

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

T.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Santa Clarita, CA, Employer**

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**Docket No. 12-1140
Issued: December 6, 2012**

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 April 30, 2012 appellant, through her attorney, filed a timely appeal of a March 30, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) determining her wage-earning capacity. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c)(1) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUE

The issue is whether OWCP properly reduced appellant's compensation benefits based on her actual earnings as an office receptionist and clerk effective July 25, 2011.

FACTUAL HISTORY

On February 8, 2008 appellant, then a 32-year-old temporary carrier, filed a traumatic injury claim alleging that she sustained a dog bite in the back of her left knee. OWCP accepted

¹ 5 U.S.C. § 8101 *et seq.*

this claim for open wound of the knee, leg and ankle on the left. Appellant underwent an arthroscopy and partial medial meniscectomy of the left knee on May 29, 2008.

In a letter dated June 16, 2009, the employing establishment informed appellant that she would be removed in 30 days due to her physical inability to meet the requirement of her position. It separated her effective October 19, 2008.

By decision dated November 10, 2009, OWCP accepted appellant's claim for a recurrence of disability on May 29, 2008. It also accepted a medial meniscal tear of the left knee.

In a report dated April 2, 2010, appellant's attending physician, Dr. Rama T. Pathi, a Board-certified orthopedic surgeon, recommended light-duty desk work only. OWCP referred appellant for vocational rehabilitation services on April 22, 2010. Appellant underwent vocational training through community college classes. She finished her class on May 16, 2011. Appellant sought employment beginning in June 2011.

Appellant began an assisted reemployment position on July 25, 2011 as an office receptionist and clerk. The vocational rehabilitation counselor noted that appellant enjoyed her job, but was standing more than she had anticipated.

By decision dated September 23, 2011, OWCP reduced appellant's compensation benefits based on her actual earnings as an office receptionist beginning July 25, 2011 earning \$380.00 per week. It found that she had performed in this position for more than 60 days and there was no evidence that the position was temporary.

In a vocational rehabilitation report dated September 26, 2011, the vocational rehabilitation counselor noted that on September 14, 2011 appellant expressed concerns about frequent requirements that she work in a separate office 91 miles away. This resulted in a reduction of appellant's hours as the employing establishment did not pay for travel time. The vocational rehabilitation counselor noted that the employing establishment received assisted reemployment funds based on her full-time work and that the employee was entitled to four more months of payments.

Appellant, through her attorney, requested an oral hearing before an OWCP hearing representative on October 3, 2011. In a letter dated January 10, 2012, the employing establishment informed her that due to lighter workdays and workloads her work schedule would be reduced to 18 hours a week. It ended appellant's insurance. Appellant was directed to report to the alternate work site every other Monday and was not to work on Wednesdays or Fridays.

Appellant testified at the oral hearing on January 12, 2012. She stated that she had worked full time at the employing establishment but presently worked less than full time with her private employer. Appellant stated that, beginning in December 2011, she worked 14 hours from December 16 through 31, 2011 and that she would be working similar hours in January 2012. She stated that one day a week every other week she was required to work in another office three hours from her home and was not allowed to work eight hours on that day as her drive time was not considered. Appellant stated that her hours were reduced due to a decrease in the number of patients.

By decision dated March 30, 2012, OWCP's hearing representative affirmed the September 23, 2011 decision. It was found that, although appellant's work hours were reduced in December 2011, the September 23, 2011 decision was appropriate when issued.

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty. Disability means the incapacity, because of an employment injury to earn the wages the employee was receiving at the time of injury. It may be partial or total.²

In determining compensation for partial disability the wage-earning capacity of an employee is determined by his or her actual earnings if his or her earnings fairly and reasonably represent his or her wage-earning capacity.³ Generally, wages actually earned are the best measure of a wage-earning capacity, and in the absence of evidence showing they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.⁴

ANALYSIS

OWCP accepted that appellant sustained a dog bite resulting in a medial meniscal tear of the left knee. Appellant began an assisted reemployment position on July 25, 2011 as an office receptionist and clerk. On September 14, 2011 she contacted the vocational rehabilitation counselor and reported that she was not working 40 hours a week as the employing establishment instructed her to work in a satellite office and did not compensate her for her travel time for 91 miles each way. On September 23, 2011 OWCP reduced appellant's compensation benefits based on her actual earnings as an office receptionist. It noted that she began working July 25, 2011 earning \$380.00 a week. In the September 23, 2011 decision, OWCP found that appellant had performed this position for more than 60 days and that there was no evidence that the position was temporary.

The Board finds that OWCP improperly reduced appellant's compensation on September 23, 2011 based on her actual earnings. Appellant began working as an office receptionist and clerk on July 25, 2011. She notified the vocational rehabilitation counselor that her hours had been reduced to less than 40 on September 14, 2011. The Board finds that the record does not reflect that appellant worked full time in her position for 60 days as required by OWCP's procedures.⁵ Moreover, OWCP did not consider whether the kind of appointment or tour of duty were at least equivalent to those of the job held on the date of injury. The record

² *Id.* at § 8102(a); 20 C.F.R. § 10.5(f).

³ *Id.* at § 8115.

⁴ *Elbert Hicks*, 49 ECAB 283 (1998).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (October 2009).

suggests that appellant's employment became less than full time and OWCP did not address this aspect of her work in the September 23, 2011 decision.⁶

CONCLUSION

The Board finds that OWCP improperly reduced appellant's compensation benefits based on its determination that her actual earnings as an office receptionist and clerk fairly and reasonably represented her wage-earning capacity.

ORDER

IT IS HEREBY ORDERED THAT March 30, 2012 decision of the Office of Workers' Compensation Programs is reversed.

Issued: December 6, 2012
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

⁶ D.C., Docket No. 12-76 (issued June 18, 2012).