United States Department of Labor
Employees' Compensation Appeals Board

V.F., Appellant	)	
	)	
and	)	**Docket No. 09-1239**
	)	**Issued: January 25, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Tampa, FL, 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
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 14, 2009 appellant filed a timely appeal from the June 30, 2008 and January 8, 2009 decisions of the Office of Workers' Compensation Programs concerning 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 this case.

ISSUE

The issue is whether the Office properly determined that appellant's actual wages as a modified rural carrier associate fairly and reasonably reflected her wage-earning capacity effective February 4, 2008.

FACTUAL HISTORY

The Office accepted that on September 30, 2006 appellant, then a 45-year-old rural carrier, sustained a left shoulder strain, left rotator cuff tendinitis and left shoulder impingement

due to performing her work duties on that date.[1] On February 13, 2007 she underwent arthroscopic surgery of her left shoulder which was authorized by the Office. Appellant received compensation from the Office for periods of disability.

On July 2, 2007 appellant underwent a functional capacity evaluation which revealed that she was capable of performing a light level of work. She could exert up to 20 pounds of force occasionally (up to one third of the time) and up to 10 pounds of force constantly (up to two thirds of the time). In a March 20, 2008 report, Dr. Jose de la Torre, an attending Board-certified physiatrist, stated that appellant could lift up to 20 pounds to shoulder height and 50 pounds overhead. Appellant could carry up to 25 pounds and push/pull up to 65 pounds and was able to handle objects with her hands continuously.

The employing establishment offered appellant a position as a modified rural carrier associate and she began working in this position on February 4, 2008.[2] The position required lifting up to 10 pounds for 8 hours per day, pushing or pulling up to 10 pounds for 1 hour per day and performing simple grasping for 8 hours per day. It did not require reaching or lifting above the shoulder and did not involve casing mail. Appellant received wages of $602.33 per week in the position.

In a June 30, 2008 decision, the Office determined that appellant's actual wages as a modified rural carrier associate fairly and reasonably represented her wage-earning capacity. It found that appellant had successfully worked in the position for more than 60 days. The Office reduced appellant's entitlement to wage-loss compensation benefits as her current pay rate was greater than her pay at the time of her injury. Appellant continued to be entitled to medical benefits for treatment of the work-related injury.

Appellant requested a telephonic hearing with an Office hearing representative. In a subsequent letter, she asserted that she was never employed as a modified rural carrier associate but that she had been working as a rural carrier associate since May 28, 2005. Appellant claimed that no modified rural carrier associate position actually existed and that there were no limited duties assigned to the carrier craft. She alleged that the modified rural carrier associate position did not fairly and reasonably represent her wage-earning capacity because there were employees who worked more hours than she did. Appellant asserted that a limited-duty job offer should be given to employees who are expected to recover and resume working in the same position while a rehabilitation job should be given to employees who can no longer perform the same duties that they were performing when injured. She maintained that she was improperly provided with a limited-duty job offer instead of a rehabilitation job.

During the November 6, 2008 telephonic hearing, appellant argued that she should not have been offered a limited-duty job offer because she reached maximum medical improvement in January 2008 and her physicians determined that she would not be able to return to her regular

[1] The position was a part time one and appellant worked an average of 23.33 hours per week for the year prior to the injury. Appellant was earning $408.43 per week at the time of the injury.

[2] The position offered work for about 40 hours per week.

duties. She claimed that in February 2008 she returned to the same limited-duty job that she returned to in May 2007.

In response to the hearing transcript, the employing establishment commented that the modified rural carrier associate position was not a make-shift position. Appellant submitted various documents, including employing establishment job offers dated June 14, 2007 and January 29, 2008, letters between the Office and the employing establishment and documentation of the assignment of her Equal Employment Opportunity complaint to an investigator.

In a January 8, 2009 decision, the Office hearing representative affirmed the Office's June 30, 2008 decision. The Office addressed appellant's arguments and indicated that there was no provision in the Federal Employees' Compensation Act to justify her claims for compensation.

LEGAL PRECEDENT

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.[3] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[4]

Section 8115(a) of the Act provides that the "wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity."[5] The Board has stated, "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."[6]

Wage-earning capacity may not be based on an odd-lot or make-shift position designed for an employee's particular needs or a position that is seasonal in an area where year-round employment is available.[7] Wage-earning capacity may only be based on a temporary or part-time position if the position held by the employee at the time of injury was a temporary or part-

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

[4] *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

[5] 5 U.S.C. § 8115(a).

