

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

C.D., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,
REGIONAL OFFICE, Decatur, GA, Employer)

Docket No. 09-2167
Issued: June 14, 2010

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 28, 2009 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated August 11, 2009, which found that her actual earnings represented her wage-earning capacity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether the Office properly determined appellant's wage-earning capacity based on her actual earnings.

FACTUAL HISTORY

On September 19, 2007 appellant, then a 59-year-old mail clerk, sustained a back injury while lifting packages at work. The Office accepted her claim for sprain of the lumbar region, sprain of the thoracic region and displaced lumbar intervertebral disc without myelopathy at L3-4 and L4-5. Appellant stopped work on September 20, 2007 and returned to a modified full-time

position on September 27, 2007. At the time of her injury, she was a level 5, step 10. Appellant received compensation benefits for all periods of disability.

Appellant was initially treated by Dr. Latonia M. Addison, a Board-certified internist. A January 31, 2008 magnetic resonance imaging (MRI) scan of the lumbar spine revealed L3-4 right foraminal annular tear and disc herniation superimposed on mild diffuse disc bulge and L4-5 small focal disc herniation superimposed on mild diffuse disc bulge. Appellant came under the treatment of Dr. Murray Robinson, a Board-certified neurosurgeon. On October 7, 2008 Dr. Robinson performed a right L3-4 and L4-5 discectomy and diagnosed right-sided disc herniation at L3-4 and L4-5. On January 12, 2009 he advised that an MRI scan of the lumbar spine performed January 6, 2009 revealed postoperative scarring at L3-4 and L4-5 with no evidence of residual or recurrent herniated disc protrusion, no spinal stenosis or neural foraminal stenosis, L2-3 small right lateral herniated disc protrusion and at L5-S1 a left paracentral annular fissure. Dr. Robinson released appellant to sedentary limited-duty work. In a work capacity evaluation, he advised that she could return to work full time, 8 hours a day, with restrictions of walking limited to 30 minutes, standing limited to 15 minutes and general limitations on reaching, reaching above the shoulder, twisting, standing/stooping and a lifting restriction of 10 pounds.

In a February 16, 2009 report, Dr. Robinson advised that appellant completed physical therapy and was released to light-duty work. In a February 16, 2009 work capacity evaluation, he noted that she could return to work full time, sitting only with no lifting over 10 pounds. Dr. Robinson opined that appellant had not reached maximum medical improvement and the restrictions would be in place for two months.

On February 27, 2009 the employing establishment offered appellant a full-time position as a modified mail clerk from 8:00 a.m. to 4:30 p.m. with a salary of \$41,653.00. The position included sitting up to eight hours a day, performing repetitive movements using the wrists and elbows when operating a computer and inputting documents into the agency computer system. The position required appellant to sit intermittently for six to eight hours per day, walk intermittently for one to two hours per day, intermittent standing to open a file drawer to retrieve a file for one-half to one-hour per day and intermittent simple grasping for one to two hours per day. The position was in compliance with the medical restrictions set forth by Dr. Robinson of full-time, sedentary work, no lifting over 10 pounds, reaching and lifting were limited to 10 pounds. Appellant accepted the position and began working on March 9, 2009.

On March 16, 2009 Dr. Robinson advised that appellant was five months status post lumbar decompression and was doing well. He released her to work with restrictions of lifting up to 20 pounds and opined that she would most likely be released from care within two months. On March 16, 2009 Dr. Robinson advised that appellant reached maximum medical improvement and was released to work full time, eight hours a day with restrictions of reaching and reaching above the shoulder limited to 10 pounds, pushing, pulling and lifting limited to 20 pounds. On April 20, 2009 he indicated that she presented with radiating right leg pain and restricted lumbar range of motion. In a work capacity evaluation of that date, Dr. Robinson noted that appellant could continue working full time with restrictions of walking limited to one-third hour, standing limited to one-half hour, twisting and bending and stooping limited to one-hour, operative a motor vehicle limited to two hours, pushing, pulling, squatting, kneeling and

climbing minimal and lifting limited to 20 pounds. On May 1, 2009 he opined that she reached maximum medical improvement. In a May 1, 2009 work capacity evaluation, Dr. Robinson advised that appellant could work full time and occasionally work over eight hours a day with permanent restrictions of walking limited to one-third hour, standing limited to one-half hour, twisting and bending and stooping limited to one-hour, operative a motor vehicle limited to two hours, pushing, pulling, squatting, kneeling and climbing minimal and lifting limited to 20 pounds.¹ In a June 15, 2009 report, he noted that she was reinjured at work on May 22, 2009 and diagnosed lumbar strain and continued her light-duty restrictions. Appellant was treated by Dr. Roy E. Hall, an internist, on May 22, 2009 for back pain experienced after she climbed an incline at work during a fire drill. Dr. Hall diagnosed lumbar strain and continued her current work restrictions.

