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

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| **B.R., Appellant** | ) | |
| **and** | ) | **Docket No. 07-1710** |
| | ) | **Issued: September 24, 2008** |
| **U.S. POSTAL SERVICE, POST OFFICE, Kyle, SD, 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
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

### ***JURISDICTION***

On June 12, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' hearing representative's decision dated December 8, 2006, which affirmed the Office's July 17, 2006 decision, which reduced appellant's compensation benefits effective August 6, 2006. The record also contains an Office decision dated May 21, 2007 denying appellant's request for review of the merits of her claim pursuant to 5 U.S.C. § 8128(a). Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit decision and the nonmerit decision in this case.

### ***ISSUES***

The issues are: (1) whether the Office met its burden of proof in reducing appellant's compensation based on its determination that the constructed position of a retail store manager represented her wage-earning capacity effective August 6, 2006; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits of her claim under 5 U.S.C. § 8128(a).

## ***FACTUAL HISTORY***

On Apri1 16, 1991 appellant, then a 37-year-old postmaster, filed an occupational disease claim alleging that she sustained carpal tunnel syndrome in the performance of duty. She alleged that she realized her condition was caused or aggravated by her employment in November 1990.[1] Appellant stopped work on November 7, 1992. The Office accepted her claim for right carpal tunnel syndrome and surgical release, tendinitis of the right wrist/hand, bursitis of the right shoulder and subsequently right shoulder superior labrum anterior-posterior (SLAP) lesion with debridement surgery. It also accepted cumulative trauma disorder. Appellant received appropriate compensation benefits. She returned to light-duty work in February 1999 as a modified postmaster.[2]

In a January 31, 2002 report, Dr. Dale R. Anderson, a Board-certified orthopedic surgeon and treating physician, advised that, despite appellant's belief that she could not work as a postmaster, he believed that she could function as a postmaster."[3] A November 4, 2002 magnetic resonance imaging (MRI) scan of the right shoulder showed tendinopathy in the supraspinatus tendon, probable impingement by the anterior lateral corner of the acromion, an abnormal middle glenohumeral ligament and abnormal signal in the superior labrum. On December 20, 2002 appellant underwent arthroscopic right shoulder surgery. On September 16, 2003 she was placed on the periodic compensation rolls. On January 9, 2003 Dr. David H. Lang, a Board-certified orthopedic surgeon, released appellant to work with restrictions of no use of her right arm.[4] On March 25, 2003 the employing establishment advised it was unable to accommodate appellant's restrictions.

On May 5, 2003 Dr. Lang noted that appellant was seen for a determination of her status and work restrictions. He noted that appellant's prior functional capacity evaluation (FCE) was invalid because there were "signs of symptom magnification and lack of effort." Dr. Lang noted that, despite appellant's complaints of bilateral shoulder pain, she could lift approximately 8 to 10 pounds. He released appellant to light duty with no lifting greater than 10 pounds and performing repetitive activities for no more than one-third of her workday. On June 17, 2003 appellant underwent another FCE, which revealed that she could perform sedentary to light work. On June 23, 2003 Dr. Lang released appellant to an eight-hour workday with restrictions per the FCE. He completed a Form OWCP-5c, work capacity evaluation, indicating that the claimant was at maximum medical improvement and could work eight hours per workday with

[1] Appellant has a separate claim under File No. 12-0137165 which was accepted for right carpal tunnel syndrome and surgical release. This claim was doubled with the current claim and closed. File No. 12-0122724

[2] On June 17, 1999 the Office determined that appellant was reemployed as a modified postmaster on March 27, 1999 with wages of $749.94 per week and that the position fairly and reasonably represented her wage-earning capacity. It noted that appellant's actual wages met or exceeded those of her date-of-injury position of $696.56 per week.

[3] Appellant also filed an occupational disease claim on May 31, 2002 for left hand, wrist, arm, and shoulder pain which she alleged was caused by her repetitive work activities since returning to modified duty in February 1999. File No. 12-200907. In an August 1, 2002 decision, the Office denied her claim.

