United States Department of Labor
Employees' Compensation Appeals Board

P.P., Appellant	)	
and	)	**Docket No. 10-1851**
	)	**Issued: June 14, 2011**
U.S. POSTAL SERVICE, MADISON MAIN POST OFFICE, Madison, WI, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 7, 2010 appellant, through her attorney, filed a timely appeal of the June 8, 2010 merit decision of the Office of Workers' Compensation Programs which denied modification of a July 31, 2002 loss of wage-earning capacity determination. Pursuant to the Federal Employees' Compensation Act[1] 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 established a modification of the Office's July 31, 2002 wage-earning capacity determination.

On appeal, counsel contends that the Office's decision is contrary to fact and law.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

The Office accepted that on June 17, 1999 appellant, then a 38-year-old mail processor, sustained a lumbar strain and left lateral epicondylitis while "tying" out a machine at work. Appellant's regular hours prior to her employment injury were 10:30 p.m. to 7:00 a.m. from Tuesday through Saturday.

Appellant stopped work on the date of injury and returned to part-time work on February 26, 2001 from 8:30 a.m. to 1:00 p.m., with Saturdays and Sundays off as a modified distribution clerk based on the restrictions set forth by Dr. Lynda A. Siewert, an attending Board-certified family practitioner.[2] Duties included hand stamping parcels, letters and flats and repairing damaged mail. Appellant was allowed to change his position every 30 minutes of sitting and standing.

In a decision dated July 31, 2002, the Office reduced appellant's compensation benefits, based on its finding that her actual wages in her limited-duty position fairly and reasonably represented her wage-earning capacity as she had demonstrated her ability to perform the duties of that position for more than two months.

On February 24, 2009 the employing establishment offered appellant a modified mail processor position from 2:00 a.m. to 6:30 a.m. on Tuesday through Saturday. Appellant rejected the job offer on the same date. Also, on February 24, 2009 the employing establishment requested that the Office make a suitability determination regarding the offered job.

By letter dated June 4, 2009, the Office advised appellant and the employing establishment of the grounds needed to establish modification of the July 31, 2002 wage-earning capacity decision. It further advised that, if appellant believed that her employment-related conditions had worsened, she should submit a notice of recurrence of disability and a rationalized medical report from her attending physician in support of her claim.

In a July 13, 2009 letter, the employing establishment terminated appellant's employment effective July 14, 2009 due to declining mail volume and her failure to submit a light-duty work request form. It stated that no productive light-duty work was available within her restrictions which limited her to day shift work.

Appellant filed claims for wage-loss compensation for the period July 14, 2009 through January 31, 2010.

In an August 14, 2009 medical report, Dr. Porter noted that appellant had been able to work four and one-half hours per day from 7:00 a.m. to 3:00 p.m. with permanent restrictions following her June 17, 1999 employment injuries. He advised that excessive lifting at work was the direct cause of her fibromyalgia. Dr. Porter did not anticipate any change in her condition.

[2] The employing establishment's job offer for the modified distribution clerk was dated May 18, 2001, but stated that the offered position was effective February 26, 2001.

In an undated prescription, Dr. Siewart ordered a functional capacity evaluation (FCE). In an October 6, 2009 treatment note, she listed findings on physical examination and diagnosed ongoing low back and neck pain and left lateral epicondylitis. Dr. Siewart advised that it was more likely than not that appellant had fibromyalgia due to the diagnosed conditions. She related that appellant did not believe it was reasonable or possible for her to work in the offered position since her symptomatology disrupted her multiple daily activities.

In a January 6, 2010 decision, the Office denied appellant's recurrence claim, finding that the medical evidence failed to establish that her disability as of July 14, 2009 was causally related to her June 17, 1999 employment injuries.

On January 11, 2010 appellant, through her attorney, requested a telephone hearing. In a January 20, 2010 letter, appellant stated that she was unable to perform the duties of her former modified distribution clerk position and February 24, 2009 offered modified mail processor position based on the results of an FCE performed on November 23 and 24, 2009.

In an April 5, 2010 report, Dr. Siewart noted appellant's ongoing problems of generalized osteoarthritis in her bilateral knees and thumbs, low back and left elbow following her June 17, 1999 employment injuries. She diagnosed left lateral epicondylitis, fibromyalgia and obstructive sleep apnea. Dr. Siewart agreed with Dr. Porter's finding that appellant was permanently disabled due to her generalized osteoarthritis and fibromyalgia.

During the April 8, 2010 telephone hearing, appellant testified that she was advised by the employing establishment on July 13, 2009 that no more work was available. At the time of her termination, she had been scanning more than 20 trucks a day for the past two years in addition to her hand stamp duties. The only available work was from 2:00 a.m. to 6:30 a.m. and involved different duties from the duties of the February 24, 2009 offered modified position. Appellant stated that her former position was assigned to another employee. She rejected the February 24, 2009 job offer based on her physicians' opinion that she could not perform the required duties. Appellant contended that she did not stop work due to the employing establishment's withdrawal of her employment on July 13, 2009, but rather due to the worsening of her employment-related conditions as demonstrated by the FCE results. Appellant's attorney contended that appellant's former limited-duty position was a makeshift position that could not be used as a basis for a wage-earning capacity determination.

