United States Department of Labor
Employees' Compensation Appeals Board

J.D., Appellant	)	
and	)	**Docket No. 07-1078**
	)	**Issued: September 17, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Claremore, OK, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 13, 2007 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated February 1, 2007, which determined her wage-earning capacity based on actual earnings. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of appellant's claim. On appeal, appellant contends that she cannot perform the position.

ISSUE

The issue is whether appellant's actual earnings as a modified rural carrier fairly and reasonably represented her wage-earning capacity.

FACTUAL HISTORY

On May 6, 2004 appellant, then a 57-year-old rural carrier, filed a traumatic injury claim alleging that on May 3, 2004 she sprained/strained her lower back when her lower back was jostled while driving on a road. The Office accepted the claim for lumbar strain/sprain, lumbosacral joint ligament strain/sprain, sacrum strain/sprain and sacroiliac ligament strain/sprain and authorized an L4-5 bilateral laminectomy and discectomy, which was

performed on November 10, 2005. By letter dated November 25, 2005, the Office advised appellant that she had been placed on the periodic compensation rolls to receive compensation benefits for temporary total disability.

On February 1, 2006 Dr. Richard D. Thomas, a treating physician, released appellant to work with restrictions for two hours per day which would gradually increase to eight hours. The restrictions included a sit down job with no twisting bending or lifting more than 10 pounds. Dr. Thomas indicated that if she tolerated the two hours, then "[a]fter two weeks she can progress to four hours per day."

On February 2, 2006 the employing establishment offered appellant a modified rural carrier position for two hours per day, but noted that the position was available for up to eight hours. The duties of the position included answering the telephone up to two hours and intermittent time spent writing up mark-ups and second notices and undeliverable bulk business mail (UBBM). The employing establishment noted that the duties were performed sitting except for UBBM, which could be performed sitting or standing. The physical restrictions included no lifting more than 10 pounds, no repetitive lifting over 5 pounds, only sitting and no excessive twisting or bending. Appellant accepted the job offer and returned to limited-duty work for two hours per day effective February 6, 2006. Her hours were increased to four hours per day on February 27, 2006 and then six hours on April 26, 2006. On June 26, 2006 Dr. Thomas released her to work eight hours per day.

In a July 31, 2006 report, Dr. Thomas noted that appellant had been doing well working eight hours per day but remained unable to perform her date-of-injury position. He recommended a functional capacity evaluation be performed to determine appellant's functional limitations.

On December 18, 2006 Dr. Thomas provided permanent restrictions for appellant. The restrictions included no lifting over 25 pounds, no repetitive lifting of more than 15 pounds, no stooping, climbing, kneeling, squatting or excessive twisting or bending and no standing more than three hours in an eight-hour day. Dr. Thomas also stated that appellant's standing would "have to be done in shifts, with 30 minutes of standing followed by 15 minutes of sitting" and no sitting more than 30 minutes at a time.

On January 5, 2007 the employing establishment offered appellant a limited-duty position of modified rural carrier working eight hours per day based upon the restrictions noted by Dr. Thomas in his December 18, 2006 report. The physical restrictions including no repetitive lifting more than 15 pounds, no lifting more than 25 pounds, no squatting, climbing, stooping, kneeling, twisting or bending, no pulling or pushing more than 25 pounds and no standing more than three hours per day. The job description noted that appellant would case auxilliary route 21. She would be required to pick up magazines, letters or other mail pieces and place in on the case for the route, which would take 1.5 to 2 hours per day. The employing establishment stated that assistance would be provided for loading the mail vehicle to keep within appellant's weight restriction of no lifting more than 25 pounds. She would then deliver and pick-up mail from mail boxes, which would take approximately 2.5 to 3 hours per day. Appellant would also be required to deliver stamps by facsimile and express mail as required. The effective start date of the position was January 20, 2007.

On January 16, 2007 Dr. Thomas reviewed and approved the proposed job offer.