By decision dated August 11, 2009, the Office found that appellant had been employed as a full-time modified mail clerk effective March 9, 2009 and had actual earnings of \$41,653.00 or \$801.02 a week, which was equivalent to the pay rate for the position she held at the time of her injury. It reduced her wage-loss compensation to zero.

LEGAL PRECEDENT

Section 8115(a) of the Federal Employees' Compensation Act² provides that in determining compensation for partial disability, "the wage-earning capacity of an employee is determined by his actual earnings if his earnings fairly and reasonably represent his wage-earning capacity."³ Office procedures indicate that a determination regarding whether actual wages fairly and reasonably represent wage-earning capacity should be made after a claimant has been working in a given position for more than 60 days⁴ and the Office may determine wage-earning capacity retroactively after claimant has stopped work,⁵ actual earnings will be presumed to fairly and reasonably represent wage-earning capacity only in the absence of contrary evidence.⁶

ANALYSIS

Appellant was a full-time mail clerk, level 5, step 10, at the time of her injury on September 19, 2007. The Office accepted her claim for lumbar sprain and thoracic region sprains and displaced lumbar intervertebral discs without myelopathy at L3-4 and L4-5. It authorized surgery which was performed on October 7, 2008. Based on appellant's medical

¹ On May 4, 2009 appellant claimed a schedule award. In a decision dated August 21, 2009, the Office denied appellant's request for a schedule award. Appellant did not appeal this decision to the Board.

² 5 U.S.C. §§ 8101-8193.

³ *Id.* at § 8115(a).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (July 1997); see *William D. Emory*, 47 ECAB 365 (1996).

⁵ Federal (FECA) Procedure Manual, *supra* note 4, at Chapter 2.814.7(e) (July 1997).

⁶ See *Mary Jo Colvert*, 45 ECAB 575 (1994).

release from Dr. Robinson, she returned to work on March 9, 2009, as a full-time modified mail clerk. The position was a level 5, step 10, effective March 9, 2009 with wages of \$41,653.00 per year. The employing establishment noted that the hours were from 8:00 a.m. to 4:30 p.m. The job duties included performing duties which included sitting up to eight hours a day, performing repetitive movements using the wrists and elbows and operating a computer to input documents into the agency computer system. The position required appellant to sit intermittently for six to eight hours a day, walk intermittently, stand intermittently to open a file drawer to retrieve a file for one-half to one-hour per day and simple grasping intermittently for one to two hours a day. The position was in compliance with the medical restrictions set forth by Dr. Robinson of full time, sedentary work, no lifting over 10 pounds and reaching and lifting were limited to 10 pounds.

The Office properly determined that appellant's actual earnings as a modified mail clerk fairly and reasonably represented her wage-earning capacity. Generally, wages actually earned are the best measure of a wage-earning capacity and, in the absence of evidence showing they do not fairly and reasonably represent the injured employee's wage-earning capacity must be accepted as such measure.⁷ The Office determined that appellant's current position provided her with a wage-earning capacity equal to the wages of the position she held at the time of her injury. The current pay rate for the job and step of mail clerk when she was injured was \$41,653.00 per annum. The pay rate for appellant's current position was also \$41,653.00 per annum. On May 28, 2008 the Office confirmed that she had completed 60 days of successful work in the job. The Board finds that the modified mail clerk position that appellant began working on March 9, 2009 is consistent with her work restrictions and abilities. Appellant worked in the position for over 60 days. Her performance of this position in excess of 60 days is persuasive evidence that the position represents her wage-earning capacity.⁸ There is no evidence that the position was seasonal, temporary or makeshift work designed for appellant's particular needs.⁹ The Office properly determined that appellant had no loss of wage-earning capacity as her actual wages met or exceeded the current pay rate for the position she held at the time of injury.¹⁰

On appeal, appellant asserts that she has developed problems with her hips and knees since the original injury and should be compensated for these conditions. The Board notes that to the extent she is alleging consequential conditions as a result of her original work injury the Office has not issued a final decision with regard to this aspect of her claim. Therefore, the Board does not have jurisdiction over such matter in the present appeal.¹¹ Appellant also referenced impairment that she attributed to her accepted conditions. However, the present appeal pertains to the Office's wage-earning capacity determination. It did not adjudicate any a schedule award claim.

⁷ *Dennis E. Maddy*, 47 ECAB 259 (1995).

⁸ *See supra* note 4.

⁹ *Elbert Hicks*, 49 ECAB 283 (1998).

¹⁰ *Gregory A. Compton*, 45 ECAB 154 (1993).

¹¹ *See* 20 C.F.R. § 501.2(c).

CONCLUSION

The Board finds that the Office properly determined that appellant's actual earnings fairly and accurately represented her wage-earning capacity.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated August 11, 2009 is affirmed.

Issued: June 14, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board