

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

C.G., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
San Diego, CA, Employer)

**Docket No. 11-1538
Issued: March 26, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 11, 2011 appellant filed a timely appeal from decisions of the Office of Workers' Compensation Programs (OWCP) dated December 16, 2010, and March 31 and April 29, 2011. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 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 appellant's actual earnings as an office automation clerk fairly and reasonably represented her wage-earning capacity.

On appeal she asserts that OWCP used an incorrect pay rate in determining her wage-earning capacity.²

¹ 5 U.S.C. §§ 8101-8193.

² Appellant referenced a second injury that occurred in September 2008, adjudicated by OWCP under file number xxxxxx677. The instant case was adjudicated under file number xxxxxx879.

FACTUAL HISTORY

On February 16, 2000 appellant, then a 30-year-old window service technician, filed an occupational disease claim alleging that her work duties caused pain in the right index finger and wrist. The claim was initially accepted for right hand and finger strain, and was expanded to include the conditions of bilateral finger/hand strains, bilateral carpal tunnel syndrome, and bilateral index finger stenosing tenosynovitis. Dr. Gregory M. Balourdas, a Board-certified orthopedic surgeon, performed a right carpal tunnel release on September 11, 2002, and a left carpal tunnel release on March 25, 2003. Appellant returned to modified duty following each surgical procedure. On August 12, 2003 Dr. Dori J. Neill Cage, a Board-certified orthopedist, began treating appellant. Appellant accepted a full-time modified sales associate position on March 4, 2005 with duties of processing accountables and business reply mail, delivering express mail, accepting passport applications, checking in carriers, and processing nixie mail. On August 23, 2005 she was granted a schedule award for a five percent loss of use of the right arm, and a five percent loss of use of the left arm. Dr. Cage continued to submit reports.

In accordance with the National Reassessment Process (NRP), appellant was reassigned to a different position in August 2008 when she began instruction in new job duties.³ In a September 9, 2008 report, Dr. Cage advised that appellant had a flare of pain caused by training in new job duties. She diagnosed recurrent right upper extremity extensor tendinitis and advised that appellant should return to her previous position. By letter dated September 26, 2008, OWCP advised appellant to file a new claim regarding the flare-up.⁴

On November 3, 2008 appellant filed a claim, indicating that she had a recurrence of disability under the instant claim, xxxxxx879. On November 5, 2008 OWCP accepted aggravation of other tenosynovitis of hand and wrist, bilateral. On November 14, 2008 the employing establishment informed OWCP that the modified passport clerk position was the job withdrawn under the NRP process. In a November 14, 2008 letter to Dr. Cage, OWCP indicated that appellant had a new injury on September 4, 2008, filed under xxxxxx677, that was accepted for aggravation of bilateral hand tenosynovitis. Appellant filed a claim for disability compensation beginning November 26, 2008. The employer indicated that no work was available because appellant's modified job had been withdrawn. On December 2, 2008 OWCP accepted that appellant sustained a recurrence of disability on November 26, 2008 because her modified position had been withdrawn. Appellant was placed on the periodic compensation rolls, and was referred for vocational rehabilitation services. Dr. Cage continued to submit reports. Following vocational testing, appellant began training in office and accounting skills.⁵ She completed her training in December 2009, and then began an internship and job search. By report dated February 11, 2010, Dr. Cage noted that appellant had finished her training program and was looking for a job and had complaints of some stiffness in the morning but could tolerate her symptoms. On physical examination, appellant had full range of motion of the upper

³ Appellant stopped work on September 5, 2008 due to pain and filed a traumatic injury claim. *Id.*

⁴ *Id.*

⁵ Appellant was enrolled at both San Diego Mesa College and Grossmont College for intensive training as an office professional.

extremities with no significant tenderness to palpation. Dr. Cage diagnosed chronic tendinitis, stable, bilateral upper extremities.

Appellant accepted a position with the Department of Homeland Security, Immigration and Customs Enforcement (ICE), beginning on Monday, September 27, 2010, as a GS-4, office automation clerk, at an annual salary of \$39,581.00. Appellant's former employer informed OWCP that the current pay rate for appellant's former position at Level 7, Step D was \$44,951.00.

