

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

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CATHY JEMISON, Appellant )

and )

U.S. POSTAL SERVICE, GENERAL MAIL )  
FACILITY, Cleveland, OH, Employer )

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**Docket No. 04-925  
Issued: July 15, 2004**

*Appearances:*

*Fred D. Middleton Jr., Esq., for the appellant  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Member  
DAVID S. GERSON, Alternate Member  
MICHAEL E. GROOM, Alternate Member

**JURISDICTION**

On February 24, 2004 appellant's counsel filed a timely appeal of the December 16, 2003 merit decision of the Office of Workers' Compensation Programs, which determined her wage-earning capacity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of appellant's claim.

**ISSUE**

The issue is whether appellant's actual earnings as a distribution clerk fairly and reasonably represents her wage-earning capacity effective May 15, 2002.

**FACTUAL HISTORY**

On January 30, 2001 appellant, then a 42-year-old part-time limited-duty distribution clerk, filed an occupational disease claim alleging that she sustained injuries to her left upper

extremity while casing and holding mail on or about January 29, 2001.<sup>1</sup> The Office accepted appellant's claim for a left shoulder and forearm strain, left shoulder impingement syndrome, left shoulder rotator cuff tear and left elbow epicondylitis. The Office authorized left shoulder surgery, which appellant underwent on August 15, 2001.<sup>2</sup> Appellant received appropriate wage-loss compensation. On May 15, 2002 appellant returned to limited duty as a distribution clerk, working six hours per day.<sup>3</sup>

Dr. Sheldon Kaffen, a Board-certified orthopedic surgeon and Office referral physician, examined appellant on May 31, 2002. In a report dated June 7, 2002, he found no objective evidence to support the continued presence of the accepted left upper extremity conditions. Absent objective findings, Dr. Kaffen stated that appellant was able to return to the duties she performed prior to her January 29, 2001 injury.

In a report dated June 29, 2002, Dr. Robert M. Fumich, a Board-certified orthopedic surgeon and appellant's treating physician, advised that appellant had reached maximum medical improvement in May 2002 and that she had permanent restrictions in limiting overhead work and a 15-pound weight restriction when carrying and lifting with her left upper extremity. The record indicates that appellant returned to modified duty on May 15, 2002.

The Office determined that a conflict of medical opinion existed as to appellant's residual disability and capacity for work, based on the opinions of Drs. Kaffen and Fumich. In a December 11, 2002 report, Dr. Alan H. Wilde, a Board-certified orthopedic surgeon and impartial medical examiner, concurred with Dr. Fumich's physical restrictions regarding lifting of no more than 15 pounds and no work reaching above the shoulder.

In a decision dated December 16, 2003, the Office found that appellant's actual earnings in the limited-duty position as a distribution clerk, with weekly earnings of \$601.20, fairly and reasonably represented her wage-earning capacity effective May 15, 2002. In determining that the position was medically suitable, the Office relied on the impartial medical examiner's December 11, 2002 report.

### **LEGAL PRECEDENT**

Under section 8115(a) of the 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 wage-earning capacity.<sup>4</sup> Generally, wages actually earned are the best

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<sup>1</sup> Appellant had an accepted claim for a left knee condition (A09-0447232). When she filed her claim for the left upper extremity condition, appellant was working 6 hours per day or 30 hours a week as a modified distribution clerk because of limitations arising from her accepted knee condition. She earned \$538.80 in weekly wages and received compensation for two hours of disability per day.

<sup>2</sup> Appellant stopped work on July 16, 2001 pending surgery on August 15, 2001.

<sup>3</sup> The hourly limitation was an accommodation for appellant's accepted knee condition. Her left upper extremity condition did not preclude full-time employment.

<sup>4</sup> 5 U.S.C. § 8115(a); *see Loni J. Cleveland*, 52 ECAB 171, 176-77 (2000).

measure of a wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.<sup>5</sup> The actual earnings in the position are compared with the current wages of the date-of-injury position to determine loss of wage-earning capacity.<sup>6</sup>

### ANALYSIS

Appellant's limited-duty assignment as a distribution clerk, which she began on May 15, 2002, is consistent with the permanent restrictions identified by both the impartial medical examiner and her treating physician, Dr. Fumich. Appellant's counsel argues that the position is not appropriate because it requires casing mail, which Dr. Fumich prohibited appellant from performing. While Dr. Fumich noted in a May 14, 2002 report that appellant had permanent restrictions of no casing mail, he did not impose that specific limitation in his more recent June 29, 2002 report. More importantly, Dr. Wilde, the impartial medical examiner, did not preclude the casing of mail. As his report constitutes the weight of medical opinion, it does not establish that appellant's modified duty does not conform to Dr. Wilde's restrictions. Counsel also contends that appellant has not worked since May 20, 2002 when the employing establishment reportedly told her it could not accommodate her restrictions. This allegation is unsubstantiated and contrary to the evidence of record. The employing establishment advised the Office on December 12, 2003 that it had been honoring appellant's permanent restrictions and would continue to honor her restrictions with respect to both her left upper and left lower extremity conditions.

From May 15, 2002 to the time the Office issued its decision on December 16, 2003, appellant had worked as a distribution clerk approximately a year and a half. Her performance of this position in excess of 60 days is persuasive evidence that actual wages in the position represents her wage-earning capacity.<sup>7</sup> Moreover, there is no evidence that the position of distribution clerk was seasonal, temporary or make-shift work designed for appellant's particular needs.<sup>8</sup> Appellant's weekly earnings as a part-time distribution clerk beginning May 15, 2002 (\$601.20) equaled the weekly wages of her date-of-injury position (\$538.80) and, therefore, she had no loss of wage-earning capacity under the *Shadrick* formula.<sup>9</sup> Accordingly, the Office properly determined that her actual wages fairly and reasonably represented her wage-earning

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<sup>5</sup> *Loni J. Cleveland*, *supra* note 4.

<sup>6</sup> *Albert C. Shadrick*, 5 ECAB 376 (1953).

<sup>7</sup> Office procedure provides that a determination regarding whether actual earnings fairly and reasonably represent wage-earning capacity should be made after an employee has been working in a given position for more than 60 days. See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1993).

<sup>8</sup> *Elbert Hicks*, 49 ECAB 283 (1998).

<sup>9</sup> *Albert C. Shadrick*, *supra* note 6. Appellant's inability to work full time is a function of her accepted left knee condition and, therefore, it is not compensable under the present claim. She remains entitled to compensation for two hours of disability per workday.

capacity effective May 15, 2002. The Office properly determined that appellant had no loss of wage-earning capacity.<sup>10</sup>

**CONCLUSION**

The Board finds that the actual earnings of distribution clerk with weekly earnings of \$601.20 fairly and reasonably represents appellant's wage-earning capacity.

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 16, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 15, 2004  
Washington, DC

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member

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<sup>10</sup> *Monique L. Love*, 48 ECAB 378 (1997).