United States Department of Labor
Employees' Compensation Appeals Board

GAIL SIMMONS, Appellant	)	
and	)	**Docket No. 06-30**
	)	**Issued: March 8, 2006**
U.S. POSTAL SERVICE, MAIN POST OFFICE, New Orleans, LA, Employer	)	

Appearances:
Gail Simmons, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 5, 2005 appellant filed a timely appeal of a June 29, 2005 merit decision of the Office of Workers' Compensation Programs that modified its July 23, 2003 determination of her loss of wage-earning capacity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUE

The issue is whether the Office properly modified its July 23, 2003 determination of appellant's wage-earning capacity.

FACTUAL HISTORY

On September 9, 2001 appellant, then a 41-year-old mail processing clerk, filed a claim for compensation for an occupational disease of cubital tunnel syndrome, entrapment neuropathy of the right ulnar nerve and bilateral C6-7 radiculopathy. She attributed these conditions to her duties of patching mail, labeling envelopes, folding letters and sealing and stuffing envelopes eight hours a day. She continued work at that time.

The Office accepted that appellant sustained bilateral entrapment neuropathy and bilateral radiculopathy in the performance of duty. It paid compensation for partial disability on September 21, 2002, when she reduced her work hours per day from eight to six, as recommended by her attending orthopedic surgeon, Dr. Windsor S. Dennis.

By decision dated July 23, 2003, the Office found that appellant was disabled for the job she held on the date of injury, but that her actual earnings in the limited-duty position she performed six hours per day since September 21, 2002, fairly and reasonably represented her wage-earning capacity. It continued payment of compensation for partial disability.

In response to a March 3, 2005 Office inquiry, Dr. Dennis submitted March 14 and 18, 2005 reports of appellant's work tolerance limitations indicating that she could work eight hours per day. On March 14, 2005 appellant increased the hours per day she worked limited duty from six to eight.

By letter dated May 25, 2005, the Office notified appellant that it proposed to modify her compensation for wage loss for the reason that she had rehabilitated herself by improving her physical condition such that she could work eight hours per day as a limited-duty mail processing clerk, which fairly and reasonably represented her wage-earning capacity. As her pay in this position exceeded the current pay rate for the job she held when injured, the Office proposed to terminate appellant's compensation for wage loss.

By decision dated May 31, 2005, the Office terminated appellant's compensation for wage loss effective March 14, 2005 on the basis that her actual earnings met or exceeded the current wages of the job held when injured. By decision dated June 29, 2005, the Office modified its July 23, 2003 determination of appellant's wage-earning capacity; effective March 14, 2005 on the basis that her position as a full-time limited-duty mail processor fairly and reasonably represented her wage-earning capacity.

LEGAL PRECEDENT

In Ronald M. Yokota, the Board stated:

> "Once the wage-earning capacity of an injured employee is properly determined, it remains undisturbed regardless of actual earnings or lack of earnings. 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. The burden is on the Office to establish that there has been a change so as to affect the employee's capacity to earn wages in the job determined to represent his earning capacity. Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn and not on actual wages lost."[1]

[1] *Ronald M.* Yokota, 33 ECAB 1629 (1982).

The Office's procedure manual provides guidelines as to the modification of loss of wage-earning capacity:

> "c. Increased Earnings. It may be appropriate to modify the rating on the grounds that the claimant has been vocationally rehabilitated if one of the following two circumstances applies:
>
> > (1) The claimant is earning substantially more in the job for which he or she was rated. This situation may occur where a claimant returned to part-time duty with the employing agency and was rated on that basis, but later increased his or her hours to full-time work.
> >
> > (2) The claimant is employed in a new job (*i.e.*, different from the job for which he or she was rated) which pays at least 25 percent more than the current pay of the job for which the claimant was rated.
>
> "d. [Claims Examiner] Actions. If these earnings have continued for at least 60 days, the CE [claims examiner] should:
>
> > (1) Determine the duration, exact pay, duties and responsibilities of the current job.
> >
> > (2) Determine whether the claimant underwent training or vocational preparation to earn the current salary.
> >
> > (3) Assess whether the actual job differs significantly in duties, responsibilities, or technical expertise from the job at which the claimant was rated.
>
> "e. If the results of this investigation establish that the claimant is rehabilitated, or if the evidence shows that the claimant was retrained for a different job, compensation may be redetermined using the *Shadrick* formula."[2]

ANALYSIS

By decision dated July 23, 2003, the Office determined that appellant's actual earnings as a limited-duty part-time mail processor position fairly and reasonably represented her wage-earning capacity effective September 21, 2002. Between that date and the Office's June 29, 2005 decision modifying the July 23, 2003 determination of her wage-earning capacity, the only change in appellant's employment status was an increase in her number of hours of work per day from six to eight on March 14, 2005, thereby earning more wages. She underwent no training or vocational preparation, and her duties did not change.

An increase in pay, by itself, is not sufficient evidence that there has been a change in an employee's capacity to earn wages.[3] Without a showing of additional qualifications obtained by

[2] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11(c)-(e) (June 1996, July 1997).

[3] *Penny L. Baggett*, 50 ECAB 559 (1999); *Odessa C. Moore*, 46 ECAB 681 (1995).

appellant through retraining, it is improper to make a new loss of wage-earning capacity determination based on increased earnings.[4] As indicated in the Office's procedure manual, quoted above, it "may be appropriate to modify" the wage-earning capacity determination on the grounds that the claimant has been vocationally rehabilitated if he or she increases his or her part-time hours to full time. Prior to such modification, however, the Office is required to determine the duration, exact pay, duties and responsibilities of the new job; determine whether the claimant underwent training or vocational preparation to earn the current salary; and assess whether the actual job differs significantly in duties, responsibilities, or technical expertise from the job at which the claimant was rated.[5]

In this case, the Office determined that appellant's pay had increased due to the increase in the number of hours she worked, but did not demonstrate that she underwent any training or vocational preparation, or that her full-time job differed significantly in duties, responsibilities or technical expertise from the part-time job at which she was initially rated. As the case record does not show any retraining or other rehabilitation or a significantly different job, the Office did not meet its burden of proof to modify her July 23, 2003 wage-earning capacity determination.

This does not mean, however, that appellant is entitled to continuing wage-loss compensation. Rather, the Office should apply the *Shadrick* formula to the wages received for the number of hours worked. To the extent that appellant is earning wages equal to or greater than those received at the time of injury, she has no disability as the term is generally defined under the Act with regard to wage-loss compensation.[6]

CONCLUSION

The Office did not meet its burden of proof to modify appellant's July 23, 2003 wage-earning capacity determination.

[4] *Willard N. Chuey*, 34 ECAB 1018 (1983).

[5] *Marie A. Gonzales*, 55 ECAB ___ (Docket No. 03-1808, issued March 18, 2004).

[6] *See Gregory A. Compton*, 45 ECAB 154 (1993). Disability under the Federal Employees' Compensation Act generally means an inability to earn the wages the employee was receiving when injured. An employee who has a physical impairment causally related to his or her federal employment, but who nonetheless has the capacity to earn the wages received at the time of injury, has no disability as that term is used under the Act and is not entitled to compensation for loss of wage-earning capacity. *See Clement Jay After Buffalo*, 45 ECAB 707 (1994).

ORDER

IT IS HEREBY ORDERED THAT the June 29, 2005 decision of the Office of Workers' Compensation Programs is reversed.

Issued: March 8, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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