United States Department of Labor
Employees' Compensation Appeals Board

L.B., Appellant	)	
and	)	**Docket No. 09-1236**
	)	**Issued: March 2, 2010**
DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, Waterville, ME, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On April 14, 2009 appellant filed a timely appeal from the November 13, 2008 merit decision of the Office of Workers' Compensation Programs, which found that her actual earnings showed no loss of wage-earning capacity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.

ISSUE

The issue is whether the Office properly reduced appellant's compensation for wage loss to zero based on her actual earnings.

FACTUAL HISTORY

On March 17, 2004 appellant, a part-time flexible field representative, sustained an injury in the performance of duty when she slipped on an icy step. The Office accepted her claim for a torn meniscus and bone bruise in her right knee and a bruised left heel. Appellant received compensation for temporary total disability on the periodic rolls.

Appellant worked in her date-of-injury job substantially the whole year immediately preceding the injury at a pay rate of $14.10 an hour. Her work schedule that year was intermittent. Appellant worked 255 days, or 1,132.75 hours, and she received $12,111.29 in gross pay, exclusive of overtime.

From February to December 2004, appellant worked as a customer service representative for L.L.Bean, Inc. In November 2004 she worked as a costume designer for Waterville High School.

On October 8, 2008 appellant notified the Office that she earned $10.52 an hour and $9,669.17 that year to date as a part-time customer service representative. She added that she earned $3,890.00 for the year as a costume designer.

In a decision dated November 13, 2008, the Office reduced appellant's compensation for wage loss. It noted earnings from L.L.Bean, Inc. of $5,414.19 in 2004, $8,300.66 in 2005, $8,148.59 in 2006, $8,034.78 in 2007 and $9,669.17 in the first 40 weeks of 2008. The Office divided appellant's 2008 earnings by 40 to find an average weekly salary of $241.73.

The Office further noted earnings from the high school of $791.00 in 2004, $927.00 in 2005, $3,754.00 in 2006 and $3,890.00 for the year 2008.[1] It divided appellant's 2008 earnings by 52 to find an average weekly salary of $74.81.

The Office found that the duties of the two part-time positions fairly and reasonably represented appellant's wage-earning capacity. It determined that the average weekly earnings from both jobs ($316.54) exceeded the current pay rate of her date-of-injury job ($259.34, effective November 3, 2008). The Office therefore reduced appellant's compensation for wage loss to zero.

On appeal, appellant contends that the Office based its decision on income from a part-time job. She repeated how her hours and pay rate fluctuated during the year and how she now had fewer hours than the Office calculated. Appellant asked the Board to review her request for authorization for two surgeries and payment for follow-up care for surgery the Office did approve. She submitted a notification of personnel action showing the pay rate of a field representative effective January 4, 2009.

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.[2] "Disability" means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.[3]

[1] Appellant disclosed that she worked for the high school in 2007 but did not disclose her earnings.

[2] 5 U.S.C. § 8102(a).

[3] 20 C.F.R. § 10.5(f).

When an employee cannot return to the date-of-injury job because of disability due to work-related injury, but does return to alternative employment with an actual wage loss, the Office must determine whether the earnings in the alternative employment fairly and reasonably represent the employee's wage-earning capacity. The Office should consider whether the kind of appointment and tour of duty are at least equivalent to those of the job held at the time of injury. Unless it is, it may not consider the work suitable. Reemployment may not be considered suitable when the job is part time, unless the claimant was a part-time worker at the time of injury.[4]

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.[5]

When the Office learns of actual earnings that span a lengthy period of time, for example, several months or more, it should determine compensation entitlement by averaging the earnings for the entire period, determining the average pay rate, and compare the average pay rate for the entire period to the pay rate of the date-of-injury job in effect at the end of the period of actual earnings. The Office's procedure manual explains:

> "For example, the Office learns on October 1, 2002 that the claimant, injured on June 5, 1997, returned to work on September 1, 1998 and worked intermittently through September 1, 2002 when he ceased work. On September 1, 2002 the pay rate for the claimant's date[-]of[-]injury job was $500[.00] per week. The claimant grossed $40,000[.00] during the four years (208 weeks) he worked from September 1, 1998 through September 1, 2002, for an average rate of $192.30 per week. When [determining wage-earning capacity], the pay rate of $192.30 would be compared to the pay rate of $500[.00]."[6]

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[7] After it has determined that an employee has disability causally related to her federal employment, it may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[8]

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[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7.a (July 1997). *See K.S.*, 60 ECAB ___ (Docket No. 08-2105, issued February 11, 2009) (finding that the Office properly determined wage-earning capacity from a part-time job where the claimant was working part time at the time of injury).

