

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

T.G., Appellant

and

DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Oklahoma City, OK, Employer

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**Docket No. 11-1641
Issued: March 15, 2012**

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, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 6, 2011 appellant, through her attorney, filed a timely appeal from a May 24, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 OWCP properly determined appellant's wage-earning capacity based on actual earnings as a telephone operator.

FACTUAL HISTORY

On April 15, 2008 appellant, then a 44-year-old pharmacy technician, filed a traumatic injury claim (Form CA-1) alleging injury to her neck and upper extremities on December 23,

¹ 5 U.S.C. § 8101 *et seq.*

2006 when she indicated that she fell out of bed.² In a narrative statement, she discussed her job duties, including repetitive activities with emptying drawers and sorting pills. In a memorandum dated May 28, 2008, OWCP indicated that, although a CA-1 form was filed, it was evident that her claim was for occupational exposure from incidents over more than one workday. Therefore, the claim would be adjudicated as such.

OWCP accepted the claim for sprains of the neck, right elbow and forearm, medial epicondylitis, right radial styloid tenosynovitis and a herniated disc at C5-6. On December 10, 2007 appellant underwent a cervical discectomy. She returned to work in a modified position on December 8, 2008. The record indicates that appellant underwent right carpal tunnel release surgery on February 27, 2009.

Appellant was referred for a second opinion examination to Dr. Christopher Jordan, an orthopedic surgeon. In a report dated June 27, 2009, Dr. Jordan provided a history and results on examination. He found that appellant could work with restrictions and completed an OWCP-5c report (work capacity evaluation). In a report dated July 23, 2009, the attending physician Dr. J. Arden Blough, a family practitioner, opined that she was totally disabled.

To resolve a conflict in the medical evidence, appellant was referred to Dr. C.L. Soo, a Board-certified orthopedic surgeon. In a report dated October 5, 2009, Dr. Soo reviewed a history of injury and results on examination. He stated that appellant could work full time with restrictions. In an OWCP-5c (work capacity evaluation) dated October 30, 2009, Dr. Soo indicated that she was restricted to six hours of such activity as sitting, walking, standing and reaching. He reported that appellant had a 10-pound lifting restriction.

By letter dated December 17, 2009, the employing establishment noted the work restrictions provided by Dr. Soo and offered appellant a position as a Police Service, Telephone Operator with annual wages of \$35,753.00 (\$687.55 per week). According to the employer, the date of injury was December 23, 2006 and she was at that time a General Services (GS) 5, Step 6 employee at \$33,075.00 per year. The employing establishment described the job duties and physical requirements.

In a report dated December 29, 2009, Dr. M. Stephen Wilson, an orthopedic surgeon, stated that he had reviewed the job offer. He noted that appellant had performed this job in the past, but when she did perform the job her condition had worsened due to the volume of telephone calls answered and the writing requirement. Dr. Wilson advised that the offered position was not suitable.

By letter dated January 15, 2010, OWCP asked the employer for information regarding pay rate, including the pay rate for the date of injury on December 23, 2006. It responded that on December 23, 2006 appellant was a GS-5, Step 5 with annual earnings of \$32,130.00 and the

² In a letter dated April 15, 2008, the employing establishment stated that December 23, 2006 was a Saturday and appellant was off work.

current annual earnings of a GS-5, Step 5 was \$35,489.00. According to the employing establishment, her current earnings in the offered position would be \$36,384.00.

After initially rejecting the offered position as a telephone operator, the record indicates that appellant accepted the position on March 2, 2010. In an OWCP-5c dated July 19, 2010, Dr. Wilson advised that she was limited to six hours a day sitting, standing and walking, four hours of reaching and repetitive wrist and elbow movements, with two hours reaching above shoulder. He also limited appellant to a maximum of 10 pounds, pulling and pushing. Dr. Wilson stated that she should not work alone and should have two consecutive days off to rest.

In a decision dated October 22, 2010, OWCP found that appellant's actual earnings as a telephone operator fairly and reasonably represented her wage-earning capacity. It found that she had current earnings of \$708.53 per week, which were greater than the current pay rate for a GS-5 Step 5 employee of \$682.48 per week. OWCP concluded that appellant had no loss of wage-earning capacity.

Appellant requested a telephonic hearing, which was held on March 15, 2011. At the hearing, she stated that the job she was working was a GS-4, Step 10 position and at times, she had to work midnight to 8:00 a.m. which was against her physician's orders. Appellant's representative argued that the job was a makeshift job.

In a letter dated April 8, 2011, the employing establishment stated that the position of telephone operator was a classified position and was not a makeshift position. The employing establishment submitted a copy of the position description.

By decision dated May 24, 2011, an OWCP hearing representative affirmed the October 22, 2010 OWCP decision. With respect to appellant's current earnings, the hearing representative indicated that the \$708.53 per week earnings included overtime and holiday pay.

LEGAL PRECEDENT

Under section 8115(a) of FECA, 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 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.⁴

OWCP's procedures state that, after a claimant has been working for 60 days, OWCP will make a determination as to whether actual earnings fairly and reasonably represent wage-

³ 5 U.S.C. § 8115(a).

⁴ *Dennis E. Maddy*, 47 ECAB 259 (1995).

earning capacity.⁵ OWCP's procedure manual provides guidelines for determining wage-earning capacity based on actual earnings:

“a. *Factors considered.* To determine whether the claimant's work fairly and reasonable represents his or her WEC, the [c]laims examiner [(CE)] should consider whether the kind of appointment and tour of duty (see FECA PM 2-900.3) are at least equivalent to those of the job held on date of injury. Unless they are, the CE may not consider the work suitable.

