

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

A.W., Appellant)	
)	
and)	Docket No. 13-453
)	Issued: August 12, 2013
DEPARTMENT OF VETERANS AFFAIRS,)	
VETERANS ADMINISTRATION MEDICAL)	
CENTER, Marion, IL, Employer)	

Appearances:
Appellant, pro se
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 December 18, 2012 appellant filed a timely appeal from the Office of Workers' Compensation Programs' (OWCP) merit decision dated October 24, 2012, which found that her actual earnings represented her wage-earning capacity. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether OWCP properly determined appellant's wage-earning capacity based on her actual earnings.

FACTUAL HISTORY

On April 26, 2010 appellant, then a 44-year-old psychiatric nursing assistant, sustained a neck, upper back, shoulder and arm injury while assisting a patient from the shower to a chair.

¹ 5 U.S.C. § 8101 *et seq.*

She stopped work on April 27, 2010 and worked intermittently thereafter. OWCP accepted the claim for right shoulder, upper arm and cervical sprain. It authorized surgery which was performed on December 7, 2010. At the time of her injury, appellant was a Level 4, Step 4 and her pay rate when she stopped work was \$30,928.00.

Appellant was initially treated by Dr. Dawn D. Lagerkvist, a Board-certified internist, for neck, arm and shoulder injuries sustained at work. Dr. Lagerkvist diagnosed neck and shoulder pain, radiculopathy and neuralgia. In an attending physician's report dated May 27, 2010, she diagnosed shoulder and neck pain with paresthesias and noted with a checkmark "yes" that appellant's condition was caused or aggravated by a work activity. Dr. Lagerkvist noted that appellant was able to return to work full-time limited duty and provided restrictions of no lifting.

On July 8, 2010 OWCP referred appellant's case to a field nurse to help with her return to work. The claims examiner noted that appellant returned to work on June 30, 2010 but stopped after seven hours due to pain.

A July 8, 2010 magnetic resonance imaging (MRI) scan of the cervical spine revealed multilevel cervical spondylosis and minimal disc bulge involving C2-3 through C6-7, mild-to-moderate spinal stenosis at C5-6, mild spinal stenosis and minimal disc bulges at C3-4 and C4-5 and C6-7 and mild narrowing and disc bulge of the right C5-6 and left C6-7. A March 7, 2011 cervical spine MRI scan revealed mild cervical spine degenerative changes at C4-5 and C6-7 on the right.

From August 16 to November 1, 2010, appellant was treated by Dr. Jeffrey K. Kachmann, a Board-certified neurosurgeon. After conservative treatment failed, Dr. Kachmann recommended surgery. On December 7, 2010 he performed an anterior cervical discectomy with decompression, interbody arthrodesis with an anterior cervical plate and diagnosed cervical spondylosis at C5-6. In reports dated January 10 to March 7, 2011, Dr. Kachmann noted appellant's complaints of axial neck and shoulder pain with shock sensations down her arm. He could not explain why she experienced pain and recommended a computerized tomography (CT) scan and an electromyogram (EMG). On April 25, 2011 Dr. Kachmann noted that an April 20, 2011 cervical spine CT scan and an April 20, 2011 EMG revealed no abnormalities with good incorporation of the interbody device without complication. He found that appellant could work full time with a lifting restriction of 40 pounds. In an April 25, 2011 work status report, Dr. Kachmann returned her to work with permanent restrictions of no lifting over 40 pounds. In a May 9, 2011 work capacity evaluation, he diagnosed sprain of the shoulder and upper right arm, sprain of the neck and displacement of the cervical intervertebral disc without myelopathy. Dr. Kachmann returned appellant to work with permanent restrictions of no lifting over 40 pounds.

On April 27, 2011 the employing establishment offered appellant a full-time limited-duty position as a modified nursing assistant from 7:30 a.m. to 4:00 p.m. with a salary of \$33,554.52. The position duties included: answering the telephone, receiving visitors to the office, assisting with simple office filing, collating materials, sorting and distributing mail and completing annual training requirements. The position was in compliance with the medical restrictions set forth by Dr. Kachmann of full-time work with no lifting over 40 pounds. Appellant accepted the position and began work on April 26, 2011.

