United States Department of Labor
Employees' Compensation Appeals Board

P.W., Appellant	)	
and	)	**Docket No. 09-2160**
	)	**Issued: June 3, 2010**
U.S. POSTAL SERVICE, POST OFFICE, San Diego, CA, Employer	)	

Appearances:
William P. Sims, Jr., 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 August 17, 2009 appellant filed a timely appeal from a June 17, 2009 merit decision of the Office of Workers' Compensation Programs. 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 reduced appellant's compensation on the grounds that the selected position of receptionist represented her wage-earning capacity.

FACTUAL HISTORY

This case was previously before the Board. In an order dated June 1, 2009, the Board remanded the case on the grounds that the March 25, 2008 Office wage-earning capacity decision was not properly issued. The Board noted that appellant had an authorized representative, but the March 25, 2008 decision was not sent to the representative as required by Office regulations. The case was remanded for an appropriate decision.

With respect to the evidence relevant to appellant's wage-earning capacity, the Office had referred her for vocational rehabilitation.

The accepted employment-related conditions were a wrist sprain and bilateral carpal tunnel syndrome. On November 28, 2006 the rehabilitation counselor completed an OWCP Form 66 for the position of receptionist, identified under the Department of Labor's *Dictionary of Occupational Titles* as No. 237.367-038. The rehabilitation counselor advised that the job was reasonably available with wages of $10.30 per hour, or $21,424.00 per year.

In a September 29, 2007 report, the rehabilitation counselor indicated that, as of September 17, 2007, appellant had been working as a sales clerk with wages of $9.00 per hour at 28 hours per week. Appellant noted that her employer was not able to offer full-time work at that time. In an October 22, 2007 report, the rehabilitation counselor reported the anticipated wages for receptionist in appellant's area was $21,424.00 per year. Wages for the selected position of appointment clerk were $15,600.00 per year.

By report dated October 29, 2007, an Office rehabilitation specialist stated that the vocational counselor had submitted the positions of receptionist at $536.00 per week, or appointment clerk at $416.00 per week, as appropriate for appellant. The specialist did not provide any additional explanation as to the wage information.

On December 6, 2007 the Office noted that the employing establishment reported the current pay rate for appellant's date-of-injury position was $43,084.00 annually, with Sunday premium of 1.25 percent per hour for 8 hours and 22 hours per weeknight differential of 10 percent per hour. On December 12, 2007 appellant submitted a CA-1032 form indicating she had been working as a cashier at $9.00 per hour since September 3, 2007.

In a work capacity evaluation (Form OWCP-5c) dated December 3, 2007, Dr. Andre Eglevsky, an attending orthopedic surgeon, found that appellant was able to work eight hours per day with restrictions. He noted that appellant was limited to 4 hours of repetitive wrist and elbow motions, 6 hours of pushing and pulling and a 20-pound lifting restriction.

By letter dated December 14, 2007, the Office advised appellant that it proposed to reduce her wage-loss compensation based on her capacity to earn $536.00 per week as a receptionist. It noted that she was currently working as a cashier, stating "but unfortunately this does not represent your wage-earning capacity." By decision dated March 25, 2008, the Office reduced appellant's compensation. Its calculations were based on a current (as of March 1, 2007) date-of-injury position pay rate of $915.52 per week, with earnings in the selected position of $536.00 per week.

As noted, the Board set aside the decision, as it was not sent to the authorized representative. By final decision dated June 17, 2009, the Office again found the selected position of receptionist represented appellant's wage-earning capacity and reduced appellant's compensation. The calculations were the same as in the March 25, 2008 decision, with an effective date reported as July 5, 2009.

LEGAL PRECEDENT

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction in such benefits.[1]

Under section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent her wage-earning capacity. 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, her age, her qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect her wage-earning capacity in her disabled condition.[2]

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an Office wage-earning capacity specialist 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 the 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 labor market should be made through contact with the state employment service or other applicable service.[3] 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.[4]

ANALYSIS

The Office determined the selected position of receptionist represented appellant's wage-earning capacity and reduced her monetary compensation. At the time of the notice of proposed reduction on December 14, 2007, appellant was working as a cashier. The Office noted that appellant was earning $9.00 per hour, but found "this did not represent her wage-earning capacity," without further explanation. The March 25, 2008 and June 17, 2009 Office decisions do not discuss her actual earnings.

It is well established that, when a claimant has actual earnings, the Office must make a proper finding as to whether such earnings fairly and reasonably represent her wage-earning capacity.[5] The Board has noted that actual earnings are generally the best measure of wage-earning capacity as they more reasonably reflect appellant's employment capacity in the open labor market.[6] The Office did not specify any deficiency in appellant's actual earnings or

[1] *Carla Letcher*, 46 ECAB 452 (1995).

[2] *See Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); *see also* 5 U.S.C. § 8115(a).

[3] *See Dennis D. Owen*, 44 ECAB 475 (1993).

[4] 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.303.

[5] *See Sherman Preston*, 56 ECAB 607 (2005).

[6] *Daniel Renard*, 51 EACB 466 (2000).

explain why her actual earnings did not fairly and reasonably represent her wage-earning capacity.[7] Only then may the Office consider a selected position with regard to the factors enumerated in 5 U.S.C. § 8115.

The Office did not make adequate findings in this case. There was no explanation provided as to why appellant's actual wages did not fairly and reasonably represent her wage-earning capacity, with reference to relevant Office procedures or Board precedent on the issue. Without a proper adjudication as to actual earnings, it was premature for the Office to consider a selected position.

The Board finds that the Office did not meet its burden to reduce appellant's compensation pursuant to 5 U.S.C. § 8115(a).

CONCLUSION

The Board finds that the Office did not meet its burden of proof to reduce appellant's compensation based on wage-earning capacity in the selected position of receptionist.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 17, 2009 is reversed.

Issued: June 3, 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

[7] *Id.*