

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

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**J.M., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Kansas City, MO, Employer**

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**Docket No. 08-942  
Issued: February 4, 2009**

*Appearances:*  
*Brian Klopfenstein, Esq., for the appellant*  
*No appearance, for the Director*

Oral Argument December 3, 2008

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Judge  
COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On February 12, 2008 appellant timely appealed merit decisions of the Office of Workers' Compensation Programs dated September 28, 2007 and January 4, 2008, concerning her wage-earning capacity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

**ISSUE**

The issue is whether the Office properly reduced appellant's compensation effective September 30, 2007 based on its determination that the constructed position of receptionist represented her wage-earning capacity.

**FACTUAL HISTORY**

On August 25, 1999 appellant, then a 43-year-old flat sorting machine operator, noticed pain and swelling in her feet that began while working overtime and during prolonged standing. She returned to work the next day with a work restriction. The Office accepted appellant's claim for bilateral Achilles tendinitis with a subsequent debridement and calcaneal ostectomy and paid

her appropriate compensation. It denied appellant's request to expand her claim to include a consequential right knee condition.<sup>1</sup>

On May 18, 2005 appellant accepted a permanent rehabilitation job offer as a modified full-time mail processing clerk. On May 25, 2005 she was involved in a nonwork-related motor vehicle accident and sustained a left rotator cuff tear. As a result of the motor vehicle accident, appellant did not work May 26 through June 26, 2005. She returned to work on June 27, 2005 and worked until June 29, 2005. Appellant stopped work and was placed on the periodic rolls. On February 8, 2008 the employing establishment administratively removed appellant from employment due to acceptance of nonpostal employment.

The Office denied appellant's subsequent claims filed in July 2005, which alleged that the work duties she performed for the three days after her motor vehicle accident aggravated her left rotator cuff tear (file number xxxxxx464) and that her job duties exceeded her work restrictions of 2001 and caused a tear in her back as well as a left shoulder injury (file number xxxxxx464). By decision dated December 19, 2006, it also denied appellant's request to expand her claim to include a consequential left shoulder condition claimed to be caused by use of a manual wheel chair prescribed for her accepted bilateral Achilles tendinitis condition.

On March 16, 2006 Dr. Timothy Badwey, a Board-certified orthopedic surgeon, evaluated appellant for her bilateral Achilles tendinitis. In a work-capacity evaluation (Form OWCP-5c), he advised that she could work full time with permanent restrictions on squatting, kneeling or climbing and lifting no more than 30 pounds. Dr. Badwey noted that appellant should not walk more than 100 feet without a 15-minute rest between, should sit in a chair with feet on the floor and should use a wheelchair between the parking lot and her workstation, which she could self-propel. Appellant also had restrictions with respect to her nonwork-related conditions.<sup>2</sup>

On March 9, 2007 the Office referred appellant to vocational rehabilitation. On April 3, 2007 the employing establishment advised the Office that it was unable to provide employment within appellant's restrictions. On April 30, 2007 appellant underwent a vocational evaluation, which demonstrated her ability to perform clerical positions.

On May 6, 2007 appellant started part-time work as an office manager at the Macedonia Baptist Church for \$100.00 per week.<sup>3</sup> The record reflects that appellant had volunteered at the church since 2005, performing clerical work. She received training in computer operations, customer service skills and attended formal training classes paid for by the church, which taught her skills in proofreading and grammar.

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<sup>1</sup> By decision dated November 4, 2003, the Board affirmed the November 20, 2002 and April 24 and February 13, 2003 decisions of the Office under file number xxxxxx280, which found that appellant did not establish a consequential injury to her right knee. Docket No. 03-1284 (issued November 4, 2003).

<sup>2</sup> The record indicates that appellant's left shoulder has a permanent restriction on "prolonged propelling of the wheelchair." Dr. Stanley Bowling, a Board-certified orthopedic surgeon, opined that appellant reached maximum medical improvement with respect to her right knee condition on April 7, 2003.

<sup>3</sup> Appellant worked Tuesday through Friday 9:00 a.m. to 4:00 p.m. and four hours on Sunday.

