bears the burden of proof, the Office may not simply select either actual earnings or a constructed position as a basis for a wage-earning capacity determination. The Office's procedure manual notes only three factors to be considered in determining whether the claimant's work fairly and reasonably represents his wage-earning capacity -- whether the job is part time, seasonal or temporary.[13]

In this case, while the Office determined that appellant's employment was not a 40-hour-a week job, nothing in the record indicates that appellant's work was part time, seasonal or "on call." Appellant advised the Office several times that her job was full time and permanent. She also explained the requirements of the position and, why she worked irregular hours.

The only identifiable difference between appellant's commission position and the selected salaried position is that the latter offered a somewhat higher wage-earning capacity. This alone is not enough.[14]

In the case of *William J. Lamontagne*,[15] the Office found that, while appellant had earnings as a taxi driver, the selected position of machine operator represented his wage-earning capacity. The Board found that this wage-earning capacity determination was improper, noting:

> "There is no evidence that his earnings as a taxi driver do not fairly represent his wage-earning capacity. This is not a situation where an employee improperly refused to accept work at a higher wage or voluntarily worked below his capacity. Appellant attempted unsuccessfully to secure jobs with greater earnings. His work and earnings as a taxi driver represent an honest endeavor to secure suitable work."

As in *Lamontague*, the Office has substituted its opinion on what appellant's earnings should be, given her qualifications and training, instead of focusing on whether appellant's actual earnings fairly and reasonably represented her honest ability to obtain work in the open labor market. As the Office never identified why appellant's actual earnings did not fairly and

[12] 15 ECAB 168, 172 (1963).

[13] *See supra* note 10.

[14] *Daniel Renard*, 51 ECAB ___ (Docket No. 97-2793, issued April 12, 2000).

[15] 18 ECAB 324, 327 (1967).

reasonably represent her wage-earning capacity, the Office was precluded from evaluating appellant's wage-earning capacity pursuant to the factors provided in 5 U.S.C. § 8115(a).

The Office's procedure manual provides that if actual wages span a lengthy period of time (e.g. several months or more) 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.[16]

The manual offers the following example:

> "[T]he Office learns on October 1, 1992 that the claimant … returned to work on September 1, 1988 and worked *intermittently* through September 1, 1992 when he ceased work. On September 1, 1992 the pay rate for the claimant's date-of-injury job was $500.00 per week. The claimant grossed $40,000.00 during the four years (208 weeks) he worked from September 1, 1988 through September 1, 1992, or an average of $192.30 per week. When using the *Shadrick* formula, the pay rate of $192.30 would be compared to the pay rate of $500.00." (Emphasis in the original.)

In this case, appellant worked for more than six months, beginning in September 1996 and continuing through February 15, 1997, for a total period of at least 23 weeks and a total number of 509 hours. Although the Board has stated that sporadic or intermittent earnings should not be used as the basis for determining wage-earning capacity,[17] the Board finds that appellant's earnings were continuous and substantually regular. Appellant had biweekly earnings from a steady employer, which merely varied due to the number of hours she worked during any particular pay period. Although appellant's hours during the two-week pay periods ranged from a high of 78 hours to a low of 49.5 hours,[18] she worked on a 50 percent commission per dog, earning more than $7,000.00 for the six-month period from the same employer.[19]

The labor market survey and the opinion of the Office's specialist that appellant could -- or should -- earn up to $26,000.00 a year do not establish that appellant's actual commission earnings as a dog groomer are not a fair and reasonable measure of her wage-earning capacity.

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[16] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4 (June 1996).

[17] *See supra* note 7, Chapter 2.814(3) (June 1996).

[18] Although the Office stated that appellant worked only 43 hours from February 3 through 15, 1997, appellant claimed that she actually worked 87 hours during that period, which exceeded the 80-hour per pay period "standard." The Office neglected to ascertain whether appellant was ill or on some sort of leave or vacation during the pay periods in which she worked fewer than 60 hours.

[19] As appellant did have actual earnings, the Office could only proceed to determine appellant's wage-earning capacity based upon a theoretical 80-hour per pay period salaried position if the Office first established that appellant's actual earnings did not fairly and reasonably represent her wage-earning capacity, or if the Office established that appellant had not complied with vocational rehabilitation. *See Daniel Renard, supra* note 14.

Similarly, the fact that appellant was not working a full 80 hours biweekly per pay period does not preclude the use of her actual earnings in determining wage-earning capacity. Appellant was not paid a salary or an hourly wage -- she worked on a commission and her earnings from commission depended on the number -- and breed -- of dogs available for her to groom.

Based on the evidence provided by appellant, the Board finds that appellant's earnings over six months met the standard for applying the *Shadrick* formula the Office erroneously discounted appellant's actual earnings as fairly and reasonably representing her wage-earning capacity.

The decisions of the Office of Workers' Compensation Programs dated August 31, 1998 and October 30, 1997 are reversed.

Dated, Washington, DC
December 15, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member