United States Department of Labor
Employees' Compensation Appeals Board

L.M., Appellant	)	
and	)	**Docket No. 07-1791**
	)	**Issued: July 22, 2008**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, St. Petersburg, FL, Employer	)	

Appearances:
Dean Albrecht, for the appellant
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 June 18, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decisions dated June 21, 2006 and May 22, 2007. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly determined that appellant's actual earnings fairly and reasonably represented her wage-earning capacity under 5 U.S.C. § 8115; and (2) whether the Office properly denied modification of the wage-earning capacity determination as of June 30, 2006.

FACTUAL HISTORY

On October 27, 1999 appellant, then a 41-year-old clerk, filed an occupational disease claim alleging that she sustained carpal tunnel syndrome as a result of repetitive activity in her federal employment. On January 4, 2000 the Office accepted her claim for bilateral carpal

tunnel syndrome and right shoulder tendinitis. Appellant underwent a right carpal tunnel release on August 1, 2000, a left carpal tunnel release on August 9, 2001, and right shoulder arthroscopic surgery on August 1, 2002. The record indicates that as of April 2003 she was working five hours per day in a light-duty position.

Appellant underwent surgery to her right elbow on January 25, 2005. In a report dated April 13, 2005, Dr. Dale Bramlet, an attending orthopedic surgeon, noted that a functional capacity evaluation indicated that appellant could lift 20 to 50 pounds occasionally and up to 25 pounds frequently. He completed a work capacity evaluation (Form OWCP-5c) noting that appellant could work five hours per day with restrictions. Dr. Bramlet reported the restrictions were permanent. On May 21, 2005 appellant accepted a formal light-duty job offer as a modified mail processor at five hours per day. She underwent additional right shoulder surgery on December 1, 2005 and then returned to the five-hour-per-day light-duty job on February 7, 2006. In a memorandum dated July 16, 2006, the employing establishment indicated that the current full-time annual salary for a level 5, step 0 clerk was $47,184.00, with appellant also earning $7.90 per week in night differential.

By decision dated June 21, 2006, the Office found that appellant's actual earnings at 25 hours per week in the modified mail handler position fairly and reasonably represented her wage-earning capacity. It noted that appellant had been a full-time employee when injured, but the medical evidence from Dr. Bramlet established that the current employment represented her wage-earning capacity at five hours a day. According to the Office, appellant was earning $575.02 weekly, which represented a 63 percent wage-earning capacity compared to the current pay rate for the date-of-injury job of $916.27 per week. After multiplying the pay rate for compensation purposes by the percentage of wage-earning capacity, the Office determined that appellant had a $299.49 loss of wage-earning capacity per week.

On July 5, 2006 appellant filed a claim for compensation (Form CA-7) for the period June 24 to July 7, 2006. She also filed a Form CA-7 for the period July 8 to 21, 2006. The employing establishment's leave record indicated that appellant had stopped work from June 30 to July 18, 2006, and then returned to work at five hours per day.

Appellant submitted a June 29, 2006 note from Dr. Robert Siegel, a pain management specialist, excusing her from work for two weeks. In a July 13, 2006 note, Dr. Siegel stated that appellant should not work until July 18, 2006. By report dated September 12, 2006, he indicated that he had been treating appellant since July 1, 2004, with treatment consisting of medications and injections at time of exacerbations. Dr. Siegel stated it was clear her pain was aggravated by work and eased by rest. He stated, "When [appellant] has had a particularly severe episode, requiring injection, I suggested she would maximize her benefit by taking some time off work."

By decision dated December 6, 2006, the Office denied the claim for compensation from June 30 to July 17, 2006. The Office found the evidence was not sufficient to warrant modification of the wage-earning capacity determination.

Appellant requested reconsideration on February 20, 2007. She argued that her condition had worsened and submitted additional medical evidence. In a report dated November 29, 2006, Dr. Bramlet indicated that appellant's shoulders and knees were painful. He reported that

appellant felt her knee pain was related to work because she had to stand four or five hours per day. In a report dated March 14, 2007, Dr. Bramlet indicated that appellant had not worked since December 2006. By April 25, 2007 report, he diagnosed partial torn left rotator cuff with impingement and probable recurrent right shoulder impingement.

By decision dated May 22, 2007, the Office reviewed the case on its merits and denied modification of the December 6, 2006 decision. It found appellant had not established a modification of wage-earning capacity determination as of June 30, 2006, or established a period of disability from June 30 to July 17, 2006. The Office noted that other claims for periods of wage loss had been filed, but had not yet been addressed by formal decision.

