United States Department of Labor
Employees' Compensation Appeals Board

P.C., Appellant	)	
and	)	**Docket No. 09-1783**
	)	**Issued: August 18, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Long Branch, NJ, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 8, 2009 appellant filed a timely appeal from the September 17, 2008 and April 9, 2009 decisions of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[1]

ISSUE

The issue is whether appellant established that she was disabled from April 16, 2003 to May 1, 2006.

On appeal, counsel for appellant contends that the Office abused its discretion by denying wage-loss benefits. In light of her partial disability, he argued that the Office should make a wage-earning capacity determination.

[1] For Office decisions issued prior to November 19, 2008, a claimant had one year to file an appeal. An appeal of Office decisions issued on or after November 19, 2008 must be filed with the Board within 180 days. 20 C.F.R. § 501.3(e) (2008).

FACTUAL HISTORY

The Office accepted that on April 24, 2002 appellant, then a 44-year-old part-time flexible clerk, sustained injury to her left knee when her leg became caught on a rug.[2] Appellant was treated for a torn medial meniscus and, on November 1, 2002, underwent surgery for repair and synovectomy of the left knee. Dr. Christopher D. Johnson, a Board-certified orthopedic surgeon, performed surgery and followed appellant's postoperative recovery. On March 6, 2003 he advised that she could return to work at a modified workstation but was totally disabled if light duty was not available.

A March 14, 2003 functional capacity evaluation noted that appellant was status post left knee arthroscopy. Appellant demonstrated moderate submaximum effort, had a mild residual functional left knee deficit that would not significantly affect job performance. She could work in a light to medium category, occasionally lifting up to 35 pounds. On April 1, 2003 Dr. Johnson reviewed the evaluation results and advised that appellant could return to light to medium work. On April 10, 2003 he described appellant's left knee condition and treatment and determined that she could not return to her regular duties; however, she was capable of light to medium work.[3]

On September 13, 2004 appellant filed a claim for compensation commencing April 16, 2003. In a July 13, 2004 report, Dr. Johnson advised that, due to her left knee injury, appellant could never resume her regular employment as a clerk. He noted that she had never been put off work and could perform light duty. On August 16, 2004 Dr. Johnson noted that appellant had previous surgery on her left knee and was now reporting problems with her right knee. He noted crepitus and tenderness on left knee examination and advised that she was symptomatic for both knees. Dr. Johnson found that appellant had plateaued regarding the left knee and had probable right knee synovitis or a medial meniscal tear. He recommended further diagnostic study. Dr. Johnson reiterated that appellant could perform light duty.

Appellant submitted a list of jobs held since December 26, 2002 in private employment. She worked at Dallies Inc. from December 26, 2002 to May 6, 2003, Endeavor House Inc. from May 12 to October 16, 2003, Delta-T Group from October 20, 2003 to February 5, 2004 and at Health South commencing February 12, 2004.

On January 31, 2005 Dr. Johnson noted appellant's complaint of increased right knee problems. An April 25, 2005 MRI scan of the right knee revealed a torn medial meniscus. Dr. Johnson subsequently reviewed the MRI scan and advised that appellant could not perform her usual job but could work light duty. He recommended right knee surgery.

On May 19, 2005 the Office requested that Delta-T Group provide appellant's pay rate information. On May 8, 2006 appellant submitted a claim for compensation from April 11, 2003 to May 1, 2006. The employing establishment advised that she had worked as needed, averaging 37.83 hours a week, and that she was separated on September 8, 2003.

[2] Appellant's initial claim alleged injury on February 27, 2002.

[3] Appellant retired on Office of Personnel Management (OPM) disability as of September 8, 2003.

On November 7, 2006 Dr. Johnson noted tenderness and crepitus on examination of the left knee. Appellant had recurrent left knee synovitis for which her prognosis was fair and she could perform light duty. Dr. Johnson advised that she had not reached maximum medical improvement but could return to full duty if she wore a knee brace.

