

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

L.S., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Salisbury, NC, Employer**

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**Docket No. 08-1015
Issued: October 15, 2008**

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 February 20, 2008 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated December 19, 2007 determining her wage-earning capacity. Pursuant to 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 the Office properly issued a retroactive determination that appellant's modified position as a nurse effective August 10, 2007 fairly and reasonably represented her wage-earning capacity.

FACTUAL HISTORY

On November 20, 2006 appellant, then a 62-year-old nurse, sustained injury to her right knee when her chair moved while she was attempting to sit. She stated that she twisted right to stop the chair and her right knee popped. The Office accepted appellant's claim for tear of the

medial meniscus of the right knee on December 14, 2006. On December 27, 2006 she underwent an arthroscopy with joint lavage, partial medial meniscectomy and chondroplasty of the medial femoral articular lesion.

Appellant's attending physician, Dr. Robert G. Steele, a Board-certified orthopedic surgeon, released her to return to light duty on February 5, 2007. Her restrictions included limited walking within one building. Dr. Steele recommended that appellant obtain a scooter to enable her to move to different buildings. On February 27, 2007 he stated that appellant could not remain on her feet for long periods of time, that she could not stoop and bend or lift. Dr. Steele recommended a sedentary job.

On July 26, 2007 Dr. Steele restricted appellant to working four days a week due to the condition of her right knee. Appellant requested wage-loss compensation beginning August 10, 2007. The Office paid compensation.

Dr. Steele completed a work restriction evaluation on October 19, 2007 and stated that appellant could perform her regular job with the use of a scooter. He indicated that appellant should not lift more than 10 pounds and should not squat, kneel or climb. In a note dated October 29, 2007, Dr. Steele stated that appellant could work 40 hours a week. On November 8, 2007 he stated that appellant could work only 24 hours a week in 8-hour shifts. Dr. Steele stated that she should avoid repetitive up and down at work and that the additional restrictions were permanent until she underwent a knee replacement. He completed a second work restriction evaluation on November 12, 2007 and stated that appellant could work 24 hours per week with the use of her scooter to replace walking activities. Appellant filed claims for compensation requesting additional wage-loss compensation beginning November 12, 2007.

The employing establishment provided appellant's pay rate information noting on November 20, 2006 she earned \$71,374.00 per year or \$34.31 per hour. On August 10, 2007 appellant earned \$74,433.00 per year or \$35.79 per hour.

By decision dated December 19, 2007, the Office reduced appellant's compensation benefits based on her actual earnings effective August 10, 2007. It found that appellant was entitled to wage-loss compensation in the amount of \$689.49 every four weeks.¹

LEGAL PRECEDENT

Section 8115(a) of the Federal Employees' Compensation Act² provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by actual earnings if actual earnings fairly and reasonably represent the wage-earning capacity. Generally wage actually earned are the best measure of a wage-earning capacity and,

¹ Following the Office's December 19, 2007 decision, appellant submitted additional new evidence. As the Office did not consider this evidence in reaching a final decision, the Board may not review the evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

² 5 U.S.C. §§ 8101-8193, § 8115(a).

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.³

The Office's procedure manual states that, when an employee cannot return to the date-of-injury job because of disability due to work-related injury or disease, but does return to alternative employment, the claims examiner must determine whether the earnings in the alternative employment fairly and reasonably represent the employee's wage-earning capacity.⁴ The 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 ... 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."⁵

In addition, the Office's procedure manual provides that the Office can make a retroactive wage-earning capacity determination if appellant worked in the position for at least 60 days, the position fairly and reasonable represented his wage-earning capacity and "the work stoppage did not occur because of any change in his injury-related condition affecting the ability to work."⁶

ANALYSIS

In reaching its loss of wage-earning capacity determination on December 19, 2007, the Office found that appellant had received actual earnings in her modified nurse position working 32 hours a week for more than 60 days beginning August 10, 2007. Prior to this decision, appellant had submitted medical evidence from Dr. Steele, a Board-certified orthopedic surgeon, beginning November 8, 2007 stating that she could work only 24 hours a week due to her injury-related condition. Appellant filed claims for compensation requesting additional wage-loss compensation due to her reduced work schedule beginning November 12, 2007.

There are situations when a retroactive wage-earning capacity determination may be appropriate. As noted above, the Office's procedure manual provides that a retroactive

³ *Selden H. Swartz*, 55 ECAB 272, 278(2004).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (July 1997).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7a (July 1997).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7.e (July 1997).

determination may be made where the claimant worked in the position for at least 60 days, the employment fairly and reasonably represented the wage-earning capacity and the work stoppage did not occur because of any change in the claimant's injury-related condition affecting her ability to work.⁷

In this case, appellant filed a claim for compensation alleging that her work-related condition resulted in a change in her ability to work such that she was only able to work 24 hours a week rather than 32 hours a week. The Office issued its December 19, 2007 wage-earning capacity determination after it received evidence that appellant's ability to work 32 hours a week had changed and after she had filed claims for compensation regarding her reduced work schedule. As the Board indicated in *William M. Bailey*, it is inappropriate to issue a retroactive wage-earning capacity determination when there is a pending claim for compensation.⁸ The Board has found that the claims examiner should request information from the claimant regarding the change in her condition and develop the record appropriately when the record supports a change in the injury-related condition occurring prior to the issuance of the retroactive wage-earning capacity determination.⁹ There is no evidence that this transpired in this case. The Office should have adjudicated the claim for compensation as of November 12, 2007 based on the relevant medical evidence, rather than issuing a retroactive wage-earning capacity determination. Accordingly, the Board finds that the Office did not properly determine appellant's wage-earning capacity based on actual earnings effective August 10, 2007.

CONCLUSION

The Board finds that the Office erroneously issued a retroactive wage-earning capacity decision after appellant submitted evidence supporting a change in her work-related condition and after she filed a claim for compensation.

⁷ *Juan A. DeJesus*, 54 ECAB 712, 722-23 (2003).

⁸ *William M. Bailey*, 51 ECAB 197 (1999) (appellant had filed a claim for recurrence of disability prior to the wage-earning capacity determination); *see also M.P.*, Docket No 06-1126 (issued September 27, 2006) (the Board found that a retroactive wage-earning capacity determination was inappropriate when the claimant had submitted medical evidence that his injury-related condition had progressed such that his work hours were restricted.).

⁹ *M.P.*, *supra* note 8.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated December 19, 2007 is reversed and the case remanded for further action consistent with this decision.

Issued: October 15, 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