

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

PATRICIA A. BODENSTEINER, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Rochester, NY, Employer**

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**Docket No. 04-2107
Issued: February 7, 2005**

Appearances:
Patricia A. Bodensteiner, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On August 26, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated July 22, 2004 finding that her actual earnings as a modified clerk represent her wage-earning capacity as of August 6, 2003. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether the Office properly determined appellant's wage-earning capacity based on her actual earnings as a modified clerk.

FACTUAL HISTORY

The Office accepted that, on or before February 5, 1995, appellant, then a 48-year-old clerk, sustained lateral epicondylitis of the left elbow. As of March 28, 2001, appellant earned \$40,472.00 a year as a modified clerk.

Dr. Jeffrey A. Jones, an attending Board-certified orthopedic surgeon, submitted reports throughout 2001 recommending a left epicondylar release due to appellant's increasing

symptoms, noting that she required a right lateral epicondylar release in 1999 and later developed right rotator cuff syndrome. Dr. Jones performed a left epicondylar release on February 1, 2002, approved by the Office. He held appellant off work through April 1, 2002. The Office accepted a recurrence of disability for appellant's work absence. There is no indication of record that appellant claimed wage-loss compensation for her work absence.

On April 1, 2002 appellant returned to work in a limited-duty position as a modified clerk at Grade 5, with a salary of \$40,472.00 a year. The job was primarily in the box section with no lifting over 10 pounds with the left arm, no forceful pulling, pushing or twisting, clerical work and some mail sorting. Dr. Jones provided permanent restrictions on May 16, 2002 of no lifting more than 5 pounds above shoulder level and all other lifting limited to 20 pounds occasionally. In reports from April 26 to June 6, 2002, an Office field nurse noted that appellant was working well in the limited-duty position.

On November 10, 2003 appellant filed a notice alleging that she sustained a recurrence of disability commencing on or about August 1, 2002. At that time, she earned \$43,099.00 a year.¹ She did not indicate any period of work absence. However, on August 7, 2003, she accepted a full-time modified clerk position with lifting limited to 20 pounds and "no overuse of right/left arms."²

By decision dated July 22, 2004, the Office found that, effective August 6, 2003, appellant was reemployed as a clerk at the employing establishment "with wages of \$ (no wage given) per week." The Office found that as appellant had "satisfactorily performed the duties described in the attached position description ... it [was] determined that this position fairly and reasonably represented [appellant's] wage-earning capacity." The Office further found that appellant had "no loss of wage-earning capacity between [her] pay rate on the date of injury, date disability began or date of recurrence and [her] ability to earn wages in [her] new position." An attached computation worksheet notes that appellant's weekly compensation pay rate was "\$ (not given)" and that her earning capacity in her new position was "\$ (not given)." The Office then stated that appellant had no loss of wage-earning capacity per week.

LEGAL PRECEDENT

Under section 8115(a) of the Federal Employees' Compensation Act,³ wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity.⁴ Generally, wages actually earned are the best

¹ There is no final decision of record regarding appellant's claim for a recurrence of disability commencing on or about August 1, 2002.

² In a February 10, 2004 form report, Dr. Jones noted additional permanent restrictions proscribing climbing, pulling or pushing, limiting driving a motor vehicle or carrying to four hours, reaching or working above the shoulders limited to two hours. He noted increasing bilateral elbow and shoulder symptoms in reports through June 8, 2004.

³ 5 U.S.C. §§ 8101-8193, 8115(a).

⁴ 5 U.S.C. § 8115(a).

measure of a 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 measure.⁵

The method of determining wage-earning capacity is based on actual wages outlined in the Board's decision in *Albert C. Shadrick*,⁶ codified at 20 C.F.R. § 10.403. The regulations define three basic terms used in formulating an employee's entitlement to compensation based on his or her wage-earning capacity. These terms are: (1) pay rate for compensation purposes; (2) current pay rate; and (3) earnings. Pay rate for compensation purposes, as defined in section 8101(4), is the greater of the employee's pay as of the date of injury, the date disability begins or the date of recurrence of disability if more than six months after returning to work. Current pay rate is defined as the salary or wages for the job the employee held at the time of injury. "Earnings" is defined as the employee's actual earnings or the salary or pay rate of the position selected as representative of his or her wage-earning capacity.⁷

ANALYSIS

The Office accepted that appellant sustained left lateral epicondylitis requiring a surgical release, performed on February 2, 2002. Dr. Jones, appellant's attending Board-certified orthopedic surgeon, released appellant to work as of April 1, 2002 with permanent restrictions. On April 1, 2002 appellant returned to work in a light-duty position as a modified clerk.

By decision dated July 22, 2004, the Office determined that appellant's actual earnings in the modified clerk position represented her wage-earning capacity. However, the Office failed to properly perform the *Shadrick*⁸ calculation to determine whether appellant sustained a loss of wage-earning capacity as a result of her return to work in the modified clerk position and whether her actual earnings represented her wage-earning capacity.⁹

The record demonstrates that, as of April 1, 2002, the date appellant returned to light-duty work, she earned \$40,472.00 a year as a modified clerk. However, the Office did not mention appellant's earnings in her date-of-injury position and did not compare these earnings to her actual earnings in the light-duty position. The Office's July 22, 2004 decision and accompanying computation worksheet are devoid of any salary amounts, listing appellant's pay rate and earning capacity in her new position as "\$ (not given). Due to these omissions, the Office failed to comply with its regulations in determining whether appellant sustained a loss of

⁵ *Francis J. Carter*, 53 ECAB ____ (Docket No. 00-1789, issued April 11, 2002); *Dennis E. Maddy*, 47 ECAB 259 (1995).

⁶ 5 ECAB 376 (1953).

⁷ 20 C.F.R. § 10.403(b)(2).

⁸ *Albert C. Shadrick*, *supra* note 6.

⁹ 20 C.F.R. § 10.403.

wage-earning capacity as a result of her accepted partial disability. The Office's July 22, 2004 decision will be reversed.¹⁰

CONCLUSION

The Board finds that the Office failed to determine if appellant sustained any loss of wage-earning capacity as a result of her accepted conditions. Therefore, the Office's July 22, 2004 decision finding that her actual earnings represented her wage-earning capacity must be reversed.

ORDER

IT IS HEREBY ORDERED THAT the July 22, 2004 decision of the Office of Workers' Compensation Programs is reversed.

Issued: February 7, 2005
Washington, DC

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁰ See *Afegalai L. Boone*, 53 ECAB ____ (Docket No. 01-2224, issued May 15, 2002).