[4] On September 13, 2002 the Office authorized appellant's treatment by Dr. Lang.

restrictions as noted in the functional capacity evaluation. The June 17, 2003 FCE report revealed that appellant was capable of sedentary to light work and should avoid overhead or repetitive work. On September 8, 2003 Dr. Lang indicated that appellant's work needed to comply with the restrictions in her FCE. He also opined that appellant had reached maximum medical improvement and advised that he was releasing appellant from care and would treat her as needed.

On September 5, 2003 appellant was referred for vocational rehabilitation. The vocational rehabilitation counselor noted that appellant had a Bachelor of Science in Business Administration and in Indian studies. He also advised that appellant could complete business administration courses in the area of health services administration at Black Hills University. The Office authorized appellant to undergo this training at Black Hills University. On September 1, 2004 it notified appellant that her spring of 2004 grades provided cause for concern regarding the unsuccessful progress of her vocational rehabilitation plan.[5] Thereafter, appellant's educational training sponsorship was discontinued as a result of her poor grades, initial nonattendance during the fall term and request for an additional year of training.[6]

On February 11, 2005 the vocational rehabilitation counselor determined that appellant could return to work as a retail store manager DOT Number 185-167-046, based on her education with a bachelor's degree in business administration and her training experience as a postmaster.[7] He noted that the median wage in appellant's home state was approximately $34,160.00 and that the average weekly wage was approximately $700.00. The vocational rehabilitation counselor also described the duties that included personally supervising employees performing the duties, planning and preparing work schedules, and assigning employees to specific duties, formulating pricing policies, coordinating sales promotions, ordering merchandise, preparing requisitions to replenish merchandise, dealing with customers, and hiring and training employees. In a September 23, 2005 memorandum, the vocational rehabilitation counselor noted that a retail store worker DOT number 185.167-046 and a case worker DOT number 195.107-010 were targeted occupations which were suitable and available. He advised that appellant had a wage-earning capacity of $700.00 per week as a retail store manager. The job of store manager was deemed light duty and reasonably available. The vocational rehabilitation counselor also indicated that the case worker position which was described as sedentary had weekly wages in the range of $500.00 to $1,000.00 per week. He recommended that the position of retail store manager be selected for appellant's wage-earning capacity determination as it most closely matched appellant's experience as a postmaster and her bachelor's degree in Business Administration. The vocational rehabilitation counselor also indicated that he had reviewed the physical requirements and determined that they did not exceed appellant's functional capabilities.

[5] The record reflects that appellant received three D's and a C.

[6] Appellant was removed from the training program as a result of her failing grades. She had nonwork-related surgery on January 18, 2005 and recommended a new 90-day placement program commencing on February 18, 2005.

[7] Appellant noted that he had previously targeted two other job opportunities. The record reflects that the position of office manager and facility manager had also been identified.

In an April 6, 2005 report, Dr. Lang noted that appellant wanted clarifications regarding her work restrictions. He advised that her job restriction included a 20-pound weight restriction and limitations with regard to overhead activities. Dr. Lang advised that appellant could return to work within her restrictions.

In a March 15, 2006 telephone call memorandum, the Office determined that appellant's pay rate on the date of injury was $34,789.00 and her current rate of pay was $43,378.00.[8]

On March 15, 2006 the Office notified appellant that it proposed to reduce her wage-loss compensation as the evidence established that she was no longer totally disabled but rather partially disabled and that she had the capacity to earn wages as a retail store manager at the rate of $700.00 per week. Appellant was advised that the rehabilitation counselor had reported that based upon her experience, education, medical restrictions, and a labor market survey, she was employable as a retail store manager. The Office informed her that her vocational rehabilitation counselor had documented that retail store manager positions were reasonably available in her commuting area and that the entry pay level for the position was $700.00 per week. Appellant was advised that the physical requirements of the position were consistent with the accepted work tolerance limitations and did not exceed her functional capacity recommendations. She was allotted 30 days to provide evidence or argument regarding her capacity to earn wages if she disagreed with this proposed reduction.

