

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

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N.C., Appellant )

and )

**DEPARTMENT OF HEALTH & HUMAN  
SERVICES, NATIONAL INSTITUTES OF  
ENVIRONMENTAL HEALTH SERVICES,  
Research Triangle, NC, Employer** )

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**Docket No. 11-378  
Issued: September 9, 2011**

*Appearances:*

*Alan J. Shapiro, Esq., for the appellant  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On December 9, 2010 appellant filed a timely appeal from an October 22, 2010 decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act (FECA)<sup>1</sup> and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether appellant's actual earnings as a writer-editor fairly and reasonably represented her wage-earning capacity.

On appeal her attorney asserts the decision is contrary to fact and law.

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

## **FACTUAL HISTORY**

On January 11, 2006 appellant, then a 44-year-old writer/editor, who had a history of nonemployment-related fibromyalgia, filed an occupational disease claims, alleging that repetitive motion in computer work caused flexor tendinitis and carpal tunnel syndrome. OWCP accepted the conditions of bilateral carpal tunnel syndrome and bilateral enthesopathy of the wrist/carpus (flexor tendinitis) as employment related.<sup>2</sup> Appellant stopped work on April 25, 2006. She was placed on the periodic compensation rolls. She returned to her regular position with prescribed assistive devices of voice activated software and an ergonomic chair on June 8, 2009. Appellant worked four hours a day the first week, six hours a day the second, and returned to full-time eight-hour daily employment on June 22, 2009.<sup>3</sup>

Appellant again stopped work on August 8, 2009.<sup>4</sup> She was in a nonemployment-related motor vehicle accident on November 6, 2009. Appellant returned to her regular position with the above-described assistive devices on November 10, 2009. On November 14, 2009 she filed an occupational disease claim for flexor tendinitis, carpal tunnel syndrome and fibromyalgia, stating that her work duties aggravated these conditions.<sup>5</sup>

By decision dated February 9, 2010, OWCP found that appellant's actual earnings, effective November 10, 2009, fairly and reasonably represented her wage-earning capacity. Appellant's wage loss was reduced to zero as her earnings were equal to those earned at the time of injury.

Appellant timely requested a hearing.

On February 25, 2010 Christine Flowers, a supervisor, reported that appellant returned to work on November 10, 2009 at which time she was given an employee performance plan outlining her performance requirements and task assignments. She stated that appellant was assigned the least demanding tasks with the most flexible deadlines from the duties of the communications program, and that these tasks allowed frequent rest periods and the ability to

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<sup>2</sup> This case has previously been before the Board on a separate issue. By decision dated March 2, 2011, Docket No. 10-1444 the Board affirmed a March 29, 2010 decision in which an OWCP hearing representative affirmed an October 29, 2009 decision finding that appellant did not establish that she sustained a recurrence of disability on August 8, 2009 causally related to the accepted conditions. The facts and law of the previous Board decision are incorporated herein by reference.

<sup>3</sup> The physical demands for the position of writer-editor are sedentary. Major duties consisted of using communication tools to maintain productive lines of communication and coordination among geographically dispersed research grantees located throughout the United States; manage, from concept through publication and distribution, news releases on grantee research outcomes, on a schedule set by senior staff; facilitate the presentation of the grants program material on internal and public internet sites; write, edit and submit articles, briefs, fact sheets, brochures and taking/enhancing digital photographs for other publications within the employing establishment for media and public. Additional duties included obtaining appropriate reviews and clearances for press releases, tracking media coverage and writing reports.

<sup>4</sup> Appellant also filed a schedule award claim on August 8, 2009.

<sup>5</sup> OWCP adjudicated this as a new claim.

switch among tasks. Appellant would be provided all assistive devices she required. She was given full access to all databases and resources. Ms. Flowers stated that appellant had not told her that she could not meet deadlines or that she worked with pain and, as far as she was aware, appellant was using the assistive software and other accommodating devices, and was able to perform her assigned tasks, although she continued to have a light workload. In December 2009, appellant volunteered to write an article for the monthly newsletter and, while she did not complete the story, this was due to difficulty connecting with an information source. Ms. Flowers stated that, with the exception of the above-mentioned article, appellant completed all assignments since her return to work in November 2009 and, in her January 27, 2010 performance review, she was given a "fully successful" rating but was told if she was not able to meet all deadlines in the next performance period, a performance improvement plan would be initiated. She also reported that appellant frequently missed work due to a variety of health issues and unfortunate occurrences and had applied for medical retirement. Ms. Flowers attached a sample of appellant's work and a position description.

By report dated January 7, 2010, Dr. Robert A. Harrell, Board-certified in internal medicine and rheumatology, diagnosed flexor tendinitis of the hands with carpal tunnel syndrome, osteoarthritis, fibromyalgia and a family history of rheumatoid arthritis. He noted that appellant went back to work in early November and was trying her best to avoid typing and that, while her hands were more stiff and sore, she had no major flare ups. Dr. Harrell provided examination findings, noted that appellant's hands continued to show thickening of flexor tendons, with bony enlargement of the distal interphalangeal joints. He reported tenderness of the trapezius muscles and medial and lateral epicondyles of the elbows and advised that the work situation was not ideal.

