

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

J.L., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Colorado Springs, CO, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 10-1328
Issued: April 11, 2011**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 14, 2010 appellant filed a timely appeal from merit decisions of the Office of Workers' Compensation Programs dated November 19, 2009 and March 16, 2010. Pursuant to the Federal Employees' Compensation Act¹ 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 appellant met her burden of proof to establish that a June 30, 1999 wage-earning capacity decision should be modified. On appeal, she generally asserts that the Office decisions were in error and that her work was improperly withdrawn under the employing establishment's National Reassessment Policy.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On December 22, 1995 appellant, then a 43-year-old letter carrier who is hearing-impaired, filed an occupational disease claim alleging that work duties caused neck and shoulder problems. She stopped work that day and returned to four hours of modified duty daily. The claim was accepted for right trapezius strain and herniated disc at C5-6 and on December 10, 1996 appellant underwent microdiscectomy at C5-6. Appellant returned to modified duty for four hours a day on February 18, 1997 and on February 26, 1998 had a second cervical procedure. On December 24, 1998 she accepted a December 21, 1998 modified carrier assignment, for four hours daily at the Templeton Station. The description stated:

“In this job you will be doing review mail. You will be working at your own pace and you will be able to sit or stand according to your needs. In addition, you will do no repetitive gripping over two minutes. This job can and will be modified as necessary to accommodate any restrictions which are prescribed by your recognized treating physician.”

The physical requirements of the position included no lifting over five pounds. Appellant returned to this position on December 28, 1998 and continued to receive wage-loss compensation for four hours a day.

On May 3, 1999 the employing establishment offered appellant a new assignment at the Briargate Station, with duties of carrier data entry on the computer, assisting with preparation of the box and case labels for the new station and researching CFS review mail for the carriers.

The physical restrictions remained the same. Appellant’s physician, Dr. Katharine Leppard, a Board-certified physiatrist, approved the position and appellant accepted it on May 6, 1999.

By decision dated June 30, 1999, the Office noted that appellant had been reemployed as a modified carrier, effective on or before March 28, 1999. It found that her actual part-time earnings represented her wage-earning capacity and reduced her compensation accordingly. On July 13, 1999 appellant was granted a schedule award for a 15 percent permanent impairment of the right upper extremity. She sustained a traumatic injury on August 26, 1999 and returned to her previous part-time position on October 4, 1999.²

On April 26, 2000 appellant was offered a modified position at the main employing establishment, for four hours daily. On May 20, 2000 she became a participant in a pilot program in which injured employees were paid administrative leave in lieu of wage-loss compensation. The Office noted that, if appellant elected to return to the compensation rolls, the June 30, 1999 decision would be reinstated. The pilot program ended on September 3, 2004 and she returned to a modified carrier position for four hours a day. Appellant was returned to the periodic compensation rolls, based on the June 30, 1999 wage-earning capacity decision.

² Appellant also filed an additional claim on March 21, 2005, asserting that she injured her right arm and finger. This claim has not been accepted.

Appellant accepted modified positions on February 24, 2005 and April 29, 2009 and continued to receive compensation based on her loss of wage-earning capacity. On September 2, 2009 the employing establishment notified her that, following guidelines set forth by the National Reassessment Process, it did not have limited duty within her medical restrictions. On September 9, 2009 appellant filed a recurrence claim, stating that she sustained a recurrence of disability on September 2, 2009 when her limited duty was withdrawn.

In letters dated September 29, 2009, the Office informed appellant of the requirements for modifying her formal loss of wage-earning capacity and asked that the employing establishment provide a position description. On October 20, 2009 appellant advised that her modified work was always “made work.” She submitted reports from Dr. Leppard dated September 1, 2000 to October 13, 2009.

By decision dated November 19, 2009, the Office found that appellant had submitted insufficient evidence to modify the June 30, 1999 wage-earning capacity decision and denied her claim for full compensation beginning September 2, 2009.³ On December 15, 2009 appellant requested reconsideration, asserting that from January 2000 to September 2, 2009 she had worked as a growth coordinator assistant and argued that the wage-earning capacity decision was in error because her modified positions had been “make work.” She attached a temporary assignment accepted on February 8, 1999. Dr. Leppard continued to submit reports, advising that appellant’s restrictions remained the same and were permanent.

In a March 16, 2010 merit decision, the Office denied modification of the November 19, 2009 decision.