[5] *Don J. Mazurek*, 46 ECAB 447 (1995).

[6] Federal (FECA) Procedure Manual, *supra* note 4 at Chapter 2.814.7.d(4).

[7] *Harold S. McGough*, 36 ECAB 332 (1984).

[8] *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

ANALYSIS

Appellant received compensation for wage loss on the basis that her March 17, 2004 employment injury disabled her from returning to work and earning the wages she was receiving as a field representative for the employing establishment, but she was not totally disabled for all work. The record establishes that appellant had earnings from L.L.Bean, Inc. and Waterville High School dating back to 2004. This demonstrated her capacity to earn wages following her federal employment injury.

The Office determined that her earnings fairly and reasonably represented her wage-earning capacity. Wages actually earned are generally the best measure of an employee's wage-earning capacity. They will be accepted as such measure in the absence of evidence to the contrary. Appellant's actual earnings were in part-time employment, but she was a part-time employee at the time of her injury in federal service. Therefore, it was proper for the Office to consider her actual earnings as a customer satisfaction representative and costume designer. Appellant's appointment and tour of duty in those positions were at least equivalent to those of her temporary part-time flexible job as a field representative. As she demonstrated her capacity to earn wages in those positions over a lengthy period of time, the Office properly accepted her actual earnings as the best measure of her wage-earning capacity.

The Office compared her actual earnings to the current pay rate of the date-of-injury job. For the actual earnings from L.L.Bean, Inc., the Office divided her most recent earnings, $9,669.17 to date in 2008, by 40 weeks. This appears inconsistent with its procedures. Where the Office has wage information spanning several years, as in this case, the procedure manual states that the Office should average the earnings for the entire period, not just the most recent months with the highest salary. Had it averaged appellant's actual earnings from 2004 through October 2008, the average pay rate would be less than its finding of $241.73.[9]

For the actual earnings from Waterville High School, appellant reported on October 8, 2008 that she had earned $3,890.00 for the year. The Office divided not by 40, as it did with her other earnings, but by 52. The Office did not explain its calculation. And again, save for 2007, the Office had wage information going back to 2004 but did not average appellant's earnings for the entire period. Had the Office done so, the average pay rate would be less than its finding of $74.81.

The Office has not shown that it properly calculated the average pay rate from appellant's actual earnings following her employment injury. It bears the burden of proof to justify its reduction of appellant's compensation, and it has not established that she no longer has disability, or the incapacity, because of an employment injury, to earn the wages she was receiving at the time of injury. The Board finds that the Office has not met its burden of proof. The Board will reverse the Office's November 13, 2008 decision.

[9] *See Christine P. Burgess*, 50 ECAB 444, 446-47 (1999) (finding that the Office properly determined the claimant's average weekly pay rate by totaling her earnings from November 19, 1978 to November 8, 1985 and dividing by the number of weeks during that period, as outlined in the Office's procedure manual).

Addressing appellant's concerns on appeal, the Board notes that the Office may consider her actual earnings in part-time employment because she was a part-time employee at the time of injury. A proper calculation of her average weekly pay rate will account for seasonal or other fluctuations during the year, and the Office will compare the average to the current pay rate of her date-of-injury job as of the end of the period in question.[10] That she no longer earns what she used to or now works fewer hours may be reflected in the Office's calculations. As for authorization from the Office for surgeries or payment for follow-up care, the Board has no jurisdiction to review these matters. The Office has issued no final decision which the Board may review.

CONCLUSION

The Board finds that the Office has not met its burden of proof to reduce appellant's compensation for wage loss to zero. It did not properly calculate her average weekly pay rate from actual earnings.

ORDER

IT IS HEREBY ORDERED THAT the November 13, 2008 decision of the Office of Workers' Compensation Programs is reversed.

Issued: March 2, 2010
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

[10] The Board has no jurisdiction to review the SF-50 notice of personnel action appellant submitted on appeal, as that evidence was not in the record before the Office at the time of its November 13, 2008 decision.