By decision dated July 17, 2006, the Office reduced appellant's compensation based on her ability to work as a retail store manager, which was found to be medically and vocationally suitable. It also indicated that appellant had not provided any additional evidence or argument regarding its proposed notice to reduce her compensation benefits. The Office determined that appellant's compensation would be reduced by the percentage of her new wage-earning capacity, which was determined to be 84 percent, and that her new rate would commence on August 6, 2006 at the rate of $159.44 per month.

On July 31, 2006 appellant requested a review of the written record. In a letter dated July 27, 2006, she alleged that she had made several attempts to return to her position as a postmaster. Appellant stated that it was "unfair" to reduce her compensation based on her current rate of pay in March 2006 as opposed to June 12, 2006, the date of her separation from the employing establishment.[9] She also provided an October 13, 2006 letter in which she alleged that she was attempting to regain her postmaster position. Appellant stated that she believed that the employing establishment was communicating with the Office, and that she did not have to file a response.[10]

By decision dated December 8, 2006, the Office hearing representative affirmed the Office's July 17, 2006 decision.

[8] The employing establishment furnished the Office with a written confirmation on March 16, 2006.

[9] A copy of her separation letter was attached.

[10] Appellant provided the Office with copies of the correspondence.

The Office subsequently received a March 7, 2007 letter from appellant who alleged that the Office was inconsistent with regard to the handling of her claims. Appellant referred to three injury claims that she had filed.[11] She referred to a February 11, 1999 modified postmaster position from the employing establishment, which she stated had the wrong claim number, but she alleged that she accepted it because she was "emotionally/mentally exhausted from all that [she] had encountered with the [Office]." Appellant alleged that she wanted to return to work to "escape the hassles." She also alleged that the employing establishment informed her that they could "accommodate most restrictions short of bed rest." Appellant also alleged that she was assigned a vocational rehabilitation counselor who closed her case when she indicated that she was willing to seek employment with the employing establishment. She stated that she had sought employment since March 2005 and requested that her compensation be reinstated. Appellant enclosed documents that included a copy of a February 11, 1999 modified postmaster position from the employing establishment, a June 26, 2001 letter from the Office advising her that she must file a new claim for any condition related to her right shoulder, acceptance letters dated August 6 and November 2, 1991 for right shoulder tenosynovitis and right carpal tunnel syndrome, and 1994 correspondence pertaining to the status of her claim, including a letter from her United States Senator.

On March 23, 2007 appellant's senator stated that appellant sought reconsideration. On April 13, 2007 the Office advised appellant's representative that appellant's "cases were not mixed up," but rather they were carefully reviewed together in attempt to assist her with a successful return to work. It noted that many attempts were made to return appellant to the employing establishment; however, it decided not to rehire her.

By letter dated May 9, 2007, appellant requested reconsideration. She alleged that she had been ill and recuperating in the hospital due to an infection which arose as a result of complications from stress.

By decision dated May 21, 2007, the Office denied appellant's request for reconsideration without a review of the merits on the grounds that her request neither raised substantial legal questions nor included relevant and pertinent evidence and, thus, it was insufficient to warrant review of its prior decision.

## ***LEGAL PRECEDENT -- ISSUE 1***

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[12]

Section 8115(a) of the Federal Employees' Compensation Act,[13] provides in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent her wage-earning

[11] File No. 12-013764, for her left wrist (carpal tunnel); File No. 12-0122724, for her right wrist, carpal tunnel, and File No. A12-137165 for her right arm/shoulder injury.

