United States Department of Labor
Employees' Compensation Appeals Board

KATHLEEN A. PRICE, Appellant	)	
and	)	**Docket No. 04-336**
	)	**Issued: May 19, 2004**
U.S. POSTAL SERVICE, SEWELL ANNEX, Sewell, NJ, Employer	)	

Appearances:
Kathleen A. Price, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On November 20, 2003 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated November 10, 2003 determining her loss of wage-earning capacity. Pursuant to 20 C.F.R.[1] §§ 10.501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly determined appellant's loss of wage-earning capacity based on her reemployment as a part-time modified rural carrier.

FACTUAL HISTORY

On August 21, 1989 appellant, then a 33-year-old rural carrier, filed an occupational disease claim alleging that she sustained an aggravation of a preexisting scoliosis condition on May 25, 1989 due to prolonged sitting in her vehicle while delivering mail and lifting parcels

[1] The Code of Federal Regulations.

and trays of mail.[2] The Office accepted her claim for aggravation of preexisting scoliosis. She underwent surgery on August 4, 1989 and August 18 and October 18, 2000. Appellant sustained a recurrence of disability on September 21, 2000.

Effective January 13, 2001 appellant was placed on the periodic compensation roll to receive compensation for temporary total disability. Appellant returned to work effective February 25, 2002 for 4 hours a day as a modified rural carrier, answering the telephone and performing clerical work, with standing and sitting limited to 1 hour at a time and lifting limited to no more than 10 pounds.

In reports dated April 29 and June 20, 2002, Dr. Richard A. Balderston, appellant's attending orthopedic surgeon, stated that appellant had recently recovered from spinal fusion surgery performed in 2000. He indicated that she could work 5 hours a day as of April 29, 2002 with no bending, pushing, pulling or twisting and no lifting over 10 pounds and sitting and standing limited to 1 hour at a time or as tolerated.

Appellant began working the modified rural carrier position for five hours a day effective April 27, 2002.

In an August 7, 2002 work capacity evaluation, Dr. Balderston indicated that appellant could work for 5 hours a day with no lifting over 10 pounds and sitting and standing limited to 1 hour at a time.

An October 31, 2003 telephone memorandum indicates that on that date an employing establishment representative advised the Office that the current full-time weekly salary for appellant's modified rural carrier position was $944.48 and her actual weekly wages were $590.30.[3] The representative advised that the current weekly salary for appellant's date-of-injury job was $694.73.

By decision dated November 10, 2003, the Office reduced appellant's compensation effective October 18, 2003 based on her reemployment on April 27, 2002 as a part-time modified rural carrier with wages of $590.30. It determined that the part-time modified rural carrier position was medically suitable and fairly and reasonably represented appellant's wage-earning capacity. The Office noted that, although appellant worked on a full-time basis at the time of her August 21, 1989 injury, it was appropriate to base her wage-earning capacity on the part-time position, because the medical evidence from Dr. Balderston established that she was capable of working only on a part-time basis. The Office also indicated that appellant had worked in that position for more than 60 days and there was no evidence that the position was temporary.

[2] Appellant was working an a full-time basis for the employing establishment at the time of the injury.

[3] Appellant was working five hours a day, rather than eight hours. Therefore she was earning five-eighths (.625 percent) of $944.48, or $590.30.

LEGAL PRECEDENT

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury, it has the burden of justifying a subsequent reduction of compensation benefits.[4]

Section 8115 of the Federal Employees' Compensation Act provides that wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity.[5] 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.[6]

The Office's procedure manual provides, in relevant part, as follows:

> "*Factors Considered*. To determine whether the claimant's work fairly and reasonably represents his or her [wage-earning capacity], the [claims examiner] 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 [the] date of injury. Unless they are, the [claims examiner] may not consider the work suitable.
>
> "For instance, reemployment of a temporary or casual worker in another temporary or casual [U.S. Postal Service] position is proper, as long as it will last at least 90 days and reemployment of a term or transitional [U.S. Postal Service] 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 a 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. If an employee obtains seasonal work voluntarily in an area where year-round work is generally performed, the [claims examiner] should carefully determine whether such work is truly representative of the claimant's [wage-earning capacity]; or
> >
> > (3) *The job is temporary* where the claimant's previous job was permanent."[7]

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[4] *Gregory A. Compton*, 45 ECAB 154 (1993).

[5] 5 U.S.C. § 8115(a); *Lawrence D. Price*, 47 ECAB 120 (1995).

[6] *Francis J. Carter*, 53 ECAB ___ (Docket No. 00-1789, issued April 11, 2002); *Dennis E. Maddy*, 47 ECAB 259 (1995).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7.a (July 1997) (Emphasis in the original).