In May 2010 appellant's attorney requested a review of the written record. He asserted that appellant's position did not represent her wage-earning capacity because it was not a regular job. Counsel submitted a July 1, 2010 pleading asserting that the February 9, 2010 wage-earning capacity determination was in error because the position on which it was based consisted of makeshift work. In a June 9, 2010 letter, appellant described her assigned job duties. She stated that beginning on January 1, 2010 she had the sole responsibility for answering the telephones and public inquiries, and was then assigned researching and confirming staff changes that would result in web page updates. On March 5, 2010 appellant was assigned to cover for a staff member on maternity leave; at the end of March was assigned the task of editing the text of the monthly newsletter; in April 2010 she was assigned to work with another staff member to update specific web page content; in May was assigned responsibility for researching reports of broken links in the web site; and in June 2010 additional duties included editing transcripts, researching and rewriting web content for specific groups, coordinating web page updates, and editing codes. She asserted that the job she returned to in the fall of 2009 consisted of small, menial tasks that were changed regularly, and that when she was assigned meaningful tasks, these led to increased use of her hands. Appellant submitted a two-page February 2010 list of job duties performed, and a list of activities that were conducive to voice-activated software and tasks that were not. In a June 21, 2010 letter, she explained that each time her duties were changed, they became less demanding and were of limited interest and required little skill or knowledge. Appellant also provided a June 29, 2010 statement, identified as a mid-year review, and an employee performance plan for the period January 1 to December 31, 2010.

By report dated September 9, 2010, Dr. Harrell requested that appellant be excused from work for the period September 7 through 21, 2010 due to worsening of the severe tendinitis of her hands and arms. He stated that he was hopeful that a period of rest would improve her condition. Appellant retired on disability, effective October 8, 2010.

In an October 22, 2010 decision, an OWCP hearing representative affirmed the February 9, 2010 wage-earning capacity decision.<sup>6</sup>

### **LEGAL PRECEDENT**

Section 8115(a) of FECA 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.<sup>7</sup> 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.<sup>8</sup> The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision,<sup>9</sup> has been codified at 20 C.F.R. § 10.403. OWCP 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.<sup>10</sup>

### **ANALYSIS**

OWCP accepted that appellant sustained employment-related bilateral carpal tunnel syndrome and bilateral flexor tendinitis of the wrists. Appellant had bilateral carpal tunnel releases in April 2007, and she returned to her regular position as writer-editor in June 2009, initially working four hours daily. At that time she was provided with voice-activated software and an ergonomic chair. Appellant began full-time work on June 22, 2009. She again stopped work on August 8, 2009 but returned to her regular position as writer-editor on November 10, 2009.

The Board finds that appellant's actual earnings as a writer-editor with prescribed assistive devices fairly and reasonably represent her wage-earning capacity. Appellant returned to full-time work at her regular position on November 20, 2009 and was working in this position on February 9, 2010, the date OWCP 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

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<sup>6</sup> Appellant also submitted medical evidence relevant to her schedule award claim that continued to be developed by OWCP.

<sup>7</sup> 5 U.S.C. § 8115(a); *Loni J. Cleveland*, 52 ECAB 171 (2000).

<sup>8</sup> *Lottie M. Williams*, 56 ECAB 302 (2005).

<sup>9</sup> *Albert C. Shadrick*, 5 ECAB 376 (1953).

<sup>10</sup> 20 C.F.R. § 10.403(c).

seasonal or temporary and no evidence to show that she was not working eight hours a day.<sup>11</sup> There is also no evidence that the position consisted of makeshift work designed for her particular needs.<sup>12</sup> While appellant asserted that her job became less challenging, she provided several statements in which she described tasks that were within her position description.

The Board delineated factors of makeshift work in the case of *A.J.*, where the employee had actual earnings as a limited-duty clerk.<sup>13</sup> The Board reversed OWCP'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.<sup>14</sup>

The facts in evidence are distinguishable from *A.J.* The position relied upon by OWCP in rendering its February 9, 2010 decision was appellant's regular position as a writer-editor, which had a specific position description. The fact that appellant was provided voice-activated software and an ergonomic chair does not constitute evidence that the position was makeshift, nor is the fact that appellant felt that she was assigned duties that were less challenging. The Board concludes that the position of writer-editor on which the February 9, 2010 wage-earning capacity 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.<sup>15</sup>

Appellant's actual earnings in the position of writer-editor fairly and reasonably represent her wage-earning capacity. The Board must determine whether OWCP properly calculated her wage-earning capacity based on her actual earnings. The Board finds that OWCP properly determined that appellant had no loss of wage-earning capacity based on her actual earnings. The current weekly earnings of \$1,327.23 per week as a writer-editor exceeded the current weekly wages of the date-of-injury position of \$1,175.56. Appellant therefore had no loss of wage-earning capacity under the *Shadrick* formula.<sup>16</sup>

Appellant may request modification of the wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

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<sup>11</sup> *J.C.*, 58 ECAB 700 (2007).

<sup>12</sup> *Id.*

<sup>13</sup> *A.J.*, Docket No. 10-619 (issued June 29, 2010).

<sup>14</sup> *Id.*

<sup>15</sup> See *Loni J. Cleveland*, *supra* note 7.

<sup>16</sup> *Albert C. Shadrick*, *supra* note 9.

**CONCLUSION**

The Board finds that OWCP met its burden of proof to establish that appellant's actual wages as a writer-editor fairly and reasonably represented her wage-earning capacity.

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 22, 2010 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: September 9, 2011  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

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

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