[12] *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

[13] 5 U.S.C. § 8115.

capacity. Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.[14] 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, his age, her qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect her wage-earning capacity in his disabled condition.[15] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[16] 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.[17] In determining an employee's wage-earning capacity, the Office may not select a makeshift or odd lot position or one not reasonably available on the open labor market.[18]

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, *Dictionary of Occupational Titles* or otherwise available in the open labor market, that fits that employee's capabilities with regard to his physical limitation, 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.[19] Finally, application of the principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.[20]

## ***ANALYSIS -- ISSUE 1***

In finding that appellant was physically capable of performing the duties of a retail store manager effective August 6, 2006, the Office relied upon several reports from appellant's treating physician, Dr. David H. Lang, a Board-certified orthopedic surgeon. On May 5, 2003 Dr. Lang released appellant to light-duty work with no lifting greater than 10 pounds and performing repetitive activities for no more than one-third of her workday. On June 23, 2003 he opined that appellant could work eight hours per workday within restrictions on overhead or repetitive work. Dr. Lang continued to submit reports advising that her work needed to comply

[14] *Hubert F. Myatt*, 32 ECAB 1994 (1981); *Lee R. Sires*, 23 ECAB 12 (1971).

[15] *See Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

[16] *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

[17] *Id.*

[18] *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

[19] *Karen L. Lonon-Jones*, 50 ECAB 293, 297 (1999).

[20] 5 ECAB 376 (1953). *See id.*

with the restrictions in her FCE. In his April 6, 2005 report, Dr. Lang advised that appellant's job restriction included a 20-pound weight restriction and limitations on overhead activities.

The Board finds that Dr. Lang's reports establish that appellant was capable of performing the duties of the selected position of a retail store manager as of the July 17, 2006 wage-earning capacity determination. There is no evidence to establish that appellant was medically unable to perform such duties which are sedentary in nature.

As appellant's vocational rehabilitation was unsuccessful, the rehabilitation counselor determined that appellant could return to work as a retail manager[21] and properly prepared a final report, finding that the position of a retail store manager was medically and vocationally suitable for the employee and proceeded with information from a labor market survey to determine the availability and wage rate of the position.[22] Through contact with the vocational counselor, the Office determined that the constructed position of a retail store manager reasonably represented appellant's wage-earning capacity. The vocational counselor identified the retail store manager position listed in the Department of Labor, *Dictionary of Occupational Titles*, DOT No. 185.167-046 and provided the appropriate information regarding the position descriptions, the availability of the positions within appellant's commuting area and pay ranges within the geographical area. He determined that this position was in accord with appellant's background, education and experience, which included her degrees in Business Administration and Indian Studies, as well as her experience as a postmaster. The rehabilitation counselor documented that the wages averaged $700.00 per week and that the position was consistent with the medical restrictions. He also provided a job description for the position of a retail store manager. The physical requirements were considered as light, and determined to be medically suitable as the physical requirements did not exceed her functional capacity.

As noted above, appellant's treating physician, Dr. Lang, opined that appellant could work for eight hours per day with limitations comprised of sedentary to light work and avoiding overhead or repetitive work. He also indicated initially that appellant had a 10-pound lifting restriction, which he later raised to 20 pounds. The Board finds that the restrictions offered by Dr. Lang are consistent with the duties of the selected position.

The Board also finds that the Office considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment and age and employment qualifications, in determining that the position of retail store manager represented appellant's wage-earning capacity. Further, the Office properly applied the *Shadrick* formula[23] and codified at 20 C.F.R. § 10.403 in determining appellant's loss of wage-earning capacity.

[21] As noted, appellant was provided with assistance to complete a course of study in health services administration. However, her educational assistance was discontinued as a result of poor grades, initial nonattendance during the fall term, and her request to receive an additional year of training.

[22] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(b) (December 1995); *see also Dorothy Jett*, 52 ECAB 246 (2001).

[23] *Albert C. Shadrick*, *supra* note 20.

Appellant has alleged that she had made several attempts to return to her position as postmaster. Although she may wish to return to her original position, the fact that she was unable to return to it does not show that she was unable to perform the duties of the constructed position. Appellant also alleged that it was unfair to reduce her compensation based on her rate of pay in March 2006 as opposed to the date of her separation. However, the Board notes that 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.[24] As noted, the Office properly applied its standard formula for determining appellant's loss of wage-earning capacity.

