United States Department of Labor
Employees' Compensation Appeals Board

K.K., Appellant	)	
and	)	**Docket No. 09-2281**
	)	**Issued: September 21, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Bradford, PA, Employer	)	

Appearances:
Anthony V. Clarke, 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 September 8, 2009[1] appellant, through counsel, filed a timely appeal from a March 12, 2009 merit decision of the Office of Workers' Compensation Programs determining his wage-earning capacity. 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 determined that appellant's actual earnings as a modified rural carrier associate fairly and reasonably represented his wage-earning capacity effective February 23, 2008.

On appeal counsel contends that the Office hearing representative's March 12, 2009 decision contained several errors. The employing establishment did not offer appellant a rural carrier associate position with weekly wages of $464.00. Rather, he worked only two days per

[1] This is the date of the postmark of appellant's appeal to the Board which renders the appeal timely filed pursuant to 20 C.F.R. § 501.3(f)(1).

month as a substitute rural carrier with fluctuating wages based on the employing establishment's demand for work. Moreover, a magnetic resonance imaging (MRI) scan of appellant's cervical spine was not relevant to his accepted employment-related right knee injury and should not have been considered by the Office.

FACTUAL HISTORY

On April 7, 2004 appellant, a 47-year-old casual city carrier, sustained a right knee injury while walking up stairs. He stopped work that day. On May 13, 2004 the Office accepted his claim for a partial tear of the anterior cruciate ligament and sprain of the medial collateral ligament of the right knee. Appellant received wage-loss compensation for total disability.

On February 19, 2008 the employing establishment offered appellant a full-time modified rural carrier associate position with an hourly rate of $17.98. The position was based on a February 12, 2008 report from Dr. David H. Johe, an attending orthopedic surgeon, who advised that appellant, could return to work with restrictions. Appellant accepted the job offer and returned to work on February 23, 2008.

On June 26, 2008 the employing establishment advised the Office that appellant did not work 40 hours a week. Appellant worked an average of 27.93 hours a week during the year prior to his April 7, 2004 injury. Since December 2005 he worked 15 hours a week at an hourly rate of $17.98. Appellant's date-of-injury position also paid $17.98 an hour effective November 24, 2007. As a modified rural carrier associate, he worked more than 40 hours per week for several weeks and received compensation benefits on the periodic rolls. Appellant worked 34 hours from March 8 to 14, 2008, 40.83 hours from May 17 to 23, 2008, 43.84 hours from June 7 to 13, 2008 and 49.09 hours from June 14 to 20, 2008. He was scheduled to work more than 40 hours a week from June 30 to at least July 31, 2008. Appellant covered two different routes on a full-time basis from June 7 to July 31, 2008. One route was evaluated at 48.5 hours and the other route was evaluated at 37.32 hours.

On June 30, 2008 the employing establishment advised the Office that appellant was a dual employee on the date of injury. It submitted the number of hours he worked since February 23, 2008.

By decision dated August 12, 2008, the Office reduced appellant's compensation benefits based on its finding that his actual earnings as a modified rural carrier associate fairly and reasonably represented his wage-earning capacity. It found that he demonstrated the ability to perform the duties of this position for two months or more. The Office determined that the position was suitable to appellant's partially disabled condition and his compensation was reduced according to the provisions of 5 U.S.C. §§ 8106 and 8115. It determined that his compensation would be reduced to $49.00 every four weeks. The Office advised that appellant's salary as a dual employee on the date-of-injury was $419.99 per week effective April 7, 2004; that the current adjusted pay rate for his job on the date-of-injury was $482.35 effective November 24, 2007 and that he was capable of earning $464.60 a week, the rate of the modified rural carrier associate. It determined that he had a 96 percent wage-earning capacity, which resulted in an adjusted wage-earning capacity of $403.19 or a loss of wage-earning capacity of

$16.80. Based on a 66 and 2/3 percent satisfactory rate, his compensation was $11.20 a week, adjusted by cost-of-living adjustments to $12.25.

On August 14, 2008 appellant requested a telephonic oral hearing with an Office hearing representative. In letters dated August 14 and 18, 2008, he contended that he was not a regular rural carrier. Appellant worked as a substitute rural carrier, a position he held for years. He contended that the number of work hours relied upon by the Office to calculate his loss of wage-earning capacity was temporary in nature and he no longer worked these hours. Currently, appellant only worked two Saturdays per month. His recent increase in wages as a substitute rural carrier was due to his frequent substitution for regular carriers. Appellant contended that his substitute rural carrier position was not related to the workers' compensation benefits he received for lost wages as a substitute causal city carrier because he had not been cleared to return to work in this position by an attending physician.

At the December 12, 2008 hearing, appellant reiterated that he never worked as a full-time rural route carrier and worked as a substitute rural route carrier or substitute casual city carrier which resulted in frequent variation of income. In February 2008, he worked quite a few hours because he filled in for a regular carrier, who had undergone surgery and another regular carrier who was on vacation. Subsequently, appellant's work hours dropped off. He was scheduled to work every other Saturday and any other days he was needed. Appellant testified that on the date-of-injury, he was working as a substitute causal city carrier. He contended that his weekly pay rate was based on artificially inflated earnings for a short period of time. Following the December 12, 2008 hearing, appellant submitted a November 4, 2008 MRI scan of his cervical spine.

