United States Department of Labor
Employees' Compensation Appeals Board

L.C., Appellant	)	
and	)	**Docket No. 06-1620**
	)	**Issued: February 28, 2007**
U.S. POSTAL SERVICE, PLAZA STATION, Pasadena, CA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 10, 2006 appellant filed a timely appeal from an August 11, 2005 merit decision of the Office of Workers' Compensation Programs determining her wage-earning capacity and a May 11, 2006 hearing representative's decision affirming the wage-earning capacity determination and addressing her pay rate for compensation purposes. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the appeal.

ISSUES

The issues are: (1) whether the Office properly reduced appellant's compensation to zero effective September 14, 2004 on the grounds that her actual earnings as a video coding systems technician fairly and reasonably represented her wage-earning capacity; and (2) whether the Office properly determined her pay rate for compensation purposes for the period August 7, 2000 to September 14, 2004.

FACTUAL HISTORY

On January 25, 2001 appellant, then a 43-year-old window clerk, filed an occupational disease claim alleging that she sustained a neck and right elbow condition due to factors of her federal employment. Her supervisor indicated on the claim form that she stopped work on April 7, 2000 for personal reasons. The Office accepted the claim for cervical and right shoulder strain.[1]

The Office paid appellant's compensation for disability beginning August 7, 2000 based on her pay rate in effect on March 10, 2000. In an internal memorandum dated June 13, 2002, the Office noted that appellant claimed compensation beginning March 10, 2000 but the medical evidence was insufficient to establish entitlement to compensation prior to August 7, 2000. The Office determined that appellant would be paid compensation based on her March 10, 2000 pay rate of $39,515.00 a year, or $759.90 per week, to prevent a possible overpayment of compensation. The Office noted that it would owe appellant additional compensation based on her August 7, 2000 pay rate of $39,869.00 per year if she did not establish entitlement to compensation beginning March 10, 2000.

On February 20, 2004 the employing establishment offered appellant a position as a modified mail processing clerk working in the video coding systems unit at the same grade and step as her current date-of-injury position. In a report dated February 25, 2004, her attending physician, Dr. David W.P. Huang, a Board-certified orthopedic surgeon, opined that she "should be able to perform her job as described."

On September 14, 2004 appellant returned to work as a video coding systems technician with wages of $43,644.00 per year. In a letter dated September 28, 2004, the Office informed appellant that it was reducing her compensation to zero as her actual earnings of $855.69 per week as a video coding systems technician equaled her earnings in her date-of-injury position.

In a report dated March 7, 2005, Dr. Huang diagnosed a cervical spine sprain. On April 18, 2005 he noted that appellant related that working the night shift aggravated her neck, shoulder and upper back conditions because she slept poorly. Dr. Huang stated: "If possible, [she] should have her working hours moved to the day shift."

On December 15, 2005 the Office informed appellant of its preliminary determination that an overpayment in the amount of $5,622.23 existed because she received compensation for total disability from August 7 to November 4, 2000 while also receiving paid leave from the employing establishment.[2] The Office noted that it paid appellant compensation from August 7, 2000 through September 13, 2004 based on pay rate date of March 10, 2000, with an annual salary of $39,515.00 or $759.90 per week. The Office found that it should have paid appellant

[1] By decision dated August 8, 2001, the Office denied appellant's claim after finding that the medical evidence was insufficient to establish that the claimed condition was due to factors of her federal employment. In a decision dated May 21, 2002, an Office hearing representative reversed the August 8, 2001 decision and accepted the claim for cervical and right shoulder strain.

[2] The Office noted that it excluded from its overpayment calculations 24 hours from October 10 to 13, 2000 and 6 hours from November 3 to 4, 2000 when appellant was on leave without pay.

based on her salary of $39,869.00 or $766.71 per week, which was in effective the date disability began on August 7, 2000. The Office calculated the amount owed her for the period August 7, 2000 through September 13, 2004 using the correct pay rate, $1,070.30 and subtracted this amount from the overpayment of $6,692,62 to find a total overpayment of $5,622.23. Appellant requested a telephone conference on the overpayment on January 14, 2005.[3]

By decision dated August 11, 2005, the Office reduced appellant's compensation to zero effective September 14, 2004 based on its finding that her actual earnings as a video coding systems technician fairly and reasonably represented her wage-earning capacity. The Office noted that her actual earnings as a video coding systems technician met or exceeded that of her job held on the date of injury. The Office found that the updated weekly pay rate for the job appellant held on August 7, 2000, the date disability began, was $855.69, which equaled her current actual earnings in her present position.