Because appellant had secured employment, vocational rehabilitation services were closed on August 9, 2007. The rehabilitation counselor identified the position of receptionist, Department of Labor's *Dictionary of Occupational Titles*, (DOT # 237.367-038) to be suitable, both medically and occupationally, reasonably available in appellant's geographic area and comparable to the job she performed at a better wage than that provided by the Macedonia Baptist Church. The position had estimated weekly earnings of \$402.00 and was available in sufficient numbers on a full-time basis in appellant's community. The position description noted that a receptionist would receive callers at the employing establishment, determine the nature of business, direct callers to destination; obtain caller's name and arrange for appointment with the person called upon; direct caller to destination and record name, time of call, nature of business and person called upon. The receptionist could also issue a visitor's pass when required; make future appointments and answer inquires; perform a variety of clerical duties and other duties pertinent to type of establishment; and collect and distribute mail and messages. The position was listed as sedentary with occasional lifting of no more than 10 pounds and no climbing, balancing, stooping, kneeling, crouching or crawling. The rehabilitation counselor opined that appellant's experience exceeded the specific vocational preparation factor of three to six months to compete on the open labor market.

In an August 23, 2007 notice of proposed reduction of compensation, the Office advised appellant that the factual and medical evidence of record established that she was no longer totally disabled. It found that appellant's actual earnings performing clerical work for her church did not adequately represent her wage-earning capacity. The Office found that the factual and medical evidence established that she had the capacity to earn the wages of a receptionist and requested that she submit additional evidence or argument within 30 days if she disagreed with the proposed action.

In response, appellant disagreed with the proposed reduction. She noted that the Macedonia Baptist Church was a nonprofit organization allowed to pay the wage amount she received. Appellant questioned why the employing establishment did not place her in a position for which she was qualified. She noted that no names of locations of specific receptionist jobs were provided and was not obligated to stay in her current position. Appellant expressed dissatisfaction with the performance of the rehabilitation counselor and noted that she had postal skills that were not helpful at the church or any other business.

By decision dated September 28, 2007, the Office reduced appellant's wage-loss compensation effective September 30, 2007, finding that the position of receptionist represented her wage-earning capacity. It noted that appellant's current weekly pay rate for the job and step when injured was \$981.75. The Office found that appellant was capable of earning \$402.00 per week, that the adjusted wage-earning capacity per week was \$374.78, that the percentage of new wage-earning capacity was 41 percent, that the loss in wage-earning capacity amount per week was \$539.31, leaving appellant with a compensation rate of \$404.48 or \$414.25 per week when increased by applicable cost-of-living adjustments. This resulted in a new compensation rate every four weeks of \$1,657.00, less health benefits premium of \$268.60, less basic life insurance premium of \$14.40 and less optional life insurance premium of \$76.20, for a net compensation every four weeks of \$1,297.80 beginning September 30, 2007.

On October 12, 2007 appellant requested reconsideration. She argued that the work she performed for the church was not consistent with the position that the Office selected. Appellant contended that she was limited in her job duties and responsibilities and often missed work. In an October 8, 2007 letter, John L. Brooks, Pastor, Macedonia Baptist Church, disagreed that appellant's job with the church was that of a receptionist. He stated that appellant only answered the telephone and took messages. Occasionally, appellant performed other "odd and end jobs that help out in the life of the church." She submitted information about a dispute with the employing establishment and a letter requesting an independent vocational rehabilitation assessment, which the Office denied by letter dated December 5, 2007. Appellant submitted September 11 and November 27, 2007 reports, from Dr. Badwey regarding her ankles and a February 2, 2007 treatment note from Dr. Bowling regarding her left shoulder and right knee.

By decision dated January 4, 2008, the Office denied modification of its September 28, 2007 decision.

On appeal, appellant contended that she cannot medically and vocationally perform the selected receptionist position. She reiterated that her actual duties at the Macedonia Baptist Church did not fit the duties identified in the constructed position.

### **LEGAL PRECEDENT**

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.<sup>4</sup> An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.<sup>5</sup>

Section 8115 of the Federal Employees' Compensation Act<sup>6</sup> and Office regulations provide that wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity or the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, usual employment, age, qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect the wage-earning capacity in his or her disabled condition.<sup>7</sup>

The Office must initially determine a claimant's medical condition and work restrictions before selecting an appropriate position that reflects his or her wage-earning capacity. The medical evidence upon which the Office relies must provide a detailed description of the

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<sup>4</sup> *James M. Frasher*, 53 ECAB 794 (2002).