ANALYSIS

The evidence in this case is sufficient to support that appellant's reemployment as a part-time modified rural carrier on April 27, 2002 with weekly wages of $590.30 fairly and reasonably represents her wage-earning capacity. Dr. Balderston indicated that appellant could work 5 hours a day with no lifting over 10 pounds and sitting and standing limited to 1 hour at a time. Effective April 27, 2002 appellant began working 5 hours a day as a modified rural carrier with no lifting over 10 pounds and sitting and standing limited to 1 hour at a time. The Office noted in its November 10, 2003 decision that appellant was capable of working only part time according to her attending physician and therefore the part-time position fairly and reasonably represented appellant's wage-earning capacity. Office procedure provides that a determination regarding whether actual earnings fairly and reasonably represent wage-earning capacity should be made after an employee has been working in a given position for more than 60 days.[8] When the Office issued its decision on wage-earning capacity on November 10, 2003 appellant had worked as a part-time modified rural carrier more than 60 days. The Office found no evidence that the position was temporary.

Although appellant worked in a full-time position when she was injured on August 21, 1989 and the modified rural carrier position was a part-time position, the Office adequately considered this circumstance in accordance with its procedural requirements.[9] The Office explained that basing appellant's wage-earning capacity on a part-time position was appropriate because the medical evidence clearly showed that she was only capable of performing part-time work. As there is no evidence to show that appellant's actual earnings as a part-time modified rural carrier do not fairly and reasonably represent her wage-earning capacity, the Office properly accepted these earnings as the best measure of her wage-earning capacity.

The formula for determining loss of wage-earning capacity based on actual earnings was set forth in the case of *Albert C. Shadrick*,[10] and is codified by regulation at 20 C.F.R. § 10.403.[11] The initial step is to compare the actual earnings with earnings at the time of injury. Then, as the *Shadrick* decision points out, the earnings in the date-of-injury position must be updated to reflect the current earnings of an employee in the date-of-injury position; the Board stated that "reasonableness and fairness require that such earnings be adjusted so as to eliminate the effect of economic factors in cases where salaries and earnings have been affected by inflationary tendencies."[12] In this case, the Office compared appellant's current actual earnings of $590.30 with the current pay rate for the date-of-injury position, $694.73. This results in a wage-earning capacity of 85 percent; this percentage is then applied to the "[p]ay rate for compensation

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

[9] *See supra* note 7 and accompanying text. *See generally William D. Emory*, 47 ECAB 365 (1996).

[10] 5 ECAB 376 (1953).

[11] *See also* Federal (FECA) Procedure Manual, Part 2 – Claims, *Computing Compensation*, Chapter 2.901.15.b-c (December 1999).

[12] *Supra* note 10.

purposes," which is defined in the Office's regulations as the employee's pay at the time of injury, the time disability began, or when compensable disability recurred, if the recurrence began more than 6 months after the employee resumed regular full-time employment with the United States, whichever is greater.[13] In this case, the Office used the pay rate on September 21, 2000, the date of recurrence of disability, $858.27. Applying the 85 percent wage-earning capacity to $858.27 results in a wage-earning capacity of $729.52 per week or a loss of wage-earning capacity of $128.75. The Board finds that the Office properly applied the principles of *Shadrick* in calculating appellant's wage-earning capacity.[14]

On appeal, appellant stated that she did not understand why her wages should be "lowered to the date of my injury." She apparently feels that comparison of her actual wages to the current pay rate for her date-of-injury position is improper. The loss of wage-earning capacity percentage is a measurement based on earnings at the time of injury, updated to current levels, compared with the current actual earnings. The purpose of the comparison is to measure the effect of the original injury on the subsequent capacity to earn wages. The Board has held that the percentage of loss of the employee's wage-earning capacity is to be determined by taking into account the type of work she was performing at the time of injury and the present pay rate she would be earning in that work but for the injury and resulting physical impairment.[15] The only appropriate method for determining loss of wage-earning capacity, and the only method contemplated by *Shadrick*, is to utilize the current pay rate of the date-of-injury position in calculating the percentage of loss of wage-earning capacity.[16]

CONCLUSION

The Board finds that in this case the Office properly calculated appellant's loss of wage-earning capacity based on her actual earnings as a part-time modified rural carrier.

[13] 20 C.F.R. § 10.5(s).

[14] *Francis J.Carter, supra* note 6.

[15] *Id.*; *Melvin Hoff, Sr.*, 27 ECAB 458 (1976).

[16] *Francis J. Carter, supra* note 6.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 10, 2003 is affirmed.

Issued: May 18, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member