

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

_____)	
J.G., Appellant)	
)	
and)	Docket No. 10-90
)	Issued: August 23, 2010
U.S. POSTAL SERVICE, BLOOMSBURG POST OFFICE, Bloomsburg, PA, Employer)	
_____)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 13, 2009 appellant filed a timely appeal from a September 29, 2009 decision of the Office of Workers' Compensation Programs regarding a wage-earning capacity determination. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether the Office properly reduced appellant's monetary compensation benefits to zero effective July 27, 2009 on the grounds that her actual earnings as a modified clerk fairly and reasonably represented her wage-earning capacity.

On appeal, counsel asserts that the Office's wage-earning capacity determination was improper as the modified clerk position was a makeshift job without defined duties and appellant did not perform the position for at least 60 days.

FACTUAL HISTORY

The Office accepted that on October 6, 2002 appellant, then a 40-year-old part-time flexible mail clerk, sustained a lumbosacral sprain, lumbosacral radiculitis, lumbar myelopathy,

degeneration of a lumbar disc and spondylolisthesis when she pushed a hamper of mail then lifted flats of mail. After a brief period of light-duty work, appellant stopped work on December 31, 2002. She received compensation for total wage loss on the periodic rolls.

Dr. A. Loren Amacher, an attending Board-certified neurosurgeon, submitted reports from February 2003 to September 2005 finding appellant totally disabled due to right-sided L5 radiculopathy causally related to the October 6, 2002 injury.¹ On April 9, 2008 the Office obtained a second opinion from Dr. Russell N. Worobec, a Board-certified orthopedic surgeon, who found appellant capable of full-time limited duty. As the medical evidence indicated that she was no longer totally disabled, the Office referred her for vocational rehabilitation.

The Office suspended vocational rehabilitation as there was a conflict of medical opinion between Dr. Worobec, for the government, and Dr. Amacher, for appellant, regarding whether appellant remained totally disabled for work. It selected Dr. Michael C. Raklewicz, a Board-certified orthopedic surgeon, to resolve the conflict. In a June 27, 2008 report, Dr. Raklewicz diagnosed degenerative lumbar spondylosis aggravated by the October 6, 2002 injury. He found that appellant could perform full-time light duty with lifting restricted to 20 pounds, 10-minute breaks every 4 hours, and sitting, standing, walking, lifting and carrying limited to 4 hours.

In an August 4, 2008 report, Dr. Matthew Berger, an attending Board-certified psychiatrist, found appellant totally disabled due to major depression, generalized anxiety disorder and chronic pain syndrome secondary to the October 6, 2002 injury. The Office obtained a second opinion report from Dr. Pamela L. Leib, a Board-certified psychiatrist, who diagnosed major depression related to the October 6, 2002 injury. Dr. Leib found appellant able to work approximately four hours a day with restrictions. The Office found a conflict of medical opinion between Dr. Berger, for appellant and Dr. Leib, for the government, regarding appellant's work capacity. It appointed Dr. Gladys Fenichel, a Board-certified psychiatrist, to resolve the conflict. In a March 25, 2009 report, Dr. Fenichel diagnosed chronic pain syndrome that did not require any activity or occupational restrictions.

In May 2009, the Office reinstated the vocational rehabilitation plan. On June 8, 2009 the employing establishment offered appellant a limited-duty assignment as a modified window distribution clerk for 37 hours a week at the Bloomsburg Branch. Duties included mail breakdown, sorting mail, boxing mail, changing box locks, box audits, recordkeeping, ordering supplies, maintaining records and assisting at the window as needed. The position required lifting up to 20 pounds, standing, walking, reaching, sitting and keyboarding. Each activity was limited to four hours a day. Appellant accepted the offer on July 27, 2009 and began work that day.

In August 11 and 12, 2009 e-mails, the employing establishment noted that appellant had not been provided a regular work schedule. Appellant was given only two hours of work on July 27, 2009. In an August 27, 2009 report, a vocational rehabilitation counselor noted that

¹ The Office obtained second opinion reports from several Board-certified orthopedic surgeons. On August 11, 2003 Peter A. Feinstein, M.D., found appellant able to perform full-time sedentary work. Albert G. Liddell, M.D., stated in a February 10, 2004 report that appellant could perform full-time limited-duty work. Robert F. Draper, Jr., M.D., opined on December 12, 2005 that appellant could perform full-time limited duty.

appellant might transfer to the Washingtonville Branch as there was not enough work for her at the Bloomsburg Branch.

On September 8, 2009 the employing establishment offered appellant a limited-duty assignment as a modified window distribution clerk for 40 hours a week at the Bloomsburg Branch. Duties included mail breakdown, sorting mail, assisting at the window, using the computer to respond to information requests from district and operations managers and acting as officer in charge. The position required lifting up to 20 pounds, standing, walking, reaching, sitting and keyboarding. Sitting, walking and computer use were limited to 2 hours a day, sorting mail and standing at the window to 3½ hours a day, and lifting to 30 minutes a day. Appellant accepted the offer on September 18, 2009.

