United States Department of Labor
Employees' Compensation Appeals Board

MICHAEL A. DAVIS, Appellant	)	
and	)	**Docket No. 03-2149**
	)	**Issued: February 18, 2004**
U.S. POSTAL SERVICE, GENERAL MAIL FACILITY, Cleveland, OH, Employer	)	

Appearances:
Michael A. Davis, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On August 25, 2003 appellant filed a timely appeal from a January 31, 2003 merit decision of the Office of Workers' Compensation Programs and a May 28, 2003 nonmerit decision of the Office. Under 20 C.F.R. §§ 501.2(c), 501.3, the Board has jurisdiction over this case. The Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly determined that appellant's actual wages as a modified mail handler fairly and reasonably represented his wage-earning capacity effective December 10, 2001; and (2) whether the Office properly refused to reopen appellant's claim for further review of the merits under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On November 29, 1988 appellant, then a 33-year-old mail handler, filed a traumatic injury claim, alleging that on November 28, 1988 he sustained twisting injuries to his left knee and ankle while dumping a tray of rejects in the performance of duty. Appellant did not stop

work until December 29, 1988 and returned to full-time work with restrictions on January 4, 1989. On February 14, 1989 the Office accepted appellant's claim for left ankle and left knee sprains and subsequently expanded its acceptance to include left ankle chondromalacia. Appellant underwent left knee arthroscopic surgery in 1989 and left ankle arthroscopy in 1991. The Office authorized the surgical procedures and paid appropriate compensation benefits for all associated periods of disability. Effective September 12, 1995, appellant accepted a permanent rehabilitation job offer as a full-time modified mail handler. In a decision dated December 18, 1995, the Office reduced appellant's compensation benefits based on his actual wages as a modified mail handler. Appellant stopped work on August 20, 1999 in order to undergo additional left ankle surgery and returned to work on November 15, 1999. The surgery and associated periods of disability were authorized by the Office. Appellant missed intermittent time from work between November 15, 1999 to August 2, 2001, when he again underwent left ankle surgery, authorized by the Office and was returned to the compensation rolls for payment of total disability compensation.

On December 10, 2001 appellant returned to his regular modified mail handler position, eight hours a day. On December 12, 2001, however, appellant began working only six hours a day in accordance with the restrictions of Dr. Edward Gabelman, his treating Board-certified orthopedic surgeon. On May 28, 2002 the Office referred appellant to Dr. Alan H. Wilde, a Board-certified orthopedic surgeon, for a second opinion. In his reports dated June 18, 2002, Dr. Wilde opined that appellant was capable of performing the duties of a modified mail handler, eight hours a day. On July 3, 2002 the Office found a conflict in medical opinion to exist between Drs. Gableman and Wilde, on the issue of whether appellant was capable of performing his modified mail handler position for eight hours a day and referred appellant for examination by independent medical examiner, Dr. Robert C. Corn, a Board-certified orthopedic surgeon. In his report dated October 21, 2002, Dr. Corn listed his impression as chronic residuals of a left knee and ankle sprain, status post multiple arthroscopic surgeries with post-traumatic chondromalacia probably due to the residual instability and stated:

> "The patient has continued to work with the same restrictions since December 10, 2001. These restrictions are as follows: No climbing, kneeling, bending, or stooping; lifting is not to exceed 10 pounds. The work duties are performed while sitting in a chair. Standing and walking to be used for personal convenience. Patching torn letters and flats, removing rubber bands from letters and placing in trays, sorting flats. Other administrative duties include answering a telephone, making photocopies and performing light housekeeping. I do believe that the [appellant] is able to continue at this point at this particular level. I do not believe that the restrictions should be changed strictly on a medical basis. The biggest problem seems to be with his left ankle. The prolonged standing and walking and after six hours, the ankle begins to swell rather significantly. I do believe it is inappropriate to push his limitations to the point where he is uncomfortable and needs to take excessive medication for pain. It is my opinion, that these modifications and work restrictions should be permanent. He is able to work on a 6-hour day basis. I do not believe that these are temporary. Increasing his activity level primarily standing and lifting and allowing him to work more than the six hours, will cause increasing difficulty and pain and may necessitate

further invasive treatment. I believe these restrictions should be permanent in nature."

