United States Department of Labor
Employees' Compensation Appeals Board

M.M., Appellant	)	
and	)	**Docket No. 09-1748**
	)	**Issued: September 23, 2010**
U.S. POSTAL SERVICE, GENERAL MAIL FACILITY, Colorado Springs, CO, Employer	)	

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 June 30, 2009 appellant filed a timely appeal from the April 30, 2009 decision of the Office of Workers' Compensation Programs which found that she was not entitled to any additional wage-loss compensation for the period September 12, 2003 through February 21, 2004. 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 paid appellant appropriate compensation from September 12, 2003 through February 21, 2004.

On appeal, appellant contends that she was not properly compensated for her wage loss as it was more than twice what she was paid by the Office.

FACTUAL HISTORY

This case has previously been before the Board.[1] The Office accepted that appellant, a 39-year-old automation clerk, sustained right thoracic outlet syndrome, a cervical strain and right brachial plexus lesions due to factors of her federal employment. Appellant did not stop work upon acceptance of her claim, but as of April 30, 2001 reduced her hours from eight to six a day with restrictions. She increased her hours to full time, eight hours, in February 2004.

On October 30, 2003 the Office reduced appellant's compensation based on her actual earnings as a modified automation clerk. In a June 9, 2006 decision, the Board addressed appellant's concerns regarding whether the Office properly considered Sunday pay or nighttime differential as well as her contention that the Office based its wage-earning compensation determination on a 30-hour week rather than a 40-hour week. The Board found that the Office properly determined appellant's rate of compensation, based on the date disability began, for the period September 7, 2003 through February 12, 2004, taking into account both the Sunday premium and night differential. However, the Office improperly reduced her compensation to zero after she returned to work as a full-time modified automation clerk on February 12, 2004 as there was no evidence that she was either retrained or vocationally rehabilitated or had a significantly different job. The Board remanded the case for the Office to review appellant's request for modification of the loss of wage-earning capacity determination.[2]

On remand appellant contended that she was never reemployed at a lower paying job with the employing establishment or other organization; rather, she argued that she worked six hours a day instead of eight and was entitled to two hours of wage loss a day from September 2003 to February 2004 when she returned to full duty.

By decision dated July 31, 2006, the Office denied modification of the October 30, 2003 wage-earning determination.

On September 26, 2006 the Office accepted appellant's claim for cervical radiculopathy at C7, left elbow radial neuropathy and aggravation of degenerative disc disease at C5-6 and C6-7.

In a May 7, 2007 decision, the Office denied further merit review of its July 31, 2006 decision.

By decision dated November 25, 2008, the Board vacated the Office's July 31, 2006 and May 7, 2007 decisions and remanded the case for further consideration. The Board found that a conflict in medical opinion arose between appellant's physician Dr. Jack L. Rook, a Board-certified physiatrist and the second opinion physician, Dr. Katharine J. Leppard, a Board-

[1] Docket No. 07-2135 (issued November 25, 2008); Docket No. 05-1672 (issued June 9, 2006).

[2] Docket No. 05-1672 (issued June 6, 2005).

certified physiatrist, with regard to appellant's work capacity and restrictions.[3] The facts and history as set forth in the Board's prior decisions are hereby incorporated by reference.

Appellant was evaluated by Dr. Barry A. Ogin, a Board-certified physiatrist serving as an impartial medical specialist, on May 15, 2007. In his medical report, Dr. Ogin noted that he did not believe that her symptoms were related to cervical degenerative disc disease or cervical radiculopathy. When discussing specifics for appellant's permanent restrictions, he noted that based on her documented abilities over the past few years, it was appropriate to restrict her to no more than 30 minutes of repetitive activity at a time. Dr. Ogin indicated that for the following 30 minutes appellant should not engage in any repetitive activity or activities requiring her to stand with prolonged neck flexion, noting that he agreed with the 30 minutes restrictions as outlined by Dr. Rook. He indicated that he did not feel that these activities would exacerbate her underlying pathology; he did indicate that they would exacerbate her pain. However, Dr. Ogin did not see any pathology that would prevent appellant, from a medical basis, to drive to and from work nor to limit her hours to before midnight. He concluded, "Essentially [appellant's] problems seems to be myofascial in nature and as long as she is given breaks to change her posture and allowed her to stretch and relax, she should be able to tolerate her job activities over an eight-hour period. Her pathology is not severe enough to place her on undue restrictions."

By decision dated April 30, 2009, the Office found that the medical evidence established that appellant's work condition had materially changed and vacated the October 30, 2003 wage-earning capacity determined. It found that appellant was not entitled to any additional wage-loss compensation from September 12, 2003 to February 21, 2004, when she returned to full duty. The Office found that she returned to full duty working six hours a day and was compensated for two hours a day on the periodic rolls.