On September 6, 2005 appellant requested an oral hearing on the August 11, 2005 wage-earning capacity determination. She contended that the Office erroneously paid her only 75 percent of her lost wages and that the employing establishment failed to allow her to return to work for four years. Appellant calculated the amount of money that she lost because she did not earn annual leave, sick leave, get a tax refund or have funds put in a retirement fund. She also argued that she should work the day rather than the night shift due to health concerns.[4]

At the hearing, held on February 22, 2006, appellant confirmed that she received the same wages in her current job as in her date-of-injury position. She argued that she was erroneously compensated for only 75 percent of her lost salary. Appellant argued that the employing establishment wrongly failed to provide her work. She also raised issues regarding the preliminary finding of an overpayment of compensation.

By decision dated May 11, 2006, the Office hearing representative affirmed the August 11, 2006 decision. She found that the Office properly reduced appellant's compensation to zero based on her actual earnings. The hearing representative further found that appellant received compensation based on an inaccurate pay rate but that this was remedied by the Office offsetting the amount owed because of the pay rate error from an overpayment that existed because she received compensation from the Office and leave from the employing establishment.

LEGAL PRECEDENT -- ISSUE 1

Section 8115(a) of the Federal Employees' Compensation Act[5] provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by her actual earnings if her actual earnings fairly and reasonably represent her wage-earning capacity.[6] Generally, wages actually earned are the best measure of a wage-

[3] The record does not contain a final overpayment decision.

[4] In an October 28, 2005 report, Dr. Huang opined that appellant could continue working modified duties.

[5] 5 U.S.C. §§ 8101-8193.

[6] 5 U.S.C. § 8115(a); *Loni J. Cleveland*, 52 ECAB 171 (2000).

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.[7] The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision,[8] has been codified at 20 C.F.R. § 10.403. The Office 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.[9] Office procedures provide 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.[10]

ANALYSIS -- ISSUE 1

The Board finds that appellant's actual earnings as a video coding systems technician fairly and reasonably represent her wage-earning capacity. On February 20, 2004 the employing establishment offered her the position of modified mail processing clerk in the video coding systems unit. Appellant's attending physician, Dr. Huang, opined on February 25, 2004 that she could perform the duties of the offered job. She returned to work on September 14, 2004 and continued working in the position through August 11, 2005, the date the Office issued its formal loss of wage-earning capacity determination. Appellant worked in the position for more than 60 days and there is no evidence that the position was seasonal, temporary or make-shift work designed for her particular needs.[11] On April 18, 2005 Dr. Huang noted that appellant reported increased symptoms in her neck, shoulder and upper back because of difficulty sleeping. He opined that she should work the day shift "if possible." Dr. Huang's finding that appellant "should" work the day shift is equivocal in nature and appears based on appellant's complaints rather than an independent finding by the physician; consequently, it is of diminished probative value.[12] As there is no probative evidence that appellant's wages in her position did not fairly and reasonably represent her wage-earning capacity, they must be accepted as the best measure of her wage-earning capacity.[13]

As appellant's actual earnings in her video coding specialist position fairly and reasonably represent her wage-earning capacity, the Board must determine whether the Office

[7] *Lottie M. Williams*, 56 ECAB ___ (Docket No. 04-1001, issued February 3, 2005).

[8] *Albert C. Shadrick*, 5 ECAB 376 (1953).

[9] 20 C.F.R. § 10.403(c).

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

[11] *Elbert Hicks*, 49 ECAB 283 (1998); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (July 1997).