<sup>5</sup> 20 C.F.R. §§ 10.402, 10.403; *John D. Jackson*, 55 ECAB 465 (2004).

<sup>6</sup> 5 U.S.C. §§ 8101-8193.

<sup>7</sup> 5 U.S.C. § 8115; 20 C.F.R. § 10.520; *John D. Jackson*, *supra* note 5.

condition.<sup>8</sup> Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.<sup>9</sup>

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 for selection of a position listed in the Department of Labor's Dictionary of Occupational Titles or otherwise available in the open market, that fits that employee's capabilities with regard to his or her physical limitations, 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.<sup>10</sup> Finally, application of the principles set forth in *Albert C. Shadrick*<sup>11</sup> will result in the percentage of the employee's loss of wage-earning capacity.<sup>12</sup> Subsection (d) of the regulations provide that the employee's wage-earning capacity in terms of percentage is obtained by dividing the employee's actual earnings or the pay rate of the position selected by the Office, by the current pay rate for the job held at the time of the injury.<sup>13</sup>

In determining an employee's wage-earning capacity based on a position deemed suitable, but not actually held, the Office must consider the degree of physical impairment, including impairment results from both injury related and preexisting conditions, but not impairments resulting from post injury or subsequently acquired conditions. Any incapacity to perform the duties of the selected position resulting from subsequently acquired conditions is immaterial to the loss of wage-earning capacity that can be attributed to the accepted employment injury and for which appellant may receive compensation.<sup>14</sup>

### ANALYSIS

Appellant's claim was accepted by the Office for bilateral Achilles tendinitis. By decision dated September 28, 2007, the Office reduced her compensation effective September 30, 2007. The Board finds that the Office properly reduced appellant's compensation based on her capacity to perform the duties of a receptionist.

In finding that appellant was physically capable of performing the duties of a receptionist, the Office relied on the March 16, 2006 opinion of Dr. Badwey who evaluated appellant for her accepted bilateral Achilles' tendinitis. Although she has other conditions and impairments pertaining to her left shoulder and ankles, these conditions and any impairments therefrom were

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<sup>8</sup> *William H. Woods*, 51 ECAB 619 (2000).

<sup>9</sup> *John D. Jackson*, *supra* note 5.

<sup>10</sup> *James M. Frasher*, *supra* note 4.

<sup>11</sup> 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.403.

<sup>12</sup> *James M. Frasher*, *supra* note 4.

<sup>13</sup> 20 C.F.R. § 10.403(d).

<sup>14</sup> *John D. Jackson*, *supra* note 5.

acquired after her employment injury; therefore, any incapacity to perform the duties of the selected position resulting from such subsequently acquired conditions is immaterial to the loss of wage-earning capacity that can be attributed to the accepted employment injury.<sup>15</sup> In a March 16, 2006 OWCP-5c form, Dr. Badwey indicated that appellant was capable of working an eight-hour day in a sedentary position with restrictions. These restrictions involved no squatting, kneeling or climbing, no lifting more than 30 pounds, walking no more than 100 feet without a 15 minute rest between, sitting in a chair with feet on the floor and using a wheelchair to get from parking lot to workstation and back, which appellant could self-propel. The Board finds that Dr. Badwey's opinion is sufficiently well rationalized to establish that appellant is medically capable of working full time in the constructed position, which is a sedentary position that has occasional lifting of no more than 10 pounds and no climbing, balancing, stooping, kneeling, crouching, or crawling. Although appellant subsequently submitted medical evidence, the medical reports are immaterial to the medical suitability of the selected receptionist position. The reports pertain to nonwork-related conditions of her ankles, left shoulder and right knee which were subsequent to her accepted injury. Accordingly, the medical evidence clearly establishes that appellant has the physical capacity to work eight hours a day as a receptionist within the restrictions noted by Dr. Badwey.