LEGAL PRECEDENT -- ISSUE 1

Under section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity.[1] 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.[2]

The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision,[3] has been codified at 20 C.F.R. § 10.403. The Office first calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the "current" pay rate. The employee's wage-earning capacity in terms of dollars is computed by multiplying the pay rate for compensation purposes by the wage-earning capacity percentage, and then the resulting dollar amount is subtracted from the pay rate for compensation purposes to determine loss of wage-earning capacity.

ANALYSIS -- ISSUE 1

Following her injury, appellant returned to a light-duty job at five hours per day, five days a week as of April 2003. She continued to work at five hours per day, with intermittent periods of total disability. On May 17, 2005 appellant accepted a formal job offer as a modified mail processor at five hours per day.

Appellant was a full-time employee at the time of her injury. As the Board noted in *Connie L. Potratz-Watson*,[4] if the Office uses a part-time position to determine wage-earning capacity when the claimant was a full-time employee, it must address the issue and explain why a part-time position is suitable based on the specific circumstances of the case. In this case, the Office acknowledged that appellant had been a full-time employee. However, Dr. Bramlet

[1] 5 U.S.C. § 8115(a).

[2] *Dennis E. Maddy*, 47 ECAB 259 (1995).

[3] 5 ECAB 376 (1953).

[4] 56 ECAB 316 (2005).

provided work restrictions that allowed part-time work for a maximum of five hours a day. He indicated appellant's work restrictions were permanent. Appellant had been working for several years in the part-time position and her physician advised that her work restrictions were permanent. Under these circumstances it was appropriate for the Office to base a wage-earning capacity determination on actual earnings from a part-time position. The Office properly explained in its decision why the part-time position was suitable.

As noted wages actually earned are generally the best measure of wage-earning capacity. There is no evidence showing the modified mail processor did not fairly and reasonably represent wage-earning capacity. Appellant had worked for more than 60 days in the position,[5] and the Board finds the Office properly determined actual earnings fairly and reasonably represented wage-earning capacity.

With respect to application of the *Shadrick* formula, the Office determined, based on evidence from the employing establishment, appellant was earning $575.02 per week. The actual earnings were compared to the current earnings for the date-of-injury position, for a wage-earning capacity of 63 percent. This percentage was then applied to the pay rate for compensation purposes to determine the loss of wage-earning capacity. There is no probative evidence of any error in the Office's calculations.

LEGAL PRECEDENT -- ISSUE 2

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.[6] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[7]

ANALYSIS -- ISSUE 2

The record indicated that appellant had stopped working from June 30 to July 17, 2006. The Office decisions dated December 6, 2006 and May 22, 2007 were limited to the claim for compensation during this period. When an employee claims compensation for total disability after a wage-earning capacity determination has been made, this raises the issue of whether the wage-earning capacity determination should be modified.[8] In this case, appellant has not been retrained or otherwise vocationally rehabilitated, nor does the evidence establish, as the above discussion illustrates, that the original determination was erroneous. The issue is whether there

[5] Office procedures indicate a wage-earning capacity decision should be made after the employee has been working for 60 days. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1993).

[6] *Sue A. Sedgwick*, 45 ECAB 211 (1993).

[7] *Id.*

[8] *See Katherine T. Kreger*, 55 ECAB 633 (2004).

was a material change in the nature and extent of the injury-related condition as of June 30, 2006.

Dr. Siegel provided brief notes that appellant should be off work, without providing further explanation. He stated in his September 12, 2006 report that appellant was sometimes placed off work when she had a severe episode requiring an injection, but he does not specifically discuss the period June 30 to July 17, 2006. Appellant has several employment-related conditions and Dr. Siegel does not discuss appellant's condition or treatment as of June 30, 2006, or provide evidence establishing there was a material change in the nature and extent of an employment-related condition. The Board accordingly finds the evidence is not sufficient to warrant a modification of the June 21, 2006 wage-earning capacity determination as of June 30, 2006.

The Board notes that the Office may accept a limited period of employment-related disability without modifying the wage-earning capacity determination.[9] For the period June 30 to July 17, 2006, however, appellant must establish that she was disabled due to an employment-related injury.[10] The medical evidence of record does not discuss the period claimed and is insufficient to establish her entitlement to compensation for total disability.

CONCLUSION

The Office properly determined that actual earnings as a modified mail processor fairly and reasonably represented wage-earning capacity pursuant to 5 U.S.C. § 8115. Appellant did not establish that a modification of the wage-earning capacity was warranted as of June 30, 2006, nor did she establish a period of employment-related disability from June 30 to July 17, 2006.

[9] *Id.*

[10] *See Fereidoon Kharabi*, 52 ECAB 291 (2001).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 22, 2007, December 6 and June 21, 2006 are affirmed.

Issued: July 22, 2008
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