[12] *Kathy A. Kelley*, 55 ECAB 206 (2004) (medical opinions that are speculative or equivocal in character have little probative value); *Earl David Seale*, 49 ECAB 152 (1997) (a physician's report is of little probative value when based on a claimant's belief rather than a doctor's independent judgment).

[13] *See Loni J. Cleveland*, *supra* note 6.

properly calculated her wage-earning capacity based on her actual earnings. The Board finds that the Office properly found that appellant had no loss of wage-earning capacity based on her actual earnings. Appellant's current weekly earnings of $855.69 per week equaled the current weekly wages of her position on August 7, 2000, the date disability began. Therefore, she had no loss of wage-earning capacity under the *Shadrick* formula.

LEGAL PRECEDENT -- ISSUE 2

Section 8105(a) of the Act provides: "If the disability is total, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of [her] monthly pay, which is known as [her] basic compensation for total disability."[14] Section 8110(b) of the Act provides that total disability compensation will equal three fourths of an employee's monthly pay when the employee has one or more dependents.[15] Pay rate for compensation purposes is defined in section 8101(4) as the monthly pay at the time of injury, the time disability begins or the time disability recurs, if the recurrence is more than six months after returning to full-time work, whichever is greater.[16]

ANALYSIS -- ISSUE 2

The Office accepted that appellant sustained cervical and right shoulder strain. Appellant requested compensation for disability beginning March 10, 2000. Pay rate for compensation purposes is defined in section 8101(4) as the monthly pay at the time of injury, the time disability begins or the time disability recurs, if the recurrence is more than six months after returning to full-time work, whichever is greater.[17] The Office paid appellant compensation for disability due to her employment injury beginning August 7, 2000. The Office indicated that it used the pay rate in effect on March 10, 2000 in order to prevent an overpayment of compensation if she subsequently established entitlement to disability compensation beginning that date. The Office acknowledged that it would owe appellant additional compensation based on the pay rate in effect on August 7, 2000 if she did not establish entitlement to compensation for disability beginning March 10, 2000. Appellant did not establish entitlement to compensation prior to August 7, 2000 and thus the Office should have paid her based on a pay rate of $766.71 per week, the date disability began.

The hearing representative, in her May 11, 2006 decision, found that the Office owed appellant compensation because it paid her at an inaccurate pay rate. She found, however, that the Office corrected the error by subtracting the amount owed to appellant because she received compensation at an inaccurate pay rate from the overpayment that existed because she received compensation for total disability from August 7 to November 2, 2000 while also receiving leave from the employing establishment. Such an offset is not allowed, however, as it permits an unrestricted recovery of the offset portion of the overpayment without regard to the factors set

[14] 5 U.S.C. § 8105(a).

[15] 5 U.S.C. § 8110(b).

[16] 5 U.S.C. §§ 8101(4); 8114; *see also* 20 C.F.R. § 10.5(s).

[17] *Id*.

forth for considering waiver in the Office's regulations, which denies administrative due process with respect to the amount offset.[18] The decision will be, therefore, set aside and remanded for further development.

Appellant argued that the Office erred in paying her only 75 percent of her salary. She also contended that she lost retirement and leave earnings. Section 8110(b) of the Act provides that total disability compensation will equal three fourths of an employee's monthly pay when the employee has one or more dependents.[19] Neither the Office nor the Board has the authority to enlarge the terms of the Act or to make an award of benefits under any terms other than those specified in the statute.[20]

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation to zero effective September 14, 2004 on the grounds that her actual earnings as a video coding systems technician fairly and reasonably represented her wage-earning capacity. The Board further finds that the Office improperly determined appellant's pay rate for compensation purposes for the period August 7, 2000 to September 14, 2004.

[18] *See Michael A. Grossman*, 51 ECAB 673 (2000).

[19] *Supra* note 15.

[20] *Danny E. Haley*, 56 ECAB ___ (Docket No. 04-853, issued March 18, 2005).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 11, 2006 is affirmed in part, set aside in part and the case is remanded for further proceedings consistent with this decision of the Board. The decision dated August 11, 2005 is affirmed.

Issued: February 28, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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