In an informal loss of wage-earning capacity letter dated June 6, 2011, OWCP determined that appellant returned to work on April 26, 2011 as a Grade 5 Step 3 with an annual salary of \$33,554.00.² It determined that the current pay for the date-of-injury position as of May 23, 2011 was \$666.12 per week. OWCP determined that appellant had a wage-earning capacity of 97 percent.

Appellant was treated by Dr. Lagerkvist on May 11, 2011 who diagnosed chronic pain syndrome. On June 21, 2011 she was treated in the emergency room for chronic neck pain and paresthesia. An x-ray of the cervical spine revealed postoperative changes of anterior cervical fixation of C5-6, mild posterior subluxation of C5, C6 secondary to degenerative changes, no swelling or fracture seen with mild straightening of the normal cervical lordosis. Appellant was returned to limited-duty work after three days.

In a June 17, 2011 letter, the employing establishment advised OWCP that all nursing assistants were upgraded to a GS-5 and that appellant's current salary was a GS-5, Step 3, \$33,554.00.

In a June 26, 2011 medical case management closure report, the field nurse noted that appellant reported to work on April 26, 2011 with a permanent restriction of no lifting over 40 pounds. The nurse noted performing a work site visit on May 3, 2011 and appellant appeared to be doing well and working within her restrictions.

Appellant filed a Form CA-7 claim for compensation for the period June 21 to 24, 2011, for a total of 28 hours.

On July 19, 2011 OWCP referred appellant to Dr. Joseph Duncan, a Board-certified orthopedic surgeon. In a September 6, 2011 report, Dr. Duncan reviewed the medical records provided and examined appellant. He noted numbness of the anterior neck, pain on palpation of the right shoulder with mild restriction of range of motion, intact motor examination, no atrophy in the arm or forearm and negative Babinski and Spurling signs. Dr. Duncan diagnosed persistent arm pain, axial neck and trapezial pain secondary to degenerative disc disease of the cervical spine. He could not explain why appellant was having the problems she was currently experiencing as her nerve study was negative and she had normal postoperative studies. Dr. Duncan stated that she would have difficulty performing her normal duties as a psychiatric nursing assistant. He advised that appellant could return to full-time work with lifting restrictions of 40 pounds. In a work capacity evaluation, Dr. Duncan noted that she was able to work eight hours a day with her current restrictions of reaching above the shoulder limited to four hours, pushing, pulling and lifting limited to eight hours per day and limited to 40 pounds.

In a decision dated September 27, 2011, OWCP denied appellant's claim for compensation.

In a letter dated May 30, 2012, the employing establishment informed Dr. Kachmann that it identified a patient services assistant position which accommodated appellant's restrictions, which include working eight hours a day, with a 40-pound pushing, pulling and lifting limitation

² The employing establishment indicated that all nursing assistants were upgraded to a Grade 5 effective April 10, 2011.

and no reaching above the shoulder more than four hours per day. It requested that he review the specific duties as outlined in the position description and advise whether the assignment was suitable for appellant. In a June 7, 2012 letter, Dr. Kachmann found that the duties of the position were medically suitable.

On July 18, 2012 the employing establishment offered appellant a permanent full-time limited-duty job as a program support assistant, telephone advice clerk, GS-303-5 Step 4 with a salary of \$34,602.00, with pay retention. The physical requirements of the position were primarily sedentary; appellant may be asked to carry light to medium weight items such as reports, files or manuals and the position involved a high percentage of work on the telephone. The duties included answering telephone calls and screening and referring calls to the appropriate units; expediting patients appointments, requests for new appointments, cancellations and rescheduling by referring to personnel as necessary; utilizing computer technology to document calls; acting as a patient advocate; participating in data collection; participating in quality assurance activities; and addressing and mailing letters and other correspondence from the telephone care providers to the patient when required. The position was in compliance with the medical restrictions set forth by Dr. Kachmann and FECA referral physician, Dr. Duncan. Appellant accepted the position on July 18, 2012 and returned to work on August 12, 2012.

In a September 21, 2012 letter, OWCP noted that on July 18, 2012 appellant accepted and on August 12, 2012 began working a permanent modified position as a program support assistant, telephone advice clerk. Appellant had a fixed schedule Monday through Friday with no differential pay. OWCP noted that the position was rated as a GS-5, Step 4 at \$34,602.00 per year or \$665.42 per week. It advised that appellant had a 100 percent wage-earning capacity and she would be removed from the periodic rolls.

