United States Department of Labor
Employees' Compensation Appeals Board

B.M., Appellant	)	
and	)	**Docket No. 09-877**
	)	**Issued: October 26, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Jacksonville, FL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 13, 2009 appellant filed a timely appeal from the Office of Workers' Compensation Programs' December 2, 2008 merit decision concerning his 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 determined that appellant's actual earnings as a valet parking supervisor fairly and reasonably reflected his wage-earning capacity effective October 1, 2008.

FACTUAL HISTORY

The Office accepted that on November 15, 2004 appellant, then a 43-year-old temporary rural mail carrier, sustained several injuries to his left wrist, forearm, elbow and shoulder due to a fall at work, including a triceps tendon tear, rotator cuff tear, wrist cartilage disorder, contusions and open wounds. After appellant's injury, he began performing light-duty work at the employing establishment. On April 15, 2005 he underwent left triceps tendon repair surgery

which was authorized by the Office. Appellant received appropriate compensation from the Office for periods of disability.[1]

In late 2005, the Office referred appellant to nurse management services to help facilitate his return to work. On September 20, 2005 appellant underwent left rotator cuff repair surgery and, on March 1, 2006, he underwent arthroscopic surgery on his left wrist. Both procedures were authorized by the Office.

In mid 2006, Dr. W.R. McArthur, an attending Board-certified orthopedic surgeon, found that appellant could perform work on a full-time basis with restrictions on lifting, reaching and climbing. In October 2006, appellant began to participate in an Office-sponsored vocational rehabilitation program. Through this program, he took classes in accounting over the course of almost two years. Appellant received two certifications in accounting through these efforts but only completed about a half of the credits for the accounting program.

On September 8, 2008 Dr. McArthur indicated that appellant could perform full-time work with restrictions on lifting and performing overhead work with his left arm alone. On October 3, 2008 appellant's rehabilitation counselor advised the Office that he had started work on October 1, 2008 at the Bay Medical Center as a valet parking supervisor. The job was full-time at 40 hours per week and paid a salary of $400.00 per week.[2]

In a December 2, 2008 decision, the Office reduced appellant's compensation to zero effective October 1, 2008, based on its determination that his actual earnings as a valet parking supervisor represented his wage-earning capacity effective that date. It found that since October 1, 2008, appellant had worked as a valet parking supervisor at the Bay Medical Center with wages of $400.00 per week. His actual earnings in the position fairly and reasonably represented his wage-earning capacity. The Office noted: "Since you have demonstrated the ability to perform the duties of this job for two months or more, this position is considered suitable to your partially disabled condition." It found that the position was permanent and did not constitute seasonal, temporary or made-up work. The Office calculated that appellant's actual earnings met or exceeded the current wages of the job he held when injured. Therefore, according to the provisions of 5 U.S.C. § 8106 and 5 U.S.C. § 8115, his entitlement to wage-loss compensation ended on October 1, 2008, the date he was reemployed with no loss in earning capacity.[3]

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[4] The

[1] Appellant last worked for the employing establishment on December 11, 2004.

[2] The vocational counselor later indicated that appellant's accounting training would be useful for performing this position as it involved managing employees and their schedules.

[3] The Office noted that the decision did not affect appellant's medical benefits which were still authorized if needed to treat his work-related condition.

[4] *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[5]

Section 8115(a) of the Federal Employees' Compensation Act provides that the "wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity."[6] The Board has stated, "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."[7]

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.[8] Wage-earning capacity may only be based on a temporary or part-time position if the position held by the employee at the time of injury was a temporary or part-time position.[9] Office procedures direct that a wage-earning capacity determination based on actual wages be made following 60 days of employment.[10]

ANALYSIS

The Office accepted that on November 15, 2004, appellant sustained several injuries to his left wrist, forearm, elbow and shoulder, including a rotator cuff tear, triceps tendon tear, wrist cartilage disorder, contusions and open wounds. Appellant received appropriate compensation from the Office for periods of disability. In a December 2, 2008 decision, the Office reduced appellant's compensation effective October 1, 2008, based on its determination that his