On December 14, 2004 appellant submitted an Office Form EN1032 in which she advised that she worked at DSNJ, Vonage and Easter Seals during the prior 15 months. On April 30, 2007 the Office requested that she provide additional documentation on each private employer's letterhead stating the inclusive dates of employment, the number of hours worked each week, job title and a brief description of the duties she performed, the weekly pay rate exclusive of overtime and the reason she left employment. Appellant was also asked to provide medical evidence from April 2, 2003 through November 6, 2006 to support her claim of disability.

In a May 31, 2007 letter, appellant listed her employment, including Allies Corp., Delta-T Group, Option Employment, Endeavor House, DSNJ and Easter Seals of New Jersey. On July 24, 2007 Delta-T Group advised that appellant was affiliated with it as an independent contractor from August 2003 to the present and was compensated on a 1099 basis at a negotiated rate of compensation.

On July 25, 2007 the Office advised Dr. Johnson that the accepted conditions in appellant's claim were tear of the left medial meniscus and villonodular synovitis of the left leg. It requested that he provide an updated medical report.

In a September 17, 2008 decision, the Office denied appellant's claim for compensation from April 16, 2003 through May 1, 2006, finding that she did not submit sufficient employment information to determine her eligibility for wage-loss compensation.

On September 23, 2008 appellant, through her attorney, requested a hearing that was changed to a review of the written record. He submitted appellant's tax returns for the years 2003 through 2007 wage information. Appellant asserted that she was entitled to a loss of wage-earning capacity determination.

In an April 9, 2009 decision, an Office hearing representative affirmed the September 17, 2008 decision. He found there was sufficient evidence to support that appellant continued to have work-related disability through May 1, 2006 that prevented her from returning to her date-of-injury job, but there was insufficient evidence to support any wage loss due to her disability.

LEGAL PRECEDENT

Under the Act, the term disability means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.[4] Disability, thus, is not synonymous with physical impairment which may or may not result in the incapacity to earn wages. An employee who has a physical impairment causally related to his or her federal employment, but who nonetheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability and is not entitled to compensation for loss of wage-earning

[4] *S.M.*, 58 ECAB 166 (2006).

capacity. When the medical evidence establishes that the residuals or sequelae of an employment injury are such that they prevent the employee from continuing in his or her employment, the employee is entitled to compensation for any loss of wages.[5] An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.[6]

Office procedures provide that, when an employee cannot return to the date-of-injury job because of disability due to work-related injury or disease, but does return to alternative employment with an actual wage loss, the Office must determine whether the earnings in the alternative employment fairly and reasonably represent the employee's wage-earning capacity.[7] If a record shows that a claimant has an approved OPM annuity, a new election of benefits must be obtained and OPM advised of the election.[8] The procedures further provide that where the Office learns of actual earnings that span a lengthy period of time, *e.g.*, several months or more, the compensation entitlement should be determined by averaging the earnings for the entire period, determining the average pay rate and applying the *Shadrick* formula.[9] The *Shadrick* formula has been codified at section 10.403 of the Office's regulations.[10]

ANALYSIS

Appellant sustained a left knee injury on April 24. 2002. The Office accepted a tear of the medial meniscus of the left knee and villonodular synovitis of the left leg for which she underwent surgery on November 1, 2002. Appellant did not return to work following surgery but obtained employment in the private sector.

When injured, appellant was employed as a part-time flexible clerk. She worked on an as-needed basis with no set shifts or tour of duty. The employing establishment noted that, when she stopped work, she earned $36,837.00 a year.[11] It advised that there was no work available to appellant based on her restrictions. Appellant retired on disability.

In computing entitlement to compensation, the Office's procedure manual addresses situations in which the employee returns to work other than at full time or year round.[12] The

[5] *C.S.*, 60 ECAB ___ (Docket No. 08-2218, issued August 7, 2009).

[6] *John D. Jackson*, 55 ECAB 465 (2004).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (October 2009).

[8] *Id*. at Chapter 2.814.7(c)(2).

[9] *Id*. at Chapter 2.814.7(d)(4); *Albert C. Shadrick*, 5 ECAB 376 (1953). 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.