By decision dated March 12, 2009, an Office hearing representative affirmed the August 12, 2008 wage-earning capacity determination. She found that the November 4, 2008 MRI scan failed to establish that appellant remained totally disabled or unable to perform the duties of the modified rural carrier position. The hearing representative further found that the Office properly calculated his loss of wage-earning capacity in this position.

LEGAL PRECEDENT

Section 8115(a) of the Federal Employees' Compensation Act[2] provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by actual earnings if actual earnings fairly and reasonably represent the wage-earning capacity. 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.[3]

The Office's procedure manual states that when an employee cannot return to the date-of-injury job because of disability due to a work-related injury or disease, but does return to alternative employment, the claims examiner must determine whether the earnings in the

[2] 5 U.S.C. §§ 8101-8193, § 8115(a).

[3] *Selden H. Swartz*, 55 ECAB 272, 278 (2004).

alternative employment fairly and reasonably represent the employee's wage-earning capacity.[4] The procedure manual provides that the Office can make a retroactive wage-earning capacity determination if appellant worked in the position for at least 60 days, the position fairly and reasonably represented his wage-earning capacity and the work stoppage did not occur because of any change in his injury-related condition affecting the ability to work.[5]

The formula for determining loss of wage-earning capacity based on actual earnings,[6] which developed in *Albert C. Shadrick*,[7] has been codified by regulation at 20 C.F.R. § 10.403.[8] Subsection (d) of these regulations provide that the employee's wage-earning capacity in terms of percentage is obtained by dividing the employee's actual earnings by the current pay rate for the job held at the time of injury.[9]

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless the original rating was in error, there is a material change in the nature and extent of the injury-related condition or that the employee has been retrained or otherwise vocationally rehabilitated. The burden of proof is on the party attempting to show a modification of the wage-earning capacity.[10]

ANALYSIS

The Board finds that the Office improperly determined that the position of modified rural carrier fairly and reasonably reflected appellant's wage-earning capacity. The record indicates that on the date-of-injury appellant worked as a dual employee. He was a substitute rural carrier and a substitute causal city carrier. Appellant returned to work as a modified rural carrier on February 23, 2008 at $17.98 per week, based on the medical opinion of Dr. Johe, an attending physician. Based on this evidence, the Office concluded that his wages of $464.40 a week fairly and reasonably represented his wage-earning capacity. Appellant contended that the earnings relied upon by the Office in calculating his wage-earning capacity, were temporary in nature as worked as a substitute rural carrier and not as a regular rural carrier when he returned to work on February 23, 2008. He stated that the number of hours he worked varied from week to week which caused his wages to vary. Appellant contended that he earned increased wages when he substituted for two employees who were on leave during the period of the loss of wage-earning capacity determination. He stated that he currently only worked two Saturdays per month.

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (July 1997).

[5] *Id.* at Chapter 2.814.7.e (July 1997).

[6] *Hayden C. Ross*, 55 ECAB 455, 460 (2004).

[7] 5 ECAB 376 (1953).

[8] 20 C.F.R. § 10.403.

[9] *Id.* at § 10.403(d).

[10] *Harley Sims, Jr.*, 56 ECAB 320, 323-24 (2005).

As noted, wages earned are generally the best measure of wage-earning capacity.[11] In concluding that the position of modified rural carrier represented appellant's wage-earning capacity, the Office neglected to consider that his earnings in this position were sporadic or intermittent in nature. Office procedures indicate that earnings of a sporadic or intermittent nature which do not fairly and reasonably represent the claimant's loss of wage-earning capacity should be deducted from continuing compensation payments using the formula in *Albert C. Shadrick* with past earnings being declared an overpayment.[12] Sporadic or intermittent earnings should not be used as the basis for a loss of wage-earning capacity determination, but may be used to help establish the kind of work the claimant can perform.[13] The procedures state that any worksheet used to calculate the deduction of sporadic earnings should be marked clearly with the words "actual earnings calculation, not a loss of wage-earning capacity determination."[14] The Board notes that an informal reduction of benefits utilizing the *Shadrick* formula is proper rather than a formal loss of wage-earning capacity determination only for the period appellant had actual sporadic and intermittent earnings.[15] Because the Office's wage-earning capacity determination in this case is inconsistent with its procedures, the Board concludes that the Office erred in determining his wage-earning capacity based on his actual wages as a sporadic dual employee.[16]

CONCLUSION

The Board finds that, as the Office improperly determined appellant's wage-earning capacity based on his actual earnings as a modified rural carrier, it did not meet its burden of proof to establish appellant's wage-earning capacity position.

[11] *Selden H. Swartz*, *supra* note 3.

[12] 5 ECAB 376 (1953).

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(d)(3) (June 1996); *L.S.*, 59 ECAB ___ (Docket No. 07-1961, issued February 14, 2008).

[14] *Id.*

[15] *See L.S.*, *supra* note 13; *Lawrence D. Price*, 47 ECAB 120 (1995).

[16] *Cheryl Dicavitch*, 50 ECAB 397 (1999).

ORDER

IT IS HEREBY ORDERED THAT the March 12, 2009 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 21, 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