On October 5, 2010 OWCP reduced appellant's monetary compensation to reflect her actual earnings with ICE of \$39,581.00 annually or \$761.17 per week. It determined that appellant's weekly pay rate when disability recurred on November 3, 2008 was \$1,032.08, that the current weekly pay rate for the job and step when injured was \$864.44, and that her current weekly wages were \$761.17. OWCP then applied the formula developed in the *Albert C. Shadrick* decision,⁶ that has been codified at section 10.403 of OWCP's regulations,⁷ and found that appellant had a new wage-earning capacity of 88 percent for a loss of wage-earning capacity of \$123.85, which yielded weekly compensation of \$92.89 for net compensation each four weeks of \$384.00. On December 16, 2010 OWCP confirmed that the current weekly pay rate for appellant's job when injured was \$864.44.

By decision dated December 16, 2010, OWCP found that appellant's employment, effective September 26, 2010, fairly and reasonably represented her wage-earning capacity and reduced her compensation in accordance with section 10.403 of its regulations and the *Shadrick* formula. On January 2, 2011 appellant requested a review of the written record. She asserted that the "current pay rate" used in calculating her loss of wage-earning capacity was incorrect. In a March 31, 2011 decision, an OWCP hearing representative determined that the *Shadrick* formula had been properly applied and affirmed the December 16, 2010 decision.

On April 2, 2011 appellant requested reconsideration. She stated that, as she sustained a new injury on September 4, 2008, adjudicated under file number xxxxxx677, her weekly wage at the time of the September 2008 injury, or \$1,032.00 per week, should be used in Item 2 of the *Shadrick* formula as the current pay rate when injured in calculating her wage-earning capacity. A telephone conference regarding appellant's pay rate was held on April 27, 2011 between an OWCP senior claims examiner and the injury compensation specialist supervisor at the employing establishment. The employing establishment provided a pay schedule effective August 2010.

In a merit decision dated April 29, 2011, OWCP denied modification of the prior decisions. It explained that, on the date of injury, November 3, 2008, appellant was at Level 6 Step D, but due to a union agreement effective March 16, 2008, the position was upgraded to a Level 7 Step D, and this figure was used by OWCP to determine the current pay rate for the job when injured, \$44,951.00 or \$864.44 a week.

⁶ *Albert C. Shadrick*, 5 ECAB 376 (1953).

⁷ 20 C.F.R. § 10.403.

LEGAL PRECEDENT

Section 8115(a) of FECA provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by the employee's actual earnings if the actual earnings fairly and reasonably represent the employee's wage-earning capacity.⁸ Generally, wages actually earned are the best measure of a wage-earning capacity, and in the absence of showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such a measure.⁹ The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision,¹⁰ has been codified at 20 C.F.R. § 10.403. OWCP calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the current pay rate for the date-of-injury job.¹¹ Its procedures provide that OWCP can make a retroactive wage-earning capacity determination if the claimant worked in the position for at least 60 days, the position fairly and reasonably represented his or her wage-earning capacity and the work stoppage did not occur because of any change in his injury-related condition affecting the ability to work.¹²

ANALYSIS

The Board finds that appellant's actual earnings as an office automation clerk with ICE represent her wage-earning capacity. After completing a vocational rehabilitation training program, she accepted the full-time position as a GS-4, office automation clerk, on September 27, 2010, at an annual salary of \$39,581.00. In the latest medical report of record, dated February 11, 2010, Dr. Cage, an attending orthopedist, noted that appellant had completed a training program and was looking for a job. She advised that appellant could tolerate her symptoms, provided physical examination findings of full upper extremity range of motion and no significant tenderness to palpation, and diagnosed stable, chronic tendinitis, of both upper extremities. On October 5, 2010 OWCP reduced appellant's monetary compensation to reflect her employment with ICE, and on December 16, 2010 OWCP issued a formal loss of wage-earning capacity decision, finding that appellant's employment effective September 26, 2010 fairly and reasonably represented her wage-earning capacity.¹³

The Board finds that appellant's actual earnings as an office automation clerk with ICE fairly and reasonably represent her wage-earning capacity. She began full-time work at this position on September 27, 2010 and was working in this position on December 16, 2010, the

⁸ 5 U.S.C. § 8115(a); *Loni J. Cleveland*, 52 ECAB 171 (2000).