The position of receptionist is also vocationally suitable to appellant. Appellant was in the initial stages of vocational rehabilitation through the Office when she secured employment at the Macedonia Baptist Church. For approximately two years, she had volunteered at the church performing work of a clerical nature. The record reflects that appellant received training in computer operations, customer service skills and attended formal training classes paid for by the church, which taught her skills in proofreading and grammar. She was hired as an Office Manager by the Macedonia Baptist Church on May 6, 2007 and performed this position from May 6, 2007 and continuing on what appears to be a part-time basis with great flexibility on the hours actually worked. Dr. Badwey, however, found that appellant could work full time. The vocational rehabilitation counselor properly recommended that the Office select a full-time receptionist position to represent appellant's wage-earning capacity as her actual employment and earnings with the church did not adequately represent her capacity for employment.<sup>16</sup>

The receptionist position was classified as sedentary with occasional lifting of no more than 10 pounds and no climbing, balancing, stooping, kneeling, crouching or crawling. These physical requirements are within the restrictions set forth by Dr. Badwey. The vocational requirements were found by the counselor to be commensurate with appellant's education and experience, as she performed these duties on a voluntary basis for two years prior to being hired May 6, 2007 and continuing. The counselor then determined the prevailing wage rate of these positions and their reasonable availability in the open labor market. Based on these calculations, the Office issued a September 28, 2007 decision reducing appellant's compensation based on her ability to earn \$402.00 a week as a receptionist.

The Board finds that the Office considered the proper factors, such as availability of receptionist positions and appellant's physical limitations, usual employment, age and

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<sup>15</sup> *Id.*; see *James Henderson, Jr.*, 51 ECAB 268 (2000).

<sup>16</sup> *T.O.*, 58 ECAB \_\_\_\_ (Docket No. 06-1458, issued February 20, 2007).

employment qualifications, in determining that the receptionist position represented appellant's wage-earning capacity.<sup>17</sup> Appellant's actual earnings did not fairly and reasonably represent her wage-earning capacity as such position was part time. Dr. Badwey opined that appellant was medically capable of full-time light-duty work at the physical demand level required by the receptionist position. Appellant performed the component tasks of this position at the Macedonia Baptist Church since 2005, first on a volunteer basis and then on a paid basis and continuing. The vocational rehabilitation counselor found that receptionist positions were reasonably available in appellant's commuting area. Also, the Office followed the established procedures under the *Shadrick* decision in calculating appellant's employment-related loss of wage-earning capacity. Appellant did not contend that the Office erred in its mathematical calculations of her wage-earning capacity. The Board has reviewed these calculations and finds them to be correct.

Appellant contends that the Office wrongfully classified the job category she could perform as her actual job duties at the church do not meet the DOL's definition for receptionist.<sup>18</sup> She further contends that her additional skills are not useful to her work with the church. However, the point at issue is whether the evidence establishes that appellant is vocationally and medically able to perform the duties of a receptionist, not whether the clerical position for which she works at the church is the same as the selected position. She also argued that the church is a nonprofit organization which can only pay her the wage she receives. Appellant is medically and vocationally capable of working eight hours a day as a receptionist. It is her choice to remain in her part-time position at the church. Appellant did not submit medical evidence to establish that she was not capable of working eight hours a day.

Appellant has argued that the rehabilitation counselor did not report information in a truthful manner and was biased. However, these assertions are not supported by any evidence. The record indicates that the counselor properly monitored her situation and determined the position accurately represented appellant's wage-earning capacity. While appellant contended that, the names of locations of specific jobs were not identified, such action is not necessary as appellant had already obtained employment and her wage-earning capacity is based upon a selected or constructed position. Furthermore, the Board has held that the mere fact that appellant is not able to secure a job in the selected position does not establish that the work is not available or suitable.<sup>19</sup> While appellant also questioned why the employing establishment did not place her in a position for which she is qualified, the Board has no jurisdiction over such personnel matters. The other information appellant submitted has no bearing on the issue in this case. The Office's September 28, 2007 decision reducing appellant's compensation based on her ability to earn wages in the constructed position of a full-time receptionist is proper under the law and the facts of this case.

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<sup>17</sup> *Loni J. Cleveland*, 52 ECAB 171 (2000).

<sup>18</sup> While appellant contended she does not type, the Board notes no requirement for typing is listed in the receptionist job description.

<sup>19</sup> *See Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

**CONCLUSION**

The Board finds that the Office properly reduced appellant's compensation effective September 30, 2007 based on its determination that the constructed position of receptionist represented her wage-earning capacity.

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs, decisions dated January 4, 2008 and September 28, 2007 are affirmed.

Issued: February 4, 2009  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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