

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

J.P., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Birnamwood, WI, Employer**

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**Docket No. 07-2165
Issued: April 9, 2008**

Appearances:
Appellant, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 21, 2007 appellant filed a timely appeal from a January 8, 2007 merit decision of the Office of Workers' Compensation Programs reducing her compensation based on her actual earnings and a July 18, 2007 merit decision denying modification of the wage-earning capacity determination. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly reduced appellant's compensation to zero effective May 18, 2006 based on its finding that her actual earnings as a modified clerk fairly and reasonably represented her wage-earning capacity; and (2) whether she has established that the May 18, 2006 wage-earning capacity determination should be modified.

FACTUAL HISTORY

On March 11, 2004 appellant, then a 31-year-old part-time flexible clerk, filed an occupational disease claim alleging that she sustained tennis elbow of the right forearm due to

factors of her federal employment. The Office accepted her claim for right forearm tendinitis. The Office paid appellant compensation for intermittent periods of disability based on its finding that she worked approximately 33 hours per week. She stopped work on August 20, 2004 and returned to light-duty employment on October 19, 2004. Appellant again stopped work on May 4, 2005. She underwent a right carpal tunnel release on August 5, 2005 and a left carpal tunnel release on September 16, 2005. The Office expanded acceptance of the claim to include bilateral carpal tunnel syndrome, thoracic outlet syndrome, neck strain and bilateral elbow epicondylitis. The Office also authorized a right first rib resection, performed by Dr. William Turnipseed, a Board-certified surgeon, on October 25, 2005.

In a report dated April 25, 2006, Dr. Margaret Anderson, a Board-certified physiatrist, diagnosed myofascial neck and arm pain, a history of mild bilateral demyelinating carpal tunnel syndrome post releases, a history of thoracic outlet syndrome post rib resection, chronic pain syndrome and narcotic use. She stated:

“I defined her work restrictions as occasional use of her upper extremities and nonrepetitive tasks allowing her to chance positions just as a means of managing her pain. I would not limit her driving however. I think it [is] fine if she has to drive further to her job and it [is] not a medical absolute contraindication. She has requested that she not be placed on a night shift. In the setting of her chronic pain, it could be argued that it would be appropriate for her to have the daytime shift, and I think that is reasonable, either first or second shift, but not night shift to allow for a normal sleep pattern.”

In a progress report dated May 5, 2006, Dr. Susan M. Schneider, who specializes in family practice, concurred with Dr. Anderson’s work restrictions. She found that appellant could work either the first or second shift.

On May 11, 2006 appellant rejected a May 5, 2006 job offer from the employing establishment working 32.5 hours a week at a modified distribution/window. She explained that she did not want to work the second shift. On May 30, 2006 Dr. Schneider noted that appellant currently worked from 9:00 a.m. to 3:30 p.m. at the employing establishment. Appellant sustained a recurrence of disability from August 30 to September 15, 2006. On September 18, 2006 Dr. Schneider released her to resume work with her previous restrictions.

On October 17, 2006 appellant accepted a position on the second shift “under protest.” In a report dated November 28, 2006, Dr. Mazin Ellias, a Board-certified anesthesiologist, diagnosed myofascial pain syndrome, neuropathic pain, depression and “some aberrant drug behavior.” He noted that appellant was working and recommended occupational therapy and altering her job to one without upper extremity movement.

In a progress report dated December 29, 2006, Dr. Schneider related that appellant wanted her restrictions changed so that she could work in a position in her former work location. She diagnosed unspecified myalgia and myositis, nerve root and plexus disorders, carpal tunnel syndrome, cervicalgia, tenosynovitis of the hand and wrist and depression. Dr. Schneider found that appellant could work eight to eight and a half hours per day lifting up to 30 pounds

occasionally, sliding up to 75 pounds off of counters and pushing or pulling up to 1,200 pound wheeled carts.¹

By decision dated January 8, 2007, the Office reduced appellant's compensation based on its finding that her actual earnings working 32 hours as a modified clerk effective on or around May 18, 2006 fairly and reasonably represented her wage-earning capacity. The Office applied the principles set forth in *Albert C. Shadrick*² and determined that she had no loss of wage-earning capacity.

On April 10, 2007 the Office of Personnel Management (OPM) approved appellant's request for disability retirement. In a progress report dated April 16, 2007, Dr. Schneider discussed appellant's current complaints and noted that she was working the second shift. She diagnosed chronic pain syndrome, tendinitis, migraine headaches, cervical strain, carpal tunnel syndrome, thoracic outlet syndrome and depression.

On April 24, 2007 appellant requested reconsideration of the January 8, 2007 wage-earning capacity determination. She indicated that she "was separated from the [employing establishment] on April 20, 2007. My monthly payment will be considerably less than what I was making so I feel I am entitled to a loss of earning capacity."

On April 24, 2007 Dr. Schneider noted that appellant complained of fatigue and pain in her neck, shoulder and arm. She diagnosed chronic pain syndrome, tendinitis, migraine headaches, cervical strain, carpal tunnel syndrome, thoracic outlet syndrome and depression. Dr. Schneider indicated that appellant was waiting for a disability determination. In a progress report dated May 11, 2007, Dr. Schneider noted that appellant had been off work the past two weeks because she had received disability retirement. Appellant's pain and hand swelling had improved. On June 1, 2007 she complained of increased pain and decreased energy. Dr. Schneider diagnosed chronic pain syndrome and depression. On June 26, 2007 she diagnosed chronic pain syndrome, migraine headaches, forearm tendinitis, hand edema, thoracic outlet syndrome, fatigue and depression. Dr. Schneider recommended decreased use of narcotics.

