U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DEBORAH J. POWERS and U.S. POSTAL SERVICE,
AIRPORT MAIL FACILITY, San Francisco, CA

Docket No. 99-1435; Submitted on the Record;
Issued May 25, 2001

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly adjusted appellant's compensation to reflect her wage-earning capacity in the position of modified mailhandler.

The Office accepted appellant's claim for low back strain resulting from a June 11, 1991 employment injury. She worked intermittently since January 7, 1992, returning to limited duty for four hours a day on May 1, 1994 and on April 3, 1996, and stopped working on November 14, 1996.

In a report dated October 21, 1997, the second opinion physician, Dr. J.C. Pickett, a Board-certified orthopedic surgeon, considered appellant's history of injury, performed a physical examination and reviewed three magnetic resonance imaging (MRI) scans dated August 12, 1991, December 21, 1994 and January 10, 1997. He diagnosed protruding, possible extruding, nucleus pulposus at L4-4 and bulging disc with slight protrusion at L4-5. Dr. Pickett opined that appellant could work four hours a day and lift up to ten pounds.

By letter dated November 26, 1997, the employing establishment offered appellant the position of modified mailhandler which involved working four hours a day from 3:30 p.m. to 7:30 p.m., two hours of standing, two hours of sitting and no lifting more than ten pounds. The employing establishment gave appellant 10 days to respond.

On December 12, 1997 appellant signed her acceptance of the job offer, although she stated that she "was not happy" with it as she had done the job before and it had affected her back but she would give it another try.

By letter dated January 16, 1998, the Office informed appellant that the weight of the medical evidence represented by Dr. Pickett's opinion established that she could perform the job of modified mailhandler and it was available. It gave appellant 30 days to respond to the offer.

In a report dated April 7, 1998 as part of a pain management consultation, Dr. George F. Smith, a Board-certified internist, considered appellant's history of injury, performed a physical examination and reviewed the January 10, 1997 MRI scan, a bone scan dated February 27, 1998 and laboratory studies dated January 9, 1998. He diagnosed chronic lumbar sprain symptoms, MRI scan evidence of degenerative bulging of L3-4, and L5-S1 and a "question of psychological factors affecting pain response, including chronic depression." Dr. Smith opined that appellant was unable to work at all.

In a report dated March 13, 1998, appellant's treating physician, Dr. Alfredo F. Fernandez, a Board-certified orthopedic surgeon, stated that appellant had a significant exacerbation of her low back condition on March 9, 1998 performed a physical examination and opined that she had a recurrence of her chronic condition. He stated that appellant was temporarily totally disabled. In a report dated April 10, 1998, Dr. Fernandez stated that appellant remained totally disabled for at least six more weeks.

By letter dated April 29, 1998, the Office found that the additional medical evidence appellant submitted was not sufficient to outweigh Dr. Pickett's report that appellant could work part time with restrictions. The Office therefore stated that appellant had 15 days to accept the job offer.

Appellant began working as a modified mailhandler on May 19, 1998 and has continued to perform the position.

In a report dated June 26, 1998, Dr. Fernandez stated that appellant was working four hours a day and "appeared to be tolerating this regime." He recommended back and leg strengthening and conditioning for the next six months.

In his reports dated August 14, October 20 and November 17, 1998 and January 15, 1999, Dr. Fernandez stated that appellant should work from 3:30 p.m. to 7:30 p.m. instead of from 1:30 p.m. to 5:30 p.m. He stated that the change in work shift would reduce appellant's commute from 2 and 1/2 hours to 45 minutes as she then could avoid rush hour. Dr. Fernandez stated that the long commute on her current shift increased appellant's symptoms of discomfort and pain in her low back.

By decision dated January 28, 1999, the Office adjusted appellant's wage-earning capacity to reflect her earnings in the position of modified mailhandler. The Office found that appellant had been working as a modified mailhandler since May 19, 1998, that the job was within appellant's physical restrictions as she worked four hours a day and did not have to lift more than ten pounds and that there was no evidence the job was temporary, part time or seasonal.

Under section 8115(a) of Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent his or her wage-earning capacity or if the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, his or her usual employment, age, qualifications for other employment, the

availability of suitable employment, and other factors and circumstances which may affect wage-earning capacity in his or her disabled condition.[1] Finally, application of the principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.[2] The basic rate of compensation paid under the Act is 66 2/3 percent of the injured employee's monthly pay.

Once an employee's loss of wage-earning capacity is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was, in fact, erroneous.[3] The burden of proof is on the party attempting to show modification of the award.

In this case, the Office found that appellant's actual wages as a modified mailhandler fairly and reasonably represented appellant's wage-earning capacity and therefore relied on those wages in determining appellant's compensation. The job of modified mailhandler which required four hours of work each day, two hours of standing, two hours of sitting and no lifting over ten pounds was within appellant's physical restrictions set by Dr. Pickett that appellant could work four hours a day and not lift over ten pounds. At the time of the Office's decision, appellant had been working as a modified mailhandler for more than six months and as the Office noted, there was no evidence that the job was seasonal or temporary. The Office, however, did not consider Dr. Fernandez's opinion in his August 14, October 20 and November 17, 1998 and January 15, 1999 reports that appellant's four-hour shift should be changed so that she could avoid commuting in rush hour traffic which increased her symptoms of discomfort and pain in her low back.[4] Although the Office is required to make findings on all relevant facts,[5] its error to fail consider Dr. Fernandez's opinion that the timing of appellant's work shift should be changed is harmless because appellant continued to perform her job for over six months and Dr. Fernandez's opinion does not establish that there was a material change in the nature and extent of the injury-related condition or that the original determination was

[1] *See Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); *petition for recon. denied*, (Docket No. 92-118, issued February 11, 1993*); see also* 5 U.S.C. § 8115(a).

[2] *Dorothy Lams*, 47 ECAB 584 (1996); *Albert C. Shadrick*, 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.303.

[3] *Don J. Mazurek*, 46 ECAB 447, 451-52 (1995); *Sue A. Segwick*, 45 EAB 211, 215-16 (1993).

[4] Since the job description of modified mailhandler stated that appellant would work from 3:30 p.m. to 7:30 p.m., appellant was apparently working a different four-hour shift than stated in the job description.

[5] *See* 5 U.S.C. § 10.126.

erroneous.[6] Appellant has, therefore, not shown that modification of the Office's determination of her wage-earning capacity is warranted.[7]

The January 28, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
May 25, 2001

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member

[6] *See, e.g.*, *Monique L. Love*, 48 ECAB 378, 379-80 (1997).

[7] The Board need not address appellant's contention on appeal challenging the amount of the award as she did not raise the issue before the Office. *See George A. Hirsch*, 47 ECAB 520, 526 (1996); *John F. Dunleavy*, 45 ECAB 891, 892 (1994).