

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

HELEN R. SELPH, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Warner Robins, GA, Employer**

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**Docket No. 05-1680
Issued: November 18, 2005**

Appearances:
Helen R. Selph, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 3, 2005 appellant timely filed a timely appeal from a May 24, 2005 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, the Board has jurisdiction over the merits of this claim.

ISSUE

The issue is whether appellant's actual earnings as a modified mail processing clerk fairly and reasonably represents her wage-earning capacity effective November 27, 2004.

FACTUAL HISTORY

On November 21, 2002 appellant, then a 57-year-old distribution clerk, filed an occupational disease claim alleging that her back, right shoulder blade, right arm and right knee hurt when she had to push or lift equipment. The Office accepted her claim for cervical spondylolysis and radiculopathy of the right arm. The Office authorized an anterior cervical discectomy fusion at C6-7, which appellant underwent on May 16, 2003. She received

appropriate wage-loss compensation. Appellant returned to four hours of modified work on September 8, 2003 and eventually worked up to full-time modified work.

In a January 16, 2004 letter, the Office requested that appellant's treating physician, Dr. Todd E. Kinnebrew, a Board-certified orthopedic surgeon, clarify her current medical status and disability. In a February 2, 2004 work capacity evaluation form, OWCP-5c, Dr. Kinnebrew opined that appellant had not yet reached maximum medical improvement. He advised that she was capable of working eight hours a day with restrictions. These restrictions included no overhead work, no pushing or pulling more than 15 pounds, no lifting more than 10 pounds and limitations on reaching and climbing.

On June 8, 2004 appellant underwent a functional capacity evaluation.¹ In a report of the same date, Keith Blankenship, a physical therapist, advised that appellant was able to work at a light level with no overhead work with right arm and no more than 10 to 15 pounds of force. Bending, kneeling and stair climbing limitations were noted. On June 22, 2004 Dr. Kinnebrew signed the June 8, 2004 functional capacity evaluation indicating that he agreed with appellant's work restrictions. Dr. Kinnebrew also evaluated appellant on June 29, 2004 and released her in accordance with the functional capacity evaluation.

In a September 3, 2004 letter, the employing establishment offered appellant the position of modified mail processing clerk effective September 11, 2004. The duties of the position consisted of casing manual letters and flats; throwing small parcels and rolls; boxing mail; working undeliverable bulk business mail; and other duties as assigned with restrictions declared by the attending physician. The physical requirement of the position was listed as: lifting: ¼ to 10 pounds for 6 to 8 hours; standing up to 6 hours; simple grasping 4 to 5 hours; occasional bending/kneeling; up to 2 hours of walking; use of both hands; no squatting and no overhead work with right arm -- should be performed with left arm.

On November 15, 2004 appellant accepted the modified mail processing clerk position. Effective November 27, 2004, appellant was permanently assigned to the modified mail processing clerk position. The employing establishment advised the Office that the offered job had a weekly pay rate of \$855.69, the same amount as the current pay rate for date-of-injury position.

By decision dated May 24, 2005, the Office found that appellant's actual earnings in the modified mail processing clerk position, with weekly earnings of \$855.69, fairly and reasonably represented her wage-earning capacity effective November 27, 2004.

¹ Appellant additionally underwent an impairment rating evaluation on June 8, 2004. On September 15, 2004 she filed a schedule award claim. The Board notes that no final decision has been issued on this aspect of her claim.

LEGAL PRECEDENT

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction in such benefits.²

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 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 that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.⁴ 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.⁵

ANALYSIS

Appellant's permanent assignment as a modified mail processing clerk position, which she began on November 27, 2004, is consistent with the permanent restrictions identified by Dr. Kinnebrew, her treating physician. He noted the June 8, 2004 functional capacity evaluation provided by Mr. Blakenship, a physical therapist, and returned appellant to work within the specified restriction.

As of November 27, 2004, appellant worked as a modified mail processing clerk, approximately six months. Her performance of this position in excess of 60 days is persuasive evidence that actual wages in the position represents her wage-earning capacity.⁶ There is no evidence that the position of modified mail processing clerk was seasonal, temporary or make-shift work.⁷ Appellant's weekly earnings as a modified mail processing clerk beginning November 27, 2004 (\$855.69) equaled the current weekly wages of her date-of-injury position (\$855.69).⁸ Therefore, she has no loss of wage-earning capacity under the *Shadrick* formula.⁹

² *Francisco Bermudez*, 51 ECAB 506 (2000).

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

⁴ *Loni J. Cleveland*, *supra* note 3.

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

⁶ 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). See also *Linda K. Blue*, 53 ECAB 653 (2002).

⁷ *Elbert Hicks*, 49 ECAB 283 (1998).

⁸ Effective July 19, 2004, the current pay rate for appellant's date of injury job was \$855.69. When appellant started her modified mail processing clerk position approximately four months later on November 27, 2004, she was earning the same pay rate of \$855.69 as that of the current pay rate for her date-of-injury position.

⁹ *Albert C. Shadrick*, *supra* note 5. Appellant remains entitled to medical benefits needed to treat her accepted, work-related injury condition.

The Office properly determined that her actual wages fairly and reasonably represent her wage-earning capacity effective November 27, 2004. The Office properly determined that appellant had no loss of wage-earning capacity and reduced her compensation accordingly.¹⁰

CONCLUSION

The Board finds that the actual earnings of modified mail processing clerk position with weekly earnings of \$855.69 fairly and reasonably represents appellant's wage-earning capacity.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated May 24, 2005 is affirmed.

Issued: November 18, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

¹⁰ *Monique L. Love*, 48 ECAB 378 (1997).