

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

D.S., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Marysville, WA, Employer)

**Docket No. 07-934
Issued: August 17, 2007**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 21, 2007 appellant filed a timely appeal from a December 5, 2006 decision of the Office of Workers' Compensation Programs, reducing her loss of wage-earning capacity to zero and terminating her compensation benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office met its burden of proof in reducing appellant's wage-earning capacity to zero and terminating her compensation benefits effective December 5, 2006 based on her ability to perform the position of a massage therapist.

FACTUAL HISTORY

In February 2005 appellant, then a 39-year-old letter carrier, filed an occupational disease claim alleging that she sustained an emotional condition due to her employment. On March 3, 2006 the Office accepted her claim for an acute reaction to stress, a depressive disorder and an

anxiety disorder. On June 19, 2006 the claim was expanded to include an adjustment reaction with anxiety and depression.

In a January 30, 2006 report, Dr. Michael K. Friedman, a psychiatrist and Office referral physician, stated that appellant could not work under a supervisor who was overly critical.

The record shows that appellant worked as a self-employed massage therapist intermittently from September 2003 to March 10, 2006. She indicated that between April 13 and July 30, 2005 she received \$25.00 per hour in her business. Beginning March 23, 2006 appellant was employed as a night stocking clerk at a store for 10 to 15 hours a week at the rate of \$8.06 per hour.

In a report dated October 15, 2006, a rehabilitation counselor provided a description of the position of massage therapist and the physical and vocational requirements and concluded that the position was within appellant's work capabilities. She noted that appellant had completed a course of study at a massage school, was licensed by the state as a massage practitioner and had worked as a massage therapist. The counselor indicated that the position of massage therapist best fit appellant's qualifications and represented her highest wage-earning capacity. She determined that appellant was physically and vocationally qualified for the position of massage therapist. The counselor noted that a labor market survey confirmed that the position was performed in sufficient numbers so as to make it reasonably available to appellant within her commuting area. She indicated that the position paid weekly wages of \$1,132.00 based on hourly wages of \$28.30 multiplied by 40 hours. The documents provided by the counselor included information from the Occupational Outlook Handbook published by the Bureau of Labor Statistics of the U.S. Department of Labor as follows:

“Because of the physical nature of the work and time needed in between sessions, massage therapists typically give massages less than 40 hours per week. Therapists who give massages anywhere from 15 to 30 hours a week usually consider themselves to be full-time workers.”

* * *

“About three-quarters of all massage therapists worked part-time or had variable schedules, although[,] as mentioned earlier[,] many massage therapists who work 15 to 30 hours per week consider themselves to be full-time workers.

“Median hourly earnings of massage therapists, including gratuities earned, were \$15.36 in May 2004. The middle 50 percent earned between \$9.78 and \$23.82. The lower 10 percent earned less than \$7.16 and the highest earned more than \$32.21. Generally, massage therapists earn 15 to 20 percent of their income as gratuities. For those who work in a hospital or other clinical setting, however, tipping is not common.”

On October 18, 2006 the Office advised appellant that it proposed to reduce her wage-loss compensation based on her wage-earning capacity as a massage therapist at the rate of \$1,132.00 a week.¹

On November 14, 2006 appellant disagreed with the proposed reduction in her compensation benefits. She stated that massage therapists do not work 40 hours a week due to the physically demanding nature of the work. Appellant argued that she could only work as a massage therapist as a sole practitioner because her anxiety condition was aggravated when she worked under supervision.

On December 5, 2006 the Office reduced appellant's wage-loss compensation to zero based on her capacity to earn wages as a massage therapist. The Office determined that the massage therapist position was medically and vocationally suitable.²

LEGAL PRECEDENT

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury, it has the burden of justifying a subsequent reduction of compensation benefits.³

Under section 8115(a) of the Federal Employees' Compensation Act,⁴ wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent her wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, her wage-earning capacity is determined with due regard to the nature of her injury, her degree of physical impairment, her usual employment, her age, her qualifications for other employment, the availability of suitable employment and other facts and circumstances which may affect her wage-earning capacity in his disabled condition.⁵ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.⁶ The job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives.⁷

¹ The current weekly pay rate for appellant's position at the employing establishment was \$885.63.

² Subsequent to the December 5, 2006 Office decision, additional evidence was added to the record. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c). The Board may not consider this evidence for the first time on appeal.

³ *Sherman Preston*, 56 ECAB ____ (Docket No. 05-721, issued June 20, 2005).

⁴ 5 U.S.C. §§ 8101-8193.

⁵ *See Mary E. Marshall*, 56 ECAB ____ (Docket No. 04-1048, issued March 25, 2005); *James Smith*, 53 ECAB 188 (2001).

⁶ *Id.*

⁷ *Id.*

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by the Office or to an Office wage-earning capacity specialist for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open labor market, that fits the employee's capabilities with regard to her physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service.⁸ Finally, the Office should apply the principles set forth in *Albert C. Shadrick* in determining loss of wage-earning capacity.⁹

ANALYSIS

The Board finds that the Office has not met its burden of proof in reducing appellant's wage-earning capacity to zero and terminating her compensation benefits effective December 5, 2006 based on her ability to perform the selected position of massage therapist.

The Office calculated appellant's loss of wage-earning capacity by multiplying an average hourly rate of \$28.30 for a massage therapist working in appellant's commuting area by 40 hours. As noted, the Occupational Outlook Handbook published by the Bureau of Labor Statistics of the U.S. Department of Labor provides as follows:

“Because of the physical nature of the work and time needed in between sessions, massage therapists typically give massages less than 40 hours per week. Therapists who give massages anywhere from 15 to 30 hours a week usually consider themselves to be full-time workers.”

The handbook stated that approximately three-quarters of all massage therapists worked part time or had variable schedules. The Board finds that the Office erred in calculating the weekly pay rate for a massage therapist by multiplying the average hourly pay rate by 40 hours. The record shows that massage therapists typically do not work 40 hours a week, with 15 to 30 hours a week being considered full-time work by massage therapists. Accordingly, the Office did not meet its burden of proof to establish that the position of massage therapist reflected appellant's wage-earning capacity effective December 5, 2006, the date it reduced her wage-loss compensation benefits to zero and terminating her compensation benefits.

CONCLUSION

The Board finds that the Office did not meet its burden of proof in determining appellant's loss of wage-earning capacity to zero based on her ability to earn the wages of a massage therapist and in terminating her compensation benefits effective December 5, 2006.

⁸ *Sherman Preston*, *supra* note 3.

⁹ 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.403.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 5, 2006 is reversed.

Issued: August 17, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board