In a September 27, 2009 report, the vocational rehabilitation counselor stated that appellant had been employed for 60 days as an officer in charge at the Marion Heights Branch for 40 hours a week. He noted that appellant worked briefly at the Washingtonville Branch at the end of August 2009, returned to Bloomsburg, then moved to the Marion Heights Branch on September 14, 2009. Appellant was awaiting a hand cart to enable her to perform essential job functions at Marion Heights.

By decision dated September 29, 2009, the Office reduced appellant's wage-loss compensation to zero under sections 8106 and 8115 of the Federal Employees' Compensation Act, based on her actual earnings as a part-time modified clerk from July 27 to September 27, 2009, which exceeded those of her date-of-injury position. The Office made the determination retroactive to July 27, 2009, finding that her actual earnings properly represented her wage-earning capacity as of that date. It noted that Dr. Fenichel and Dr. Raklewicz both opined that the modified clerk position offered to appellant on June 8, 2009 was medically suitable.

LEGAL PRECEDENT

Under section 8115 (a) of the Act,² wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent her wage-earning capacity. 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.³ The Office's procedure manual provides that factors to be considered in determining whether the claimant's work fairly and reasonably represents her wage-earning capacity include the kind of appointment, that is, whether the position is temporary, seasonal or permanent and the tour of duty, that is, whether it

² 5 U.S.C. §§ 8101-8193, 8115(a).

³ *Hayden C. Ross*, 55 ECAB 455 (2004).

is part time or full time.⁴ Further, a makeshift⁵ or odd-lot position designed for a claimant's particular needs will not be considered suitable.⁶

The formula for determining loss of wage-earning capacity based on actual earnings, developed in the Board's decision in *Albert C. Shadrick*,⁷ has been codified by regulations at 20 C.F.R. § 10.403. 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 The amount any compensation paid is based on the wage-earning capacity determination and it remains undisturbed until properly modified.⁹

ANALYSIS

The Office accepted that appellant sustained lumbosacral sprain, lumbosacral radiculitis, lumbar myelopathy, a degenerated lumbar disc and spondylolisthesis. Appellant stopped work on December 31, 2002 and remained under medical treatment. Following development of the medical evidence and a reemployment effort, she returned to work on July 27, 2009 as a modified window distribution clerk. The Office reduced her wage-loss compensation to zero effective July 27, 2009, finding that appellant's actual earnings from July 27 to September 27, 2009 fairly and reasonably represented her wage-earning capacity. It found that appellant successfully performed the modified window clerk position for 60 days. However, the record demonstrates that appellant did not perform the job offered to her on June 8, 2009 for 60 days.

The vocational counselor noted that appellant was transferred several times from July 27 to September 27, 2009. Appellant returned to work at Bloomsburg Branch on July 27, 2009, was transferred to the Washingtonville Branch in late August, returned to Bloomsburg, then transferred to Marion Heights as of September 14, 2009. She was not issued a handcart needed to perform her job. The employing establishment confirmed in an August 27, 2009 e-mail that appellant would transfer to the Washingtonville Branch as there was not enough work for her at the Bloomsburg Branch. This evidence establishes that appellant did not perform the same job for 60 days.

Additionally, the two written job offers list different job duties and tours of duty. The June 8, 2009 job offer that appellant performed beginning on July 27, 2009 was for a 37-hour-a-

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (July 1997).

⁵ A makeshift position is one that is specifically tailored to an employee's particular needs and generally lacks a position description with specific duties, physical requirements and work schedule. See *William D. Emory*, 47 ECAB 365 (1996); *James D. Champlain*, 44 ECAB 438 (1993).

⁶ *A.J.*, 61 ECAB ___ (Docket No. 10-619, issued June 29, 2010).

⁷ *Albert C. Shadrick*, 5 ECAB 376 (1953).

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

⁹ See *Sharon C. Clement*, 55 ECAB 552 (2004).

week position as a modified window clerk, sorting and breaking down mail, changing box locks, ordering supplies, maintaining records and assisting at the window. The September 8, 2009 job offer that appellant began on September 18, 2009 was for a 40-hour-a-week modified window clerk position, requiring additional duties of acting as officer in charge and responding to electronic information requests. The duration of sitting, standing, walking and lifting also varied between the two jobs. During the 60-day period July 27 to September 27, 2009, appellant performed at least two different jobs with disparate duties, physical requirements and tours of duty. The Board therefore finds that the Office failed to follow its accepted procedures. The Office did not establish that appellant performed one position consistently for 60 days.¹⁰ As it failed to meet its burden of proof in this case, the wage-earning capacity determination must be reversed.

CONCLUSION

The Board finds that the Office improperly found that the position of modified clerk properly represented appellant's wage-earning capacity as of July 27, 2009.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 29, 2009 is reversed.

Issued: August 23, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁰ *Amalia Stys* (Docket No. 96-521, issued June 9, 1998) (where the Board found that as the claimant was terminated after 56 days of employment, she did not have 60 days of actual wages from which the Office could derive a fair and reasonable representation of her wage-earning capacity).