

FACTUAL HISTORY

On December 13, 2005 appellant, then a 46-year-old mail handler, sustained an employment-related right rotator cuff sprain/strain while pulling a sack of mail.² She stopped work that day and returned to limited duty for eight hours a day on May 29, 2006. The Office accepted that appellant sustained a recurrence of disability on September 21, 2006 and she was placed on the periodic compensation rolls.

The Office referred appellant to Dr. Robert Franklin Draper, Jr., a Board-certified orthopedic surgeon. In a February 1, 2007 report, Dr. Draper provided findings on examination and diagnosed impingement syndrome of the right shoulder with partial tear of the supraspinatus tendon and cervical strain with disc herniations at C2 through C6. He advised that appellant could perform light-duty work with restrictions on her physical activity. Appellant's claim was accepted for temporary aggravation of degenerative cervical disc disease.

On August 6, 2007 Dr. John M. Fenlin, a Board-certified orthopedic surgeon, performed surgery for acromioplasty and right rotator cuff repair. In reports dated December 20, 2007 to February 26, 2009, Dr. Dennis W. Ivill, a Board-certified physiatrist and associate of Dr. Fenlin, provided examination findings, diagnosed C6 cervical radiculopathy and rotator cuff tear. He advised that appellant could not work.

An April 6, 2009 functional capacity evaluation was reported as invalid due to submaximal effort. On May 20, 2009 Dr. Ivill reported that appellant could return to work for eight hours a day with sitting and standing at will, pushing 1 pound, and pulling and lifting 10 pounds. On June 16, 2009 appellant was offered a modified mail handler position at an annual salary of \$51,895.00. The duties of the position consisted of rewrapping packages while sitting or standing in front of a conveyor belt using a gun, and debris-sorting letters and flats and placing them into tubs and trays. The physical requirements were no lifting over 10 pounds, and no climbing or kneeling. Sitting, standing, walking, and fine manipulation were limited to three to four hours; bending, stooping, twisting and reaching limited to one to two hours; and pushing and pulling to two to three hours. Appellant began the modified position on June 23, 2009.

On June 29, 2009 the Office reduced appellant's monetary compensation to zero, effective June 23, 2009, based on her actual earnings in the modified mail handler position. In reports dated July 8 to November 11, 2009, Dr. Ivill provided examination findings and advised that she could work full time in a modified position with a 10-pound weight restriction.

By decision dated December 2, 2009, the Office determined that appellant's actual wages in the modified mail handler position fairly and reasonably represented her wage-earning

² The record indicates that at the time the claim was filed, appellant was working modified duty for an accepted left hand tendinitis, adjudicated by the Office under number xxxxxx567.

capacity. It applied the *Shadrick* formula, noting that, as the weekly pay rate when injured was \$883.17 and the current pay rate for the position was \$998.00, she had a zero percent loss.³

LEGAL PRECEDENT

Section 8115(a) of the Act provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by the employee's actual earnings if the actual earnings fairly and reasonably represent the employee's wage-earning capacity.⁴ 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.⁵ The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision,⁶ 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.⁷ Office procedures provide that the Office can make a retroactive wage-earning capacity determination if the claimant worked in the position for at least 60 days, the position fairly and reasonably represented his or her wage-earning capacity and the work stoppage did not occur because of any change in his injury-related condition affecting the ability to work.⁸

ANALYSIS

The Office accepted that on December 13, 2005 appellant sustained a right rotator cuff sprain/strain and temporary aggravation of degenerative disc disease of the cervical spine. On August 6, 2009 appellant underwent right shoulder surgery and returned to a modified position on June 23, 2009 at an annual salary of \$51,895.00. The duties of the position were described as rewrapping packages while sitting or standing in front of a conveyor belt using a gun, and debris-sorting letters and flats and placing them into tubs and trays. The physical requirements were no lifting over 10 pounds, and no climbing or kneeling. Sitting, standing, walking and fine manipulation were limited to three to four hours; bending, stooping, twisting and reaching limited to one to two hours; and pushing and pulling to two to three hours. The duties of the modified position conform to the medical evidence set by appellant's physician.

³ On December 7, 2009 appellant filed a recurrence claim. By decision dated January 19, 2010, the Office denied the recurrence claim, and in a July 13, 2010 decision, an Office hearing representative affirmed the January 19, 2010 decision. Appellant filed an appeal with the Board, Docket No. 11-419, that will be adjudicated separately. The record also contains an April 22, 2010 decision denying her schedule award claim. On January 20, 2011 appellant requested reconsideration before the Office of the April 22, 2010 decision.

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

⁵ *Lottie M. Williams*, 56 ECAB 302 (2005).

⁶ *Albert C. Shadrick*, 5 ECAB 376 (1953).

⁷ 20 C.F.R. § 10.403(c).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity* Chapter 2.814.7(a) (July 1997); *Selden H. Swartz*, 55 ECAB 272 (2004).

The Board finds that appellant's actual earnings as a modified mail handler fairly and reasonably represent her wage-earning capacity. Appellant returned to full-time work on June 23, 2009 and was working in this position on December 3, 2009, the date the Office issued its wage-earning capacity determination. She worked in the position for more than 60 days, and there is no evidence that the position was seasonal or temporary and no evidence to show that she was not working eight hours a day.⁹

Regarding appellant's argument on appeal that the position was tailored to her particular restrictions, the Board finds there is no evidence that the position was seasonal, temporary or makeshift work designed for her particular needs. The evidence establishes that she returned to work for eight hours a day.¹⁰ The Board delineated factors of makeshift work in the *A.J.* case, where the employee had actual earnings as a limited-duty clerk.¹¹ The Board reversed the Office's wage-earning capacity determination, finding that the clerk position was makeshift work specifically tailored to the claimant's needs. For example, there was no detailed job description or set schedule and her significant medical limitations precluded many clerical duties.¹²

The facts in evidence are distinguished from *A.J.* The position relied upon by the Office in its December 3, 2009 decision clearly defined appellant's duties. The duties of the position consisted of rewrapping packages while sitting or standing in front of a conveyor belt using a gun, and debris-sorting letters and flats and placing them into tubs and trays. The physical requirements were no lifting over 10 pounds and no climbing or kneeling. Sitting, standing, walking and fine manipulation were limited to three to four hours; bending, stooping, twisting and reaching limited to one to two hours; and pushing and pulling to two to three hours. The assigned duties described a bona fide job that would be available to appellant in the community at large. The Board concludes that the modified position on which the December 3, 2009 decision was based fairly and reasonable represented appellant's wage-earning capacity.

As there is no evidence that her wages in this position did not fairly and reasonable represent her wage-earning capacity, they must be accepted as the best measure of her wage-earning capacity.¹³

Appellant's actual earnings in the position of modified mail handler 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 determined that appellant had no loss of wage-earning capacity based on her actual earnings. The current weekly earnings of \$998.00 per week as a modified mail handler

⁹ *J.C.*, 58 ECAB 700 (2007).

¹⁰ *Id.*

¹¹ *A.J.*, Docket No. 10-619 (issued June 29, 2010).

¹² *Id.*

¹³ See *Loni J. Cleveland*, *supra* note 4.

exceeded the current weekly wages of the date-of-injury position of \$883.17. Appellant therefore had no loss of wage-earning capacity under the *Shadrick* formula.¹⁴

CONCLUSION

The Board finds that the Office met its burden of proof to establish that appellant's actual wages as a modified mail handler 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 2, 2009 be affirmed.

Issued: April 4, 2011
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

¹⁴ *Albert C. Shadrick, supra* note 6.