The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of retail store manager and that the position was reasonably available within the general labor market of appellant's commuting area. The Office properly determined that the position of a retail store manager reflected her wage-earning capacity effective August 6, 2006. Because the Office followed proper procedures in determining appellant's loss of wage-earning capacity, the Board affirms the Office's reduction of appellant's compensation.

## ***LEGAL PRECEDENT -- ISSUE 2***

Under section 8128(a) of the Act,[25] the Office may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provides that a claimant may obtain review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence that:

> "(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or
>
> "(ii) Advances a relevant legal argument not previously considered by the Office; or
>
> "(iii) Constitutes relevant and pertinent new evidence not previously considered by the [the Office]."[26]

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[27]

[24] 20 C.F.R. § 10.403(c). *See Shadrick supra* note 20.

[25] 5 U.S.C. § 8128(a).

[26] 20 C.F.R. § 10.606(b).

[27] 20 C.F.R. § 10.608(b).

## ***ANALYSIS -- ISSUE 2***

Appellant did not show that the Office erroneously applied or interpreted a specific point of law; she did not advance a relevant legal argument not previously considered by the Office; and she has not submitted relevant and pertinent medical evidence not previously considered by the Office.

Appellant requested reconsideration on May 9, 2007. She alleged that the Office was inconsistent and unfair in the handling of her claims with the Office. However, appellant did not submit any evidence supporting her general allegations. The Board notes that this argument is not relevant as the underlying issue pertains to the wage-earning capacity decision. Appellant's argument does not show that the original determination was erroneous. She has not shown that the Office erred in the handling of her claim and this argument has no reasonable color of validity.[28]

Appellant also referred to the February 11, 1999 modified postmaster position with the employing establishment, which she alleged had a wrong claim number. She also alleged that she accepted the position because she was "emotionally/mentally exhausted from all that [she] had encountered with the [Office]. The Board finds that this argument also has no reasonable color of validity and is not relevant to the issue of her ability to perform the constructed position of a retail store manager in August 2006. Appellant's argument that the employing establishment indicated that it could "accommodate most restrictions short of bed rest" is also not relevant to the issue of whether she was able to perform the duties of retail store manager in August 2006. The record reflects that the employing establishment later informed the Office on March 25, 2003 that it was unable to accommodate her restrictions. Thus, the employing establishment's earlier indication that it was able to accommodate her is no longer valid or relevant to the underlying issue. Likewise, appellant's assertion that her vocational rehabilitation counselor closed her case when she indicated that she was willing to seek employment is not relevant to the underlying issue of whether she was able to work as a retail store manager. Instead, it would tend to support her ability to return to work.

Appellant also argued that appellant had been seeking employment since March 2005 and requested that her compensation be reinstated. This argument is also not relevant as the fact that appellant was seeking employment or that she was unsuccessful in obtaining full-time employment in the selected position in the commuting area does not establish that the position is unavailable in the area.[29]

Appellant enclosed copies of documents from her claims. However, this evidence is merely duplicative and not relevant to the issue of appellant's ability to perform the constructed

[28] *See John F. Critz*, 44 ECAB 788 (1993) (reopening of a claim not required where a legal contention does not have a reasonable color of validity).

[29] *Rosa M. Garcia*, 49 ECAB 272 (1998).

position of a retail store manager in August 2006. The submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.[30]

Consequently, the Office properly denied appellant's request for reconsideration.

## ***CONCLUSION***

The Board finds that the Office properly reduced appellant's compensation benefits effective August 6, 2006. The Board also finds that the Office also properly refused to deny appellant's reconsideration request without reviewing the merits of her claim.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the May 21, 2007 and December 8, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 24, 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

[30] *Alan G. Williams*, 52 ECAB 180 (2000); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000); *Robert P. Mitchell*, 52 ECAB 116 (2000).