⁹ *Lottie M. Williams*, 56 ECAB 302 (2005).

¹⁰ *Albert C. Shadrick*, *supra* note 6.

¹¹ 20 C.F.R. § 10.403(c).

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity* Chapter 2.814.7(a) (July 1997); *Selden H. Swartz*, 55 ECAB 272 (2004).

¹³ Appellant's first day of work was Monday, September 27, 2010.

date OWCP issued its wage-earning capacity determination. Appellant thus worked in the position for more than 60 days, and there is no evidence that the position was seasonal or temporary and no evidence to show that she was not working eight hours a day.¹⁴ There is also no evidence that the position consisted of make-shift work designed for her particular needs.¹⁵ As there is no evidence that appellant's wages in the clerk position at ICE did not fairly and reasonable represent her wage-earning capacity, they must be accepted as the best measure of her wage-earning capacity.¹⁶

As appellant's actual earnings in the position of office automation clerk fairly and reasonably represent her wage-earning capacity, the Board must determine whether OWCP properly calculated her wage-earning capacity based on her actual earnings. Appellant asserted on appeal that OWCP used an incorrect pay rate in determining her wage-earning capacity. She stated that she sustained a new injury on September 4, 2008 under claim number xxxxxx677 that was accepted by OWCP, and that due to this injury, she was unable to perform the light-duty job that was withdrawn. She argued that Item 2 of the *Shadrick* formula should reflect her weekly wages on the date of the new injury, or \$1,032.08, rather than her wages on the date of the original injury, February 8, 2000.

The employing establishment indicated that the job withdrawn under the NRP that led to appellant's recurrence of disability and resumption of wage-loss compensation was the modified position she had been performing for a number of years. In a September 9, 2008 report, Dr. Cage indicated that appellant had a flare of pain caused by training for new job duties and advised that she should return to her previous, modified position. Thus, the record does not support appellant's assertion that she was unable to perform the duties of the modified position that was withdrawn and led to the November 2008 recurrence of disability and resumption of wage-loss compensation. Rather, the recurrence of disability occurred because the modified position appellant began in 2005 was withdrawn under the NRP, and her physician Dr. Cage clearly indicated on September 9, 2008 that appellant could perform the duties of that position after the September 4, 2008 injury that occurred when appellant was training for a new position because she recommended that appellant return to that position.

OWCP obtained pay rate information from appellant's former employer and new employer. In applying the *Shadrick* formula, OWCP properly found that the weekly pay rate when the disability occurred on November 3, 2008 was \$1,032.08, for Item 1. For Item 2, OWCP properly utilized the current pay rate for the job and step when appellant was injured on February 8, 2000, or \$864.44. OWCP then properly found that appellant's current weekly wage in her position with ICE was \$761.17 for Item 3. OWCP then properly followed the *Shadrick* formula and divided Item 3 by Item 2, yielding an 88 percent wage-earning capacity, Item 4. Item 4 was then multiplied by Item 1, for an adjusted wage-earning capacity of \$908.23, Item 5. Item 5 was then subtracted from Item 1, yielding a loss in wage-earning capacity of \$123.85 per week, Item 6. OWCP then determined that compensation at the 75 percent augmented rate

¹⁴ *J.C.*, 58 ECAB 700 (2007).

¹⁵ *Id.*

¹⁶ *See Loni J. Cleveland, supra* note 8.

totaled \$92.89, Item 7, which was increased by cost-of-living adjustments to \$96.00 a week. The Board finds that OWCP properly applied the *Shadrick* formula in determining appellant's loss of wage-earning capacity.¹⁷

Appellant may request modification of the wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

CONCLUSION

The Board finds that OWCP met its burden of proof to establish that appellant's actual earnings as an office automation clerk fairly and reasonably represented her wage-earning capacity.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated April 29 and March 31, 2011 and December 16, 2010 are affirmed.

Issued: March 26, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

¹⁷ *Albert C. Shadrick, supra* note 6.