On January 22, 2007 appellant accepted the offered position with corrections noted on the letter. The effective and response date of January 20, 2007 was crossed out and replaced with January 23, 2007. Under job description "[c]ase auxilliary route 21" was replaced with "[a]ssist delivering mail and rural routes[;] [a]ssist casing mail and rural routes." The sentence "assist casing and carrying mail on rural routes" was added.

By decision dated February 1, 2007, the Office determined that appellant's actual earnings effective January 20, 2007 as a modified rural carrier fairly and reasonably represented her wage-earning capacity. The Office found that appellant's actual earnings met or exceeded the current wages of her date-of-injury position and, therefore, she did not have a loss of wage-earning capacity.

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.[1] 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]

Office procedures provide requirements for a proper determination of wage-earning capacity based on actual earnings.[3] A determination of wage-earning capacity may be made when a claimant is currently working in a position and after working for 60 days, a determination as to whether actual earnings fairly and reasonably represent wage-earning capacity can be made.[4]

ANALYSIS

The Office based its loss of wage-earning capacity decision on appellant's wages as of January 20, 2007. The Office stated that she had been employed as a "modified rural carrier" effective January 20, 2007, had worked more than two months and the position was found to fairly and reasonably represent wage-earning capacity. However, the facts of the case do not support this conclusion. Appellant accepted a February 2, 2006 job offer by the employing establishment and initially returned to work for two hours per day on February 6, 2006, which

[1] 5 U.S.C. § 8115(a).

[2] *D.S.*, 58 ECAB ___ (Docket Nos. 06-1408 & 06-2061, issued March 1, 2007); *Dennis E. Maddy*, 47 ECAB 259 (1995).

[3] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (July 1997). *See Connie L. Potratz-Watson*, 56 ECAB ___ (Docket No. 03-1346, issued February 8, 2005).

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (July 1997); *see A.P.*, 58 ECAB ___ (Docket No. 06-1428, issued November 29, 2006).

increased to eight hours per day on June 26, 2006. This position required her to perform her duties sitting down. On December 18, 2006 Dr. Thomas concluded that appellant had reached maximum medical improvement and provided permanent physical restrictions. Based upon these restrictions, the employing establishment, on January 5, 2007, offered appellant the limited-duty position of modified rural carrier working eight hours per day, which she accepted. Appellant's duties included driving a vehicle and delivering mail. To the extent that the Office was treating the actual earnings as resulting from one position that had been performed for more than 60 days, the record does not support such a finding. The position appellant was performing for eight hours as of June 26, 2006 was sedentary and required no lifting more than 10 pounds and no repetitive lifting of more than 5 pounds. The position she started performing on January 23, 2007 required her to drive a vehicle and deliver mail. The physical restrictions of the position included no lifting more than 25 pounds and no repetitive lifting more than 15 pounds. It is evident from the record that the January 5, 2007 job offer represented a new position as the duties and lifting restrictions were different from the limited-duty job appellant had been performing since returning to work.

The Office made a determination that the January 5, 2007 position that appellant accepted on January 22, 2007 represented her wage-earning capacity as of January 20, 2007, which was the effective start date noted on the job offer. However, the record is unclear as to when appellant started the position as her acceptance noted January 23, 2007 as the response date and effective start date. The Office did not acknowledge in its decision that the position appellant was performing as of January 20 or 23, 2007 involved different duties and physical restrictions than the one she had been performing previously. In addition, Dr. Thomas did not provide permanent work restrictions for appellant until December 18, 2006, which was the basis of the January 5, 2007 job offer. The Board notes that a claimant must work in the position for at least 60 days[5] and at the time of the February 1, 2007 decision appellant had only performed the position for little over a week.

Accordingly, the Board finds that the Office did not properly determine appellant's wage-earning capacity based on the actual earnings effective January 20, 2007 as she had not been performing this position for at least 60 days.

CONCLUSION

The Office did not properly determine appellant's wage-earning capacity based on actual earnings as she had not worked in the position for 60 days.

[5] *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 1, 2007 is reversed.

Issued: September 17, 2007
Washington, DC

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

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