United States Department of Labor
Employees' Compensation Appeals Board

B.S., Appellant	)	
and	)	**Docket No. 07-480**
	)	**Issued: May 7, 2007**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Beckley, WV, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 12, 2006 appellant filed a timely appeal from a March 14, 2006 merit decision of the Office of Workers' Compensation Programs reducing her wage-loss benefits based on her actual earnings. Pursuant to 20 C.F.R. §§ 501.2(c) and 501(d)(3), the Board has jurisdiction over the merits of this wage-loss case.

ISSUE

The issue is whether the Office properly determined that appellant's actual earnings as an information receptionist fairly and reasonably represent her wage-earning capacity as of March 14, 2006.

FACTUAL HISTORY

On March 17, 2004 appellant, then a 55-year-old nurse, filed a traumatic injury claim alleging that from 2000 through 2003 she realized that her lumbar bulging disc with nerve impingement and spinal stenosis had been aggravated by her employment duties. She also filed

an occupational disease claim on March 17, 2004 alleging that on May 15, 2003 she first realized that her back condition and fibromyalgia were employment related. Appellant stopped work on July 11, 2003 due to retirement and returned to work in September 2001 working predominantly days. The Office accepted the claim for lumbar strain/sprain, aggravation of facet arthropathy, aggravation of degenerative joint disease/osteoarthritis and aggravation of lumbar spinal stenosis.

Appellant received intermittent wage loss for the period July 11, 2003 through August 31, 2005. On July 5, 2005 she elected to receive benefits effective May 25, 2003 under the Federal Employees' Compensation Act instead of benefits issued by the Office of Personnel Management.

On May 23, 2005 Dr. Harry H. Fathy, a second opinion Board-certified orthopedic surgeon, diagnosed generalized degenerative joint disease, facet arthropathy, spinal stenosis and chronic lumbosacral strain, which he opined had been permanently aggravated by her employment. He also diagnosed fibromyalgia, which was not employment related. Dr. Fathy concluded that appellant would be capable of performing secretarial duties four to six hours per day. In an attached functional capacity evaluation form (OWCP-5c), he indicated that appellant had permanent restrictions, but was capable of working six to eight hours per day. The restrictions included sitting, walking, standing, twisting, pulling, pushing, lifting, kneeling, squatting and climbing. Dr. Fathy also stated that appellant required 10-minute breaks every two hours.

Appellant returned to work as an information receptionist on October 17, 2005 working six hours per day with weekly wages of $462.70.

On November 1, 2005 the Office reduced appellant's wage-loss compensation effective October 17, 2005 based on her ability to earn wages as an information receptionist working 30 hours per week at a weekly pay rate of $462.00. On November 3, 2005 the Office adjusted appellant's loss of wage-earning capacity effective November 2, 2005 to reflect that she was working four hours per day.

In a decision dated March 14, 2006, the Office found that appellant had been earning wages as an information receptionist at the employing establishment working four hours per day effective October 31, 2005 and that, as she had this position for more than two months, the position fairly and reasonably represented her wage-earning capacity and was considered suitable. The Office noted that appellant's pay rate when her disability began was $1,013.15, that the current pay rate for the job and step when injured was $1,206.40, that appellant had actual earnings of $316.77 per week, that dividing $316.77 by $1,206.40 resulted in a loss of wage-earning capacity of 26 percent and that when $1,013.15 was multiplied by 26 percent appellant had a wage-earning capacity of $263.42. The Office then subtracted $263.42 from appellant's pay rate when disability began, $1,013.15 and determined that appellant had a loss of wage-earning capacity of $749.33. Multiplied by appellant's compensation rate of 75 percent, this resulted in a new compensation amount of $562.30 per week. Using cost-of-living adjustments, the Office found that appellant's compensation amount was $581.50.

LEGAL PRECEDENT

Under section 8115(a) of the Act,[1] wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent her wage-earning capacity. 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.[2] The formula for determining loss of wage-earning capacity based on actual earnings, developed in the Board's decision in *Albert C. Shadrick*,[3] has been codified by regulation at 20 C.F.R. § 10.403. Office procedures provide 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.[4] The amount of compensation paid is based on the wage-earning capacity determination and it remains undisturbed until properly modified.[5]

ANALYSIS

The Office accepted that appellant sustained lumbar strain/sprain, aggravation of facet arthropathy, aggravation of degenerative joint disease/osteoarthritis and aggravation of lumbar spinal stenosis. Following a period of total disability, she returned to work on October 17, 2005 in an information receptionist position. Initially appellant worked six hours per day, which was reduced to four hours per day effective November 2, 2005. She performed this position without incident.

On November 1, 2005 the Office informed appellant that it was reducing her wage-loss compensation effective October 17, 2005 based on her ability to earn wages as an information receptionist working 6 hours per day or 30 hours per week at a weekly pay rate of $462.00. On November 3, 2005 the Office adjusted appellant's loss of wage-earning capacity effective November 2, 2005 to reflect that she was working four hours per day instead of six hours per day.

The Board finds that appellant's performance of this position in excess of 60 days is persuasive evidence that the position represents her wage-earning capacity.[6] Moreover, there is

[1] 5 U.S.C. § 8115(a).

[2] *Hayden C. Ross*, 55 ECAB 455 (2004).

[3] 5 ECAB 376 (1953).

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1993).

[5] *See Sharon C. Clement*, 55 ECAB 552 (2004).

[6] Office procedures provide 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 supra* note 4.

no evidence that the position was seasonal, temporary or make-shift work designed for her particular needs.[7]

The Board finds that the Office properly applied the *Shadrick* formula in determining her loss of wage-earning capacity. The Office noted that the pay rate for appellant's current position was based on a weekly pay rate of $316.77 for 20 hours. The Office then took appellant's weekly pay rate when injured and determined that appellant made $1,013.15 per week when injured and that the current pay rate for the job and step when injured was $1,206.40. The Office then divided these earnings by her current pay rate of $316.77 and determined that appellant had a 26 percent wage-earning capacity. The Office then multiplied the pay rate at the time of the injury, $1,013.15, by the 26 percent wage-earning capacity. The resulting amount of $263.42 was then subtracted from appellant's date-of-injury pay rate of $1,013.15, which provided a loss of wage-earning capacity of $749.73 per week. The Office then multiplied this amount by the appropriate compensation rate of three-fourths, to yield $562.30. The Office found that cost-of-living adjustments increased this amount to $581.50. The Board finds that the Office properly determined that appellant's actual earnings fairly and reasonably represent her wage-earning capacity and the Office properly reduced appellant's compensation in accordance with the *Shadrick* formula.

As there was no evidence to show that appellant's actual earnings as an information receptionist did not fairly and reasonably represent her wage-earning capacity, the Office properly accepted these earnings as the best measure of her wage-earning capacity.[8]

CONCLUSION

The Board hereby finds that the Office properly determined appellant's wage-earning capacity based on her actual earnings as an information receptionist.

[7] *Elbert Hicks*, 49 ECAB 283 (1998).

[8] On appeal, appellant submitted an informational letter from the Office requesting medical evidence as it pertains to her claim for a schedule award. As the Office has not issued a final decision on her request for a schedule award, the issue is not before the Board in this appeal. *See* 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 14, 2006 is affirmed.

Issued: May 7, 2007
Washington, DC

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

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

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