By decision dated October 24, 2012, OWCP found that appellant had been employed as a full-time modified program support assistant effective August 12, 2012, which was over 60 days with actual earnings of \$34,602.00 or \$665.42 per week. This was equivalent to the pay rate for the position she held at the time of her injury such that no loss of wages occurred. OWCP found that her actual earnings fairly and reasonably represented her wage-earning capacity. It advised that appellant remained entitled to medical benefits for her work-related condition.

LEGAL PRECEDENT

Section 8115(a) of FECA³ provides that 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.”⁴ OWCP’s procedures indicate that a determination regarding whether actual wages fairly and reasonably represent wage-earning capacity should be made after a claimant has been working in a given position for more than 60 days⁵ and OWCP may determine wage-earning capacity

³ 5 U.S.C. §§ 8101-8193.

⁴ *Id.* at § 8115(a).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (July 1997); see *William D. Emory*, 47 ECAB 365 (1996).

retroactively after claimant has stopped work,⁶ actual earnings will be presumed to fairly and reasonably represent wage-earning capacity only in the absence of contrary evidence.⁷

ANALYSIS

Appellant was a full-time psychiatric nursing assistant at the time of her injury on April 26, 2010. OWCP accepted her claim for shoulder, right upper arm and cervical sprain. It authorized surgery which was performed on December 7, 2010. Based on her medical release by Dr. Kachmann and Dr. Duncan, an OWCP referral physician, appellant returned to work on August 12, 2012, in a full-time limited-duty position as a program support assistant, telephone advice clerk. The position was GS-303, Level 5, Step 4 with retained pay. The employing establishment listed the details of the position including its duties. The physical requirements of the position were primarily sedentary, appellant may be asked to carry light to medium weight items such as reports, files or manuals with a high percentage of work on the telephone. The position was consistent with the medical restrictions set forth by Dr. Kachmann of full time, sedentary work, reaching above the shoulder limited to four hours, pushing, pulling and lifting limited to eight hours a day subject to a lifting restriction of 40 pounds. On June 7, 2012 Dr. Kachmann specifically noted that the duties of the position were medically suitable.

OWCP properly determined that appellant had actual earnings in her work as a modified program support assistant commencing August 12, 2012. Because appellant's actual earnings as a program support assistant were equal to the current pay rate of her date-of-injury position as a psychiatric nursing assistant, she was, by definition, no longer disabled for work.⁸ 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.⁹ OWCP determined that appellant's current position provided her with a wage-earning capacity equal to the wages of the position held at the time of her injury. The Board finds that the modified program support assistant position was consistent with her work restrictions and abilities. Appellant worked in the position for over 60 days. Her performance of this position in excess of 60 days is persuasive evidence that the position represents her wage-earning capacity.¹⁰ There is no evidence that the position was seasonal, temporary or make-shift work designed for appellant's particular needs.¹¹ OWCP properly determined that appellant had no loss of wage-earning capacity as her actual wages met the current pay rate for the position she held at the time of injury.¹²

⁶ *Id.* at Chapter 2.814.7(e) (July 1997).

⁷ *See Mary Jo Colvert*, 45 ECAB 575 (1994).

⁸ 20 C.F.R. § 10.5(f) (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).

⁹ *Dennis E. Maddy*, 47 ECAB 259 (1995).

¹⁰ *See supra* note 5.

¹¹ *Elbert Hicks*, 49 ECAB 283 (1998).

¹² *Gregory A. Compton*, 45 ECAB 154 (1993).

On appeal, appellant asserts that she experienced a lack of communication with OWCP, that there was poor management at the employing establishment and that her employer failed to mention permanent physical disability or an award based on permanent disability. The Board notes that the present appeal pertains to OWCP's wage-earning capacity determination. The evidence of record establishes that OWCP properly reduced appellant's wage-loss compensation to zero.

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

CONCLUSION

The Board finds that OWCP properly determined that appellant's actual earnings as a modified program support assistant fairly and accurately represented her wage-earning capacity.

ORDER

IT IS HEREBY ORDERED THAT the October 24, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 12, 2013
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