“For instance, reemployment of a temporary or casual worker in another temporary or casual (USPS) position is proper, as long as it will last at least 90 days and reemployment of a term or transitional (USPS) worker in another term or transitional position is likewise acceptable. However, the reemployment may not be considered suitable when:

“(1) *The job is part-time* (unless the claimant was part-time worker at the time of injury) or sporadic in nature;

“(2) *The job is seasonal* in an area where year-round employment is available.

“(3) *The job is temporary* where the claimant's previous job was permanent.”⁶

The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision,⁷ has been codified at 20 C.F.R. § 10.403. OWCP first 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 position.⁸

ANALYSIS

In the present case, the record indicates that appellant began working as a telephone operator on or about March 2, 2010. There is no evidence that the offered position was a part-time, temporary or seasonal position. Appellant has argued that the position was a makeshift position that is not appropriate for a wage-earning capacity determination.⁹ The Board has found that question of whether a position is makeshift involves consideration of such factors as whether the position had an official title or formal position description, whether there were such strict

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1995).

⁶ Federal (FECA) Procedure Manual, *supra* note 5, Chapter 2.814.7(a) (July 1997).

⁷ 5 ECAB 376 (1953).

⁸ 20 C.F.R. § 10.403(d).

⁹ A makeshift position is one specifically tailored to an employee's particular needs and generally lacks a position description, physical requirements and work schedule. *William D. Emory*, 47 ECAB 365 (1996).

limitations that it would indicate that the claimant would not be able to secure a position in the community at large, whether the claimant performed meaningful tasks in the position and whether the job appeared to be temporary in nature.¹⁰ In this case, the position offered did have a title and job description, with defined and meaningful duties and no indication that the job was temporary. At the telephonic hearing appellant appeared to argue that her job duties differed from the job description, but she did not describe her job duties or support an argument that the job was makeshift in nature.

With respect to the medical evidence and the job duties as a telephone operator, the Board notes that Dr. Wilson's statement in a December 29, 2009 report that the job was not suitable appeared to be based on a concern that the job might cause an aggravation of appellant's condition in the future.¹¹ Moreover, there had been a conflict in the medical evidence¹² regarding her disability and work restrictions and the referee physician, Dr. Soo, had provided work restrictions. As a referee physician resolving a conflict, his complete report and opinion as to work restrictions is entitled to special weight.¹³ The job offer was based on the restrictions from Dr. Soo and there is no evidence that the job duties were outside the work restrictions provided by the referee physician.

Appellant also stated that after she began work she had to work some nights and this was against her physician's orders. She did not provide a detailed discussion of her work schedule. The restrictions provided by Dr. Wilson in the July 19, 2010 OWCP-5c did not discuss any restriction on working at night. Dr. Wilson indicated in a March 17, 2010 report that appellant should have eight hours in between her work shifts, but there was no probative evidence that the job was outside established work restrictions .

The Board accordingly finds that OWCP properly found that earnings in the position of telephone operator fairly and reasonably represented her wage-earning capacity. Appellant worked in the position for more than 60 days and it was not a makeshift, part-time, temporary or seasonal position.

As to the calculation of appellant's wage-earning capacity, however, the record requires further development. OWCP found that her current earnings were \$708.53 per week, which included overtime work performed. It is well established that overtime pay is not included in computing an employee's pay.¹⁴ In addition, OWCP found that the date of injury in this case was December 23, 2006. The comparison between current earnings and current pay rate for the date-of-injury position, as required by 20 C.F.R. § 10.403, was therefore based on the underlying

¹⁰ See *A.J.*, Docket No. 10-619 (issued June 29, 2010).

¹¹ This type of prophylactic restriction is not a basis for compensation under FECA. See *L.T.*, Docket No. 10-2031 (issued August 1, 2011); *Mary Geary*, 43 ECAB 3000 (1991).

¹² FECA provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make the examination. 5 U.S.C. § 8123(a).

¹³ *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

¹⁴ 5 U.S.C. § 8114(e) specifically provides that overtime pay is not included in determining a claimant's pay rate.

date-of-injury pay rate as of December 23, 2006. But the December 23, 2006 date was based on information on appellant's CA-1 traumatic injury claim form. The claim was developed as an occupational disease or illness claim for incidents occurring over more than one workday. For an occupational claim, the date of injury is the date of last exposure to the identified factors causing the injury.¹⁵ OWCP did not make a proper finding as to the date of injury in this case. Once the date of injury is properly determined, OWCP can determine the current pay rate for the date-of-injury position.

The case will accordingly be remanded to OWCP for proper findings as to pay rate and proper calculation of appellant's loss of wage-earning capacity. After such further development as OWCP deems necessary, it should issue an appropriate decision.

CONCLUSION

The Board finds that the actual earnings as a telephone operator were appropriate for a wage-earning capacity determination, but OWCP did not properly calculate the loss of wage-earning capacity and the case is remanded for further development.

¹⁵ *Barbara A. Dumnivant*, 48 ECAB 517 (1997).

ORDER

IT IS HEREBY ORDERED THAT the May 24, 2011 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further action consistent with this decision of the Board.

Issued: March 15, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board