[10] 20 C.F.R. § 10.403.

[11] The employer clarified that appellant's last day in pay status was January 25, 2003 at which time she earned $19.77 an hour.

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(d).

starting point on which compensation is computed is based on the nature of the work performed by the employee: (i) Part-time work, in which case compensation is computed using the *Shadrick* formula; (ii) Seasonal and temporary employment, for which the annual salary of the job selected is divided by 52 to obtain a weekly pay rate. The figure obtained is then compared, using the *Shadrick* formula to the weekly pay for the grade and step of the job held when injured; (iii) Earnings of a sporadic or intermittent nature that do not fairly or reasonably represent the injured employee's wage-earning capacity are to be deducted but are not to be used as the basis for a wage-earning capacity determination; (iv) Actual earnings spanning a lengthy period of time may be averaged for the entire period to determine an average pay rate and applying the *Shadrick* formula. These provisions contemplate that, in calculating entitlement to compensation where there are actual earnings, the *Shadrick* formula will be utilized regardless of whether a wage-earning capacity decision is warranted.[13]

Appellant has provided information concerning her actual earnings in the private sector. She worked at Allies, Inc from December 26, 2002 to May 6, 2003 at a rate of $10.00 an hour, but she did not list total earnings or the number of hours worked. Counsel supplemented the record with 2003 tax information listing earnings in the amount of $7,991.45 with that employer; $834.00 at Options Employment Resource; $11,631.00 at Endeavor House; $24.00 at Orthopedic Associates and $3,319.00.[14] For 2005, two employers were listed: Developmental Services in the amount of $15,392.00 and Caring Family Mentors in the amount of $2,715.00. Appellant had wages in 2006 of $19,485.00 at Easter Seals, $1,212.00 at Vonage and $6,469.00 at Developmental Services. In 2007, appellant's earned wages of $40,796.00 at Easter Seals.[15]

The decision of the Office hearing representative noted that there was "enough evidence to support that work-related disability exists, at least through May 1, 2006," but there was insufficient evidence submitted to support any wage loss as a result of disability. The medical evidence does support that appellant has partial disability as Dr. Johnson found that she was capable of work with physical limitations. The Board finds that the hearing representative did not adequately compare appellant's earnings from the job held when injured to the information submitted pertaining to her wages from 2003 to 2007 to establish that appellant did not sustain any wage loss. The evidence reflects that appellant had actual earnings that span a lengthy period of time; compensation should be determined by averaging the earnings for the entire period, determining the average pay rate, and applying the *Shadrick* formula.[16] The procedure manual provides an example to be used in determining compensation entitlement in such a case, stating:

> "For example, the Office learns on October 1, 2002 that the claimant, injured on June 5, 1997, returned to work on September 1, 1998 and worked intermittently through September 1, 2002 when he ceased work. On September 1, 2002 the pay rate for the claimant's date of injury job was $500 per week. The claimant

[13] *See S.T.*, Docket No. 07-306, issued October 19, 2007.

[14] From her federal income tax forms, total wages were $23,799.00 in 2003; $23,162.00 in 2004; $18,107.00 in 2005; $27,166.00 in 2006 and $40,796.00 in 2007.

[15] Appellant had $1,579.75 in nonemployment income in 2007 from Delta-T Group.

[16] *Supra* note 9.

> gross[ed] $40,000 during the four years (208 weeks) he worked from September 1, 1998 through September 1, 2002, 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."[17]

The Board finds that appellant has furnished sufficient records that encompass a number of years such that the Office may compare her actual earnings to those wages earned when injured. The case will be remanded to the Office for further development. After such further development as deemed necessary, the Office shall issue an appropriate decision of appellant's claim for compensation.

CONCLUSION

The Board finds this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the April 9, 2009 and September 17, 2008 decisions of the Office of Workers' Compensation Programs be set aside. The case is remanded for proceedings consistent with this opinion.

Issued: August 18, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

[17] Federal (FECA) Procedure Manual, *supra* note 7 at Chapter 2.814.7(d)(4).