In a June 8, 2010 decision, an Office hearing representative affirmed the January 6, 2010 decision. The hearing representative found appellant did not establish that modification of the July 31, 2002 wage-earning capacity determination was warranted as the newly submitted medical evidence failed to establish a material worsening of her employment-related conditions.

LEGAL PRECEDENT

Section 8115(a) of the Act provides that 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.[3] The Board has stated, generally, wages actually earned are the best

[3] 5 U.S.C. § 8115(a).

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.[4] However, wage-earning capacity may not be based on an odd-lot or make-shift position designed for an employee's particular needs or a position that is seasonal in an area where year-round employment is available.[5] Office procedures direct that a wage-earning capacity determination based on actual wages be made following 60 days of employment.[6]

The Office's procedure manual provides guidelines for determining wage-earning capacity based on actual earnings:

> "a. *Factors considered*. To determine whether the claimant's work fairly and reasonably represents his or her WEC [wage-earning capacity], the CE [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 date of injury. Unless they are, the CE may not consider the work suitable.
>
> "For instance, reemployment of a temporary or casual worker in another temporary or casual (USPS) position is proper, as long as it will last at least 90 days and reemployment of a term or transitional (USPS) 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.
> >
> > (3) *The job is temporary* where the claimant's previous job was permanent."[7]

Board precedent and the Office's procedures provide that once a loss of wage-earning capacity is determined, a modification of such a determination is not warranted unless there is a material change in the nature and extent of the employment-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was in fact

---

[4] *Floyd A. Gervais*, 40 ECAB 1045, 1048 (1989); *Clyde Price*, 32 ECAB 1932, 1934 (1981). Disability is defined in the implementing federal regulations as the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. 20 C.F.R. § 10.5(f). Once it is determined that the actual wages of a given position represent a employee's wage-earning capacity, the Office applies the principles enunciated in *Albert C. Shadrick*, 5 ECAB 376 (1953), in order to calculate the adjustment in the employee's compensation.

[5] *See James D. Champlain*, 44 ECAB 438, 440-41 (1993); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7a(1) (July 1997).

[6] Federal (FECA) Procedure Manual, *supra* note 5 at Chapter 2.814.7c (December 1993).

[7] Federal (FECA) Procedure Manual, *supra* note 5 at Chapter 2.814.7a (July 1997).

erroneous.[8] The burden of proof is on the party attempting to show the award should be modified.[9]

ANALYSIS

The Office issued a wage-earning capacity determination on July 31, 2002 based on appellant's actual earnings as a modified distribution clerk. Appellant filed claims for compensation commencing July 14, 2009. In a January 6, 2010 decision, the Office denied appellant's recurrence claim, finding that the medical evidence failed to establish that her disability as of July 14, 2009 was causally related to her June 17, 1999 employment injuries. However, as the July 31, 2002 wage-earning capacity determination was in place on July 14, 2009, the issue is whether the Office should modify the existing wage-earning capacity determination.[10]

Appellant argued that the original wage-earning capacity determination was erroneous, in that the limited-duty position did not reasonably reflect her wage-earning capacity. The Board finds that the original wage-earning capacity determination was erroneous.

The record indicates that appellant's date-of-injury job as a mail processor was a full-time job for at least 40 hours per week. However, the actual earnings in this case were based on a part-time position, at four and one-half hours per week, as a modified distribution clerk. As the Office procedure manual indicates, in situations where an employee is working full time when injured and is reemployed in a part-time position, a formal wage-earning capacity determination is generally not appropriate. The Board has held that the Office must address the issue and explain why a part-time position is suitable for a wage-earning capacity determination based on the specific circumstances of the case.[11] The Office did not address this issue in either its July 31, 2002 or June 8, 2010 decisions. The decisions make a finding that the modified distribution clerk position represented appellant's wage-earning capacity, without clearly explaining why the actual earnings were based on a part-time position where appellant was not a part-time employee when injured.[12] The Board finds that the position does not fairly and reasonably represent her wage-earning capacity and, thus, the original wage-earning capacity determination was erroneous. Consequently, appellant has established that the July 31, 2002 wage-earning capacity determination warrants modification.

---

[8] *George W. Coleman*, 38 ECAB 782, 788 (1987); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984). *See also* Federal (FECA) Procedure Manual, *supra* note 5 at Chapter 2.814.11 (October 2009).

[9] *Jack E. Rohrabaugh*, 38 ECAB 186, 190 (1986); *see also* Federal (FECA) Procedure Manual, *supra* note 5 at Chapter 2.814.11 (October 2009).

[10] *See K.R.*, Docket No. 09-415 (issued February 24, 2010).

[11] *Connie L. Potratz-Watson*, 56 ECAB 316 (2005).

[12] In the July 31, 2002 decision, the Office briefly noted that appellant was employed in a full-time capacity on the date of injury and the medical evidence showed appellant was only capable of part-time employment, but it did not provide any further explanation of why it was appropriate to base appellant's wage-earning capacity on a part-time position.

CONCLUSION

The Board finds that the Office improperly denied modification of its July 31, 2002 wage-earning capacity determination as the evidence establishes the wage-earning capacity was issued in error.

ORDER

IT IS HEREBY ORDERED THAT the June 8, 2010 decision of the Office of Workers' Compensation Programs is reversed.

Issued: June 14, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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