LEGAL PRECEDENT

Under the Federal Employees' Compensation Act,[4] the term disability means the incapacity, because of an employment injury, to earn wages that the employee was receiving at the time of the injury.[5] Disability is not synonymous with physical impairment, which may or may not result in incapacity to earn wages. An employee who has a physical impairment causally related to a federal employment injury, but who nevertheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used in the Act.[6] For each period of disability claimed, a claimant has the burden of proving that she is disabled for work as a result of her injury. Whether a particular injury caused an employee to be disabled for employment and the duration of that disability are medical issues which must be provided by preponderance of the reliable, probative and substantial medical evidence.[7]

[3] Docket No. 07-2135 (issued May, 7, 2007).

[4] 5 U.S.C. §§ 8101-8193.

[5] 20 C.F.R. § 10.5(f).

[6] *Cheryl L. Decavitch*, 50 ECAB 397, 401 (1999).

[7] *Fereidoon Kharabi*, 52 ECAB 291, 292 (2001).

ANALYSIS

The Board remanded this case for the Office to address the opinion of the impartial medical examiner, Dr. Ogin, who reported on May 15, 2007 that appellant was capable of working with limitations of 30 minutes of activity and resting for 30 minutes and that she should not engage in repetitive activity or activities requiring her to stand with prolonged neck flexion. Dr. Ogin also reported that appellant could drive and was not limited to working prior to midnight. He concluded that appellant's problems were myofascial in nature and so long as the breaks every 30 minutes were imposed, she was capable of working an 8-hour day without undue restrictions. Based on this report, the Office vacated the October 30, 2003 wage-earning capacity determination on the grounds that appellant's condition had materially changed. As the impartial medical specialist, Dr. Ogin's report constitutes the special weight of the medical evidence.[8] The Office found that appellant was not entitled to any additional wage-loss compensation for the period September 12, 2003 up to February 21, 2004.

Appellant contends on appeal that she was not properly compensated for her wage-loss. She argued that her wage loss was twice what she was paid. Appellant's argument that she was not paid properly from September 12, 3003 through February 21, 2004 was addressed in the Board's prior decisions. She has argued repeatedly that her compensation rate did not account for the fact that she was only able to work a 30-hour week during this period and that she should have been compensated for two additional hours of work a day or a 40-hour week. The Board finds that appellant was properly compensated and that the Office properly considered appellant's abbreviated workweek in making its determination. In a prior decision dated June 9, 2003, the Board discussed the Office's calculations and affirmed its determination.[9] Appellant has not presented any new evidence to establish that this determination was erroneous. Consequently, she has not met her burden of proof to establish a basis for modification of her compensation rate from September 12, 2003 through February 21, 2004.

[8] *Gloria J. Godfrey*, 52 ECAB 1486 (2001).

[9] The Board found in its June 9, 2006 decision that the Office properly determined appellant's compensation rate from September 7, 2003 through February 12, 2004 based on her actual earnings. At that time the Board stated that the Office found that the pay rate for appellant's current position was based on a weekly base rate of $713.12 for 40 hours. As appellant only worked 30 hours, the Office determined that she earned three-fourths of that amount a week, $585.99. It then took her weekly pay rate when disability began including nighttime differential and Sunday premium pay to determine that she made $672.53 per week when injured and that the current pay rate for the job and step when injured was $692.50. The Office then divided these earnings by appellant's current pay rate of $585.99 and determined that she had an 85 percent wage-earning capacity. It then multiplied the pay rate at the time of the injury, $672.53, by the 85 percent wage-earning capacity percentage. The resulting amount of $571.65 was then subtracted from appellant's date-of-injury pay rate of $672.53, which provided a loss of wage-earning capacity of $100.88 per week. The Office then multiplied this amount by the appropriate compensation rate of two-thirds, to yield $67.25. It found that cost-of-living adjustments increased this amount of $68.75 which afforded appellant compensation for the 15 percent loss of wage-earning capacity or difference of 10 hours out of a 40 hours work week. The Board affirmed the Office's calculations. Docket No. 05-6772 (issued June 9, 2006). *See Albert C. Shadrick*, 5 ECAB 376 (1953) for the application of the formula; *see also* 20 C.F.R. § 10.403 which codifies the *Shadrick* case.

CONCLUSION

The Board finds that the Office paid appellant at the correct amount of compensation from September 12, 2003 through February 21, 2004.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 30, 2009 is affirmed.

Issued: September 23, 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