LEGAL PRECEDENT

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant’s ability to earn wages. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.⁴ Office procedures provide that the Office can make a retroactive wage-earning capacity determination if the claimant worked in the position for at least 60 days, the position fairly and reasonably represented his or her wage-earning capacity and the work stoppage did not occur because of any change in his injury-related condition affecting the ability to work.⁵

Office procedures further provide that, “[i]f a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss. In this instance the [claims examiner] will need

³ Appellant continued to receive compensation based on the June 30, 1999 wage-earning capacity decision.

⁴ *Katherine T. Kreger*, 55 ECAB 633 (2004).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (July 1997); *Selden H. Swartz*, 55 ECAB 272 (2004).

to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity.”⁶

Chapter 2.814.11 of the procedure manual contains provisions regarding the modification of a formal loss of wage-earning capacity. The relevant part provides that a formal loss of wage-earning capacity will be modified when: (1) the original rating was in error; (2) the claimant’s medical condition has changed; or (3) the claimant has been vocationally rehabilitated. Office procedures further provide that the party seeking modification of a formal loss of wage-earning capacity decision has the burden to prove that one of these criteria has been met. If the Office is seeking modification, it must establish that the original rating was in error, that the injury-related condition has improved or that the claimant has been vocationally rehabilitated.⁷

ANALYSIS

The Office accepted that appellant sustained a right trapezius strain and herniated disc at C5-6 and she underwent surgical procedures on her neck on December 10, 1996 and February 26, 1998. Following the 1998 surgery, appellant returned to a modified carrier position for four hours daily on December 28, 1998 and on May 6, 1999 accepted a modified position, with different duties, at a new station. By decision dated June 30, 1999, the Office found that her actual part-time earnings, effective on or before March 28, 1999, represented her wage-earning capacity and reduced her compensation accordingly. For the period May 20, 2000 to September 3, 2004, appellant participated in a pilot program and was paid administrative leave in lieu of wage-loss compensation. At the termination of the program, she returned to the periodic compensation rolls, based on the June 30, 1999 wage-earning capacity decision.

The Board finds that the Office improperly reduced appellant’s compensation on June 30, 1999 based on her actual earnings in a modified carrier position as the position she performed from December 28, 1998 to May 6, 1999, the basis for the June 30, 1999 decision, was a makeshift position not available in the open labor market.

The Board delineated factors of makeshift work in the case *A.J.*, where the employee had actual earnings as a limited-duty clerk.⁸ The Board reversed the Office’s wage-earning capacity determination, finding that the clerk position was makeshift work specifically tailored to the claimant’s needs. The Board noted that there was no detailed job description or set schedule and the employee’s significant medical limitations precluded many clerical duties.⁹

In the case at hand, there was no formal job description for the modified clerk position and the position was described as doing “review mail” at appellant’s own pace. The job offer further stated that the position “can and will” be modified as necessary to accommodate her restrictions. The Board finds that the actual earnings on which the Office based its June 30, 1999

⁶ *Id.* at Chapter 2.814.9(a) (December 1995).

⁷ *Id.* at Chapter 2.814.11 (June 1996).

⁸ *A.J.*, Docket No. 10-619 (issued June 29, 2010).

⁹ *Id.*

wage-earning capacity determination are unreliable as to appellant's ability to earn wages in the open labor market under normal employment conditions. While wages earned may be the best measure of an injured workers' capacity for employment, such wages may not be based on sheltered employment.¹⁰

Thus, under the facts of this case, the modified assignment upon which the June 30, 1999 wage-earning capacity determination was made was makeshift in nature. On its face, the job offer stated that it was created to accommodate appellant's restrictions. The assigned duty of reviewing mail does not constitute a bona fide job that would be available to her in the community at large. Therefore, the position does not fairly and reasonable represent appellant's wage-earning capacity and the June 30, 1999 determination was erroneous. Accordingly, the Office decisions dated November 19, 2009 and March 16, 2010 will be reversed.

CONCLUSION

The Board finds that the June 30, 1999 wage-earning capacity determination was erroneous, as the modified carrier position on which it was based was makeshift in nature. Thus, the Office improperly denied modification by its November 19, 2009 and March 16, 2010 decisions.

¹⁰ See *Connie L. Potratz-Watson*, 56 ECAB 316 (2005).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs decisions dated March 16, 2010 and November 19, 2009 are reversed.

Issued: April 11, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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