In a decision dated July 18, 2007, the Office denied modification of its January 8, 2007 wage-earning capacity determination. The Office found that the medical evidence did not show that appellant's condition had worsened such that she was now disabled.

LEGAL PRECEDENT -- ISSUE 1

Section 8115(a) of the Federal Employees' Compensation Act³ provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by her actual earnings if her actual earnings fairly and reasonably represent her

¹ In a decision dated January 18, 2007, the Office denied appellant's claim for a schedule award. The denial of the schedule award claim was before the Board in Docket No. 07-1462 and is not before the Board at this time.

² 5 ECAB 376 (1953); codified by regulation at 20 C.F.R. § 10.403.

³ 5 U.S.C. §§ 8101-8193.

wage-earning capacity.⁴ Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such a measure.⁵ The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision,⁶ has been codified at 20 C.F.R. § 10.403. The Office calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the current pay rate for the date-of-injury job.⁷ 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.⁸

ANALYSIS -- ISSUE 1

The Board finds that appellant's actual earnings as modified distribution/window clerk effective May 18, 2006 fairly and reasonably represent her wage-earning capacity. In a report dated April 25, 2006, Dr. Anderson found that appellant could work either the first or second shift with restrictions on the use of her upper extremities. On May 5, 2006 Dr. Schneider concurred with Dr. Anderson's work restrictions. On May 5, 2006 the employing establishment offered appellant the position of modified distribution/window clerk working 32.5 hours per week on the second shift. Appellant refused to work on the second shift but returned to work from 9:00 a.m. to 3:30 p.m. She sustained a recurrence of disability from August 30 to September 15, 2006. Dr. Schneider released appellant to resume work on September 18, 2006 with her previous restrictions. On October 17, 2006 appellant accepted a position on the second shift "under protest."

Appellant returned to work in May 2006 and, except for a limited recurrence of disability, continued working in the position through January 8, 2007, the date the Office issued its formal loss of wage-earning capacity determination. She worked in the position for more than 60 days and there is no evidence that the position was seasonal, temporary or make-shift work designed for her particular needs.⁹ As there is no probative evidence that appellant's wages in her position did not fairly and reasonably represent her wage-earning capacity, they must be accepted as the best measure of her wage-earning capacity.¹⁰

⁴ 5 U.S.C. § 8115(a); *Loni J. Cleveland*, 52 ECAB 171 (2000).

⁵ *Lottie M. Williams*, 56 ECAB 302 (2005).

⁶ See *supra* note 2.

⁷ 20 C.F.R. § 10.403(c).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (July 1997).

⁹ *Elbert Hicks*, 49 ECAB 283 (1998); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (July 1997).

¹⁰ See *Loni J. Cleveland*, *supra* note 4.

As appellant's actual earnings in her modified distribution/window clerk position fairly and reasonably represent her wage-earning capacity, the Board must determine whether the Office properly calculated her wage-earning capacity based on her actual earnings. The Board finds that the Office properly found that appellant had no loss of wage-earning capacity based on her actual earnings. Appellant's current weekly earnings of \$729.30 per week exceeded the current weekly wages of her position on April 21, 2004, the date disability began, of \$664.27. Therefore, she had no loss of wage-earning capacity under the *Shadrick* formula.

LEGAL PRECEDENT -- ISSUE 2

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 the loss of the capacity to earn and not on actual wages lost.”¹¹

ANALYSIS -- ISSUE 2

The Board finds that appellant has not met any of the requirements for modification of the Office's January 8, 2007 wage-earning capacity determination. Appellant has not submitted any evidence to establish that the original determination of her wage-earning capacity was erroneous. On April 10, 2007 the Office of Personnel Management approved her application for disability retirement. Appellant argued that she would receive less in disability retirement than she earned at the employing establishment and thus had a loss of wage-earning capacity. A finding of disability under another federal statute, however, does not establish disability under the Act.¹²

On April 24, 2007 Dr. Schneider discussed appellant's complaints of chronic neck, shoulder and arm pain and fatigue. She diagnosed chronic pain syndrome, tendinitis, migraine headaches, cervical strain, carpal tunnel syndrome, thoracic outlet syndrome and depression. Dr. Schneider indicated that appellant was currently working while awaiting a disability determination. On May 11, 2007 she noted that appellant had retired on disability. Appellant's symptoms had improved since she had stopped working. On June 1, 2007 Dr. Schneider related that appellant's pain had worsened and she lacked energy. She diagnosed chronic pain syndrome and depression. On June 26, 2007 Dr. Schneider diagnosed chronic pain syndrome, migraine headaches, forearm tendinitis, hand edema, thoracic outlet syndrome, fatigue and depression. In

¹¹ 33 ECAB 1629 (1982); *see also Marie A. Gonzales*, 55 ECAB 395 (2004).

¹² *John E. Cannon*, 55 ECAB 585 (2004).

her reports, Dr. Schneider did not address the relevant issue of whether appellant could perform her modified-duty employment. Accordingly, the medical evidence is insufficient to establish a material change in the nature and extent of the accepted injury-related conditions. The Office, therefore, properly denied modification of its January 8, 2007 wage-earning capacity determination.

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation effective May 18, 2006 to zero based on its finding that her actual earnings as a modified clerk fairly and reasonably represented her wage-earning capacity. The Board further finds that appellant has not established that the May 18, 2006 wage-earning capacity determination should be modified.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated July 18 and January 8, 2007 are affirmed.

Issued: April 9, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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