[6] *Floyd A. Gervais*, 40 ECAB 1045, 1048 (1989); *Clyde Price*, 32 ECAB 1932, 1934 (1981). Disability is defined in the implementing federal regulations as "the incapacity, because of an employment injury, to earn the wages the employee was receiving *at the time of injury*." (Emphasis added.) 20 C.F.R. § 10.5(f). Once it is determined that the actual wages of a given position represent a employee's wage-earning capacity, the Office applies the principles enunciated in *Albert C. Shadrick*, 5 ECAB 376 (1953), in order to calculate the adjustment in the employee's compensation.

[7] *See James D. Champlain*, 44 ECAB 438, 440-41 (1993); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7a(1), (2) (July 1997).

time position.[8] Office procedures direct that a wage-earning capacity determination based on actual wages be made following 60 days of employment.[9] The Board has held that the probability that an employee, if not for her work-related condition, might have obtained other positions with greater earnings is not proof of a loss of wage-earning capacity and does not afford a basis for payment of compensation under the Act.[10]

ANALYSIS

The Office accepted that on September 30, 2006 appellant sustained a left shoulder strain, left rotator cuff tendinitis and left shoulder impingement due to performing her work duties on that date. In a June 30, 2008 decision, it determined that appellant's actual wages as a modified rural carrier associate fairly and reasonably reflected her wage-earning capacity effective February 4, 2008. The Office terminated appellant's compensation as she now was earning greater wages than she did in her date-of-injury job.

In reaching its determination of appellant's wage-earning capacity, the Office properly found that she had received actual earnings as a modified rural carrier associate for more than 60 days in that she had been working in the position since February 4, 2008 when the Office issued its June 30, 2008 decision.[11] According to the evidence of record, the job offer was in accordance with the restrictions provided by an attending physician.[12] The evidence of record also confirms that the Office took the appropriate steps to obtain appellant's pay rate information from the employing establishment before issuing the decision on whether the modified rural carrier associate position, with wages of $602.33 per week, represented her wage-earning capacity. The Office compared appellant's actual earnings as a modified rural carrier associate with the wages she was receiving at the time of her injury. As appellant's actual earnings met or exceeded those she earned at the time of her injury, the Office properly reduced her wage-loss compensation to zero.

The Office also properly found that appellant's actual wages as modified rural carrier associate fairly and reasonably represented her wage-earning capacity. The record does not establish that the modified rural carrier associate position constitutes sporadic, part-time, seasonal or temporary work. Moreover, the record does not reveal that the position is a make-

[8] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7a(3) (July 1997).

[9] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7c (December 1993).

[10] *See Dempsey Jackson, Jr.*, 40 ECAB 942 (1989); *Billy G. Sinor*, 35 ECAB 419, 422 (1983).

[11] *See supra* note 9.

[12] The position required lifting up to 10 pounds for eight hours per day, pushing or pulling up to 10 pounds for one hour per day and performing simple grasping for eight hours per day. The position did not require reaching or lifting above the shoulder and did not involve casing mail. These duties were well within the restrictions recommended by Dr. de la Torre, an attending Board-certified physiatrist.

shift position designed for appellant's particular needs.[13] There was no evidence that appellant's wages did not fairly and reasonably represent her wage-earning capacity.

On appeal, appellant argued that the modified rural carrier associate position did not represent her wage-earning capacity because she returned to the same limited-duty position in February 2008 that she held when she returned to work in May 2007 as a rural carrier associate. She further maintained that the employing establishment incorrectly placed her in a limited-duty position rather than a rehabilitation position. Appellant also maintained that, if she had not been injured, she would have been able to average 40 hours of work per week. She argued that there were employees who worked more hours than she did. Appellant also claimed that holding the modified rural carrier associate prevented her from applying for higher paying jobs.

The Board notes that appellant has not provided adequate support for her arguments. The modified rural carrier associate position did in fact exist as a position separate and distinct from her previously held rural carrier position. Appellant did not adequately explain the significance of her characterization of the differences between limited-duty and rehabilitation jobs with respect to the relevant issue of the present case. Moreover, there is no provision under the Act to pay a claimant in appellant's position the higher rate of pay of a rural carrier associate who worked more hours per week or otherwise earned more money than she did. Although appellant alleged that the modified rural carrier associate position prevented her from getting higher paying jobs, the Board has held that the probability that an employee, if not for her work-related condition, might have obtained other positions with greater earnings is not proof of a loss of wage-earning capacity and does not afford a basis for payment of compensation under the Act.[14]

CONCLUSION

The Board finds that the Office properly determined that appellant's actual wages as a modified rural carrier associate fairly and reasonably reflected her wage-earning capacity effective February 4, 2008.

[13] *See supra* note 7.

[14] *See supra* note 10.

ORDER

IT IS HEREBY ORDERED THAT the January 8, 2009 and June 30, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 25, 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