

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

T.M., Appellant)
)
and) **Docket No. 10-674**
) **Issued: October 18, 2010**
U.S. POSTAL SERVICE, POST OFFICE,)
Bay Village, OH, Employer)

)

Appearances:
Alan J. Shapiro, 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 January 11, 2010 appellant filed a timely appeal from a November 2, 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 found that appellant's actual earnings in a modified position fairly and reasonably represented his wage-earning capacity.

FACTUAL HISTORY

On April 9, 2005 appellant, then a 47-year-old part-time flexible letter carrier, filed an occupational claim (Form CA-2) alleging that he sustained left foot fractures as a result of excessive walking in his federal employment. He stopped work on June 22, 2004.¹

On September 19, 2005 the Office advised appellant that it had accepted the claim for fracture of the first metatarsal (closed), left foot, fracture of the calcaneus (closed), right foot and left plantar nerve lesion.² As to appellant's work history, it noted that he had returned to work on October 9, 2004. On March 11, 2005 he again stopped work. An October 19, 2005 memorandum found that in the year prior to June 24, 2004 appellant had worked 1,521.79 hours, earning \$29,810.66, or an average of 29 hours per week at \$573.28 per week.

The record establishes that, as of May 5, 2007, appellant began working four hours a day in a light-duty position. On September 4, 2008 the employing establishment offered appellant a permanent position as a modified carrier at four hours a day. The full-time annual wages were \$50,571.00 and the offer was effective September 27, 2008. Appellant accepted the position on September 26, 2008. A memorandum of telephone call dated March 4, 2009 noted the current pay rate for appellant's date-of-injury position as \$24.99 per hour.

By decision dated March 13, 2009, the Office determined that appellant's actual earnings since September 27, 2008 of \$486.26 a week fairly and reasonably represented his wage-earning capacity. Its calculations noted the pay rate as of June 2004 as \$573.28 per week, the current pay rate for the date-of-injury job as \$724.71 a week, and appellant had earnings of \$486.26 per week, for a 33 percent loss of wage-earning capacity.

Appellant requested a hearing before an Office hearing representative, which was held on August 19, 2009. On August 27, 2009 he submitted additional evidence, including payroll records for some pay periods commencing in 1999. For 2003 the records covered pay periods 16 and 17 and, for 2004, pay periods 24 and 25.

By decision dated November 2, 2009, an Office hearing representative affirmed the March 13, 2009 wage-earning capacity determination.

LEGAL PRECEDENT

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 his wage-earning capacity.³ After the claimant has been working for 60

¹ The record indicates appellant had filed an occupational claim for a right foot injury on March 31, 2003 (OWCP File No. xxxxxx415). The claim was accepted for a right foot neuritis/neuroma and appellant had been released to return to full duty in June 2003.

² A statement of accepted facts dated September 19, 2005 stated that the claim was accepted for Morton's neuroma of the second interspace of the left foot.

³ 5 U.S.C. § 8115(a).

days, the Office makes a determination as to whether actual earnings fairly and reasonably represent wage-earning capacity.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

The formula for determining loss of wage-earning capacity based on actual earnings, as stated in *Albert C. Shadrick*,⁶ has been codified at 20 C.F.R. § 10.403. The Office calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the current pay rate for the job held at time of injury.

ANALYSIS

The Office accepted appellant's claim for conditions including both feet. Appellant returned to work for four hours a day commencing in May 2007. In September 2008 the employing establishment offered him a permanent modified position at four hours per day with duties that included preparing mail dispatches and carrier duties such as address verification. The evidence establishes that the job was permanent and, as of March 13, 2009, appellant had performed the position for more than 60 days.

The date of injury in this case was the date of last exposure to the identified work factors, or approximately June 22, 2004, when appellant had stopped working.⁷ For the year prior to June 22, 2004, appellant had been working an average of 29 hours per week, according to the October 19, 2005 Office memorandum. Accordingly, he would not be considered a full-time employee at the time of injury. The offer of a permanent part-time position in September 2008 was proper.

With respect to the Office calculations, it found that appellant's pay rate in June 2004 was \$573.28, and the current pay rate for his position was \$724.71 (\$24.99 multiplied by 29 hours). At the hearing appellant contended these figures were too low, as he had worked overtime prior to his injury. He also appeared to allege that he was working 40 hours at the time of injury. As to overtime, the pay rate would not include overtime hours.⁸ With respect to working 40 hours a week, appellant's allegation is not clear when he worked 40 hours a week. The relevant time period would be the year prior to June 22, 2004. Appellant submitted some pay stubs, but they are incomplete and do not cover the relevant period. The probative evidence of record as contained in the October 19, 2005 memorandum, found that appellant worked approximately 29 hours per week. The Board finds that the amounts determined by the Office in

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1993).

⁵ *Dennis E. Maddy*, 47 ECAB 259 (1995).

⁶ 5 ECAB 376 (1953).

⁷ *See Hugh A. Feeley*, 45 ECAB 255, 256 (1993).

⁸ *See* 5 U.S.C. § 8114(e), which provides that overtime pay is not included in computing the employee's pay rate.

the *Shadrick* formula calculations are supported by evidence of record. The Office divided earnings of \$486.26 by current pay rate of \$724.71 for a 67 percent wage-earning capacity, or a 33 percent loss of wage-earning capacity.

As noted, generally wages earned are the best measure of wage-earning capacity. The evidence of record supports the Office's finding that actual earnings in this case fairly and reasonably represented wage-earning capacity pursuant to 5 U.S.C. § 8115.

CONCLUSION

The Board finds the Office properly determined that appellant's actual earnings fairly and reasonably represented his wage-earning capacity and properly reduced his compensation.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 2, 2009 is affirmed.

Issued: October 18, 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