United States Department of Labor
Employees' Compensation Appeals Board

D.S., Appellant	)	
and	)	**Docket No. 08-7**
	)	**Issued: September 4, 2008**
U.S. POSTAL SERVICE, POST OFFICE, San Bernardino, CA, 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
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On October 1, 2007 appellant filed an appeal from merit decisions of the Office of Workers' Compensation Programs dated January 13 and June 7, 2007. 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 appellant's actual earnings as a modified city carrier fairly and reasonably represented her wage-earning capacity.

FACTUAL HISTORY

On March 13, 1997 appellant, then a 47-year-old letter carrier, sustained an employment-related injury when she fell backward while being attacked by a dog.[1] She returned to inside

[1] Under Office file numbers 131127070, 131205019 and 132003119, the Office has accepted the following conditions: strain/sprain of the neck, bilateral shoulder and arm, thoracic and lumbar regions, acute reaction to stress, bilateral carpal tunnel syndrome, bilateral rotator cuff syndrome, right radial styloid tenosynovitis and other shoulder conditions.

work only on May 6, 1997 and to her regular duties in June 1997. The Office accepted several recurrences and appellant underwent left and right carpal tunnel decompression procedures and left shoulder surgery. Appellant returned to limited duty for four hours a day on January 30, 2006 and received compensation for four hours a day.

In May 2006, the Office referred appellant to Dr. Bunsri T. Sophon, a Board-certified orthopedic surgeon, for a second opinion evaluation. In reports dated May 23 and June 22, 2006, Dr. Sophon noted his review of the statement of accepted facts, medical record and appellant's complaints. He provided physical findings and diagnoses and advised that appellant could work eight hours per day of modified duty with permanent restrictions of no reaching above the shoulder, four hours of reaching, pushing, pulling and lifting, six hours of sitting, walking and standing and a weight limitation of 20 pounds.

On August 21, 2006 appellant rejected a modified city carrier job offer, stating that she could only work four hours daily.[2] In an October 13, 2006 report, Dr. William Simpson, an attending orthopedic surgeon, reviewed Dr. Sophon's report and disagreed with his conclusion that appellant could work eight hours a day, advising that she should only work four hours of light duty daily.

Appellant accepted the offered position on October 20, 2006,[3] and began working eight hours daily on October 21, 2006. On January 19, 2007 the Office ascertained that appellant continued to work in that position and was informed that her pay rate was $49,219.00 per year, or $946.52 per week.

By decision dated January 13, 2007, the Office determined that appellant's actual wages in the modified city carrier position fairly and reasonably represented her wage-earning capacity, with a zero percent loss of wage-earning capacity. On February 1, 2007 appellant requested a review of the written record.[4] By decision dated June 7, 2007, an Office hearing representative affirmed the January 13, 2007 decision.

LEGAL PRECEDENT

Section 8115(a) of the Federal Employees' Compensation Act[5] provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by the employee's actual earnings if the actual earnings fairly and reasonably represent the employee's wage-earning capacity.[6] Generally, wages actually earned are the best

[2] The position was for eight hours a day, and consisted of pick-up and delivery of express mail, case and deliver within medical limitations, window and retail services including sales, lobby director and passport duties, accountable mail and other duties within her medical restrictions.

[3] By letter dated September 18, 2006, the Office informed appellant that the offered position was suitable.

[4] Dr. Simpson continued to advise that appellant should only work eight hours a day. On December 28, 2006 she requested leave under the Family and Medical Leave Act. There is no indication in the record as to whether this was approved.

[5] 5 U.S.C. §§ 8101-8193.

[6] 5 U.S.C. § 8115(a); *Loni J. Cleveland*, 52 ECAB 171 (2000).

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.[7] The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision,[8] 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.[9] Office procedures provide that the Office can make a retroactive wage-earning capacity determination if the claimant worked in the position for at least 60 days, the position fairly and reasonably represented his or her wage-earning capacity and the work stoppage did not occur because of any change in his injury-related condition affecting the ability to work.[10]

ANALYSIS

The Office accepted that appellant sustained multiple employment-related injuries beginning on March 13, 1997.[11] After several periods of total disability, she returned to four hours of modified duty on January 30, 2006, and continued to receive compensation for four hours a day. In May 2006, the Office referred her to Dr. Sophon for a second opinion evaluation, and in reports dated May 23 and June 22, 2006, he provided examination findings and advised that appellant could return to eight hours of modified duty a day. On October 17, 2006 appellant accepted a job offer as a modified city carrier for eight hours a day, and began working this schedule on October 21, 2006. On January 19, 2007 the Office ascertained that appellant continued to work in that position at a pay rate of $49,219.00 per year, or $946.52 per week.

The Board finds that appellant's actual earnings as a modified city carrier fairly and reasonably represent her wage-earning capacity. She returned to full-time work on October 21, 2006 as a modified city carrier and was working in this position on January 19, 2007, the date the Office issued its wage-earning capacity determination. Appellant worked in the position for more than 60 days, and there is no evidence that the position was seasonal, temporary or makeshift work designed for her particular needs and no evidence to show that she was not working eight hours a day.[12] As there is no evidence that her wages in this position did not fairly and reasonably represent her wage-earning capacity, they must be accepted as the best measure of her wage-earning capacity.[13]

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[7] *Lottie M. Williams*, 56 ECAB 302 (2005).

[8] 5 ECAB 376 (1953).

[9] 20 C.F.R. § 10.403(c).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity,* Chapter 2.814.7(a) (July 1997); *Selden H. Swartz*, 55 ECAB 272 (2004).

[11] *Supra* note 1.

[12] *J.C.*, 58 ECAB ____ (Docket No. 07-1165, issued September 21, 2007).

[13] *See Loni J. Cleveland*, *supra* note 6.

As appellant's actual earnings in the position of modified city carrier 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 determined that appellant had no loss of wage-earning capacity based on her actual earnings. The current weekly earnings of $946.52 per week as a modified city carrier exceeded the current weekly wages of the date-of-injury position as a letter carrier.[14] Appellant therefore had no loss of wage-earning capacity under the *Shadrick* formula.[15]

CONCLUSION

The Board finds that the Office met its burden of proof to establish that appellant's actual wages as a modified city carrier fairly and reasonably represented her wage-earning capacity.[16]

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 7, 2007 be affirmed.

Issued: September 4, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

[14] Appellant sustained her final recurrence of disability in May 2000, and the Office based her compensation thereafter on a May 20, 2000 date of injury, at a weekly wage of $766.67.

[15] *Albert C. Shadrick, supra* note 8.

[16] The Board notes that appellant submitted evidence subsequent to the June 7, 2007 Office decision and with her appeal to the Board. The Board cannot consider this evidence, however, as its review of the case is limited to the evidence of record that was before the Board at the time of its final decision. 20 C.F.R. § 501.2(c); *see Sandra D. Pruitt*, 57 ECAB 126 (2005). Appellant also simultaneously requested reconsideration with the Office and appealed to the Board. The Office and the Board may not have simultaneous jurisdiction over the same issue in the same case. Following the docketing of an appeal with the Board, the Office does not retain jurisdiction to render a further decision regarding a case on appeal until after the Board relinquishes its jurisdiction. *Linda D. Guerrero*, 54 ECAB 556 (2003). Appellant retains the right to request modification of the wage-earning capacity decision with the Office.