By decision dated January 31, 2003, the Office determined that appellant had been reemployed on December 10, 2001 as a modified mail handler, six hours a day, at a wage of $599.58 per week, including night differential pay. The Office found that this position fairly and reasonably represented his wage-earning capacity and adjusted his compensation accordingly, effective December 10, 2001.

By letter dated March 20, 2003, appellant requested reconsideration of the Office's January 31, 2003 wage-earning capacity decision, asserting that the Office had improperly adjusted his compensation. In a decision dated May 28, 2003, the Office denied appellant's request for reconsideration on the grounds that the request neither raised substantive legal questions nor included new and relevant evidence and, therefore, was insufficient to warrant review of the prior decision.

LEGAL PRECEDENT -- ISSUE 1

It is well established that, once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.[1] After it has determined that an employee has a disability causally related to his or her federal employment, the Office may not reduce compensation without establishing that the disability ceased or that it is no longer related to the employment.[2] Section 8115(a) of the Federal Employees' Compensation Act[3] provides that in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity.[4] While wages actually earned are the best measure of a wage-earning capacity, this is only true if the evidence shows that the actual wages fairly and reasonably represent a claimant's wage-earning capacity. The Board has held that actual earnings do not fairly and reasonably represent a claimant's wage-earning capacity where the actual earnings are derived from a make-shift or sporadic position designed for appellant's particular needs.[5] The Office procedures specifically direct a claims examiner to consider factors such as part time, seasonal or temporary work, when determining whether the position fairly and reasonably represents a claimant's wage-earning capacity.[6] After the Office determines that appellant's actual earnings fairly and reasonably represent his or her wage-earning capacity,

[1] *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[2] *Id.*

[3] 5 U.S.C. §§ 8101-8193.

[4] 5 U.S.C. § 8115(a); *Roberta R. Moncrief*, 52 ECAB 418 (2001).

[5] *See Stanley B. Plotkin*, 51 ECAB 700 (2000); *Monique L. Love*, 48 ECAB 378 (1997); *William D. Emory*, 47 ECAB 365 (1996).

[6] *William D. Emory*, *supra* note 5; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (July 1997).

application of the principles set forth in the *Albert C. Shadrick*[7] decision will result in the percentage of the employee's wage-earning capacity.[8] This has been codified by regulation at 20 C.F.R. § 10.403. Section 10.403(d) provides that the employee's wage-earning capacity in terms of percentage is obtained by dividing the employee's actual earnings by the current pay rate for the job held at the time of injury.[9] The Office 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 days.[10]

ANALYSIS -- ISSUE 1

In the instant case, appellant returned to work as a modified mail handler on December 10, 2001 and began working six hours a day in this position on December 12, 2001. Therefore, appellant had been working the requisite 60 days when the Office determined his wage-earning capacity on January 31, 2003. The modified mail handler position was permanent and there is no evidence in the record that the position constituted sporadic, seasonal, temporary or make-shift work. While the modified mail handler position is part time, being only six hours a day and appellant had worked full time prior to stopping work to undergo surgery on August 2, 2001 the Office exercised its discretion to find that, under the facts of this case, the position nonetheless fairly and reasonably represented appellant's wage-earning capacity, given the fact that Dr. Corn, the impartial medical examiner, opined that appellant was permanently restricted from working more than six hours a day, due to residuals of his accepted conditions. The Board, therefore, finds that the Office properly determined that appellant's position as a part-time modified mail handler fairly and reasonably represents his wage-earning capacity.

In determining the wage-earning capacity based on actual earnings, as developed in the *Shadrick* decision, the Office first calculates the employee's wage-earning capacity in terms of a percentage by dividing actual earnings by current date-of-injury pay rate. In the instant case, the Board finds that the Office properly used appellant's actual earnings of $599.58 per week and a current pay rate for the job held at the time of his August 2, 2001 recurrence of disability of $659.12 per week to determine that he had a 91 percent wage-earning capacity.[11] The Office

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[7] *Albert C. Shadrick*, 5 ECAB 376 (1953).

[8] *Ronald Litzler*, 51 ECAB 588 (2000); *Albert C. Shadrick*, *supra* note 7.

[9] 20 C.F.R. § 10.403(d) (1999); *see Afegalai L. Boone*, 53 ECAB ____ (Docket No. 01-2224, issued May 15, 2002).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (July 1997); *see Ronald Litzler*, *supra* note 8.

[11] "Pay Rate for Compensation Purposes," defined at 5 U.S.C. § 8101(4), is the greater of the employee's pay as of the date of injury, the date disability begins, or the date of recurrence of disability if more than six months after returning to work. "Current Pay Rate" is defined as the current, or updated, salary or pay rate for the job the employee held at the time of injury. "Earnings" is defined as the employee's actual earnings, or the salary or pay rate of the job selected as representative of his or her wage-earning capacity. *Carlos Perez*, 50 ECAB 493 (1999). In determining the current pay rate for appellant's date-of-recurrence job, as well as his current actual earnings, the Office properly included premium pay consisting of appellant's night differential pay. *See* 5 U.S.C § 8114(e); Federal (FECA) Procedure Manual, Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates: Elements Included in Pay Rate*, Chapter 2.900.7(b)(1) (April 2002).

then multiplied appellant's pay rate at the time of his recurrence of disability, $777.90, by the 91 percent wage-earning capacity percentage. The resulting figure of $707.88 was then subtracted from appellant's date-of-recurrence pay rate of $777.90, which provided a loss of wage-earning capacity of $70.02. The Office then multiplied this amount by the appropriate compensation rate of 75 percent, to yield $52.52, or $210.08 every four weeks. The Board, therefore, finds that the Office properly determined that appellant's actual earnings fairly and reasonably represent his wage-earning capacity and the Office properly reduced appellant's compensation in accordance with the *Shadrick* formula.

LEGAL PRECEDENT -- ISSUE 2

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.[12] Section 10.608(b) provides that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[13]

ANALYSIS -- ISSUE 2

In his letter requesting reconsideration, appellant asserted that the Office erred in computing his compensation using his pay rate at the date of his original November 28, 1988 injury. He further stated that he did not understand how his wage-earning capacity could be calculated to be 91 percent, when he was only earning 75 percent of his wages. While appellant's letter makes it clear that he does not understand how the Office arrived at its wage-earning capacity determination, which in fact was based on appellant's date-of-recurrence pay rate and not on his original November 28, 1988 pay rate, appellant did not allege or demonstrate that the Office erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2). In addition, as appellant did not submit any new evidence in support of his request for reconsideration, he is not entitled to a review of the merits of his claim based on the third above-noted requirement under section 10.606(b)(2).

As appellant has failed to show that the Office erroneously applied or interpreted a point of law, to advance a point of law or fact not previously considered by the Office or to submit

[12] 20 C.F.R. § 10.606(b)(2) (1999).

[13] 20 C.F.R. § 10.608(b) (1999).

relevant and pertinent new evidence not previously considered by the Office, the Office properly refused to reopen appellant's claim for a review on the merits.

CONCLUSION

The Board finds that the Office properly determined that appellant's actual wages as a modified mail handler fairly and reasonably represent his wage-earning capacity. The Board further finds that with respect to the Office's May 28, 2003 decision denying reconsideration, the Office properly refused to reopen appellant's case for merit review under 20 C.F.R. § 10.608.

ORDER

IT IS HEREBY ORDERED THAT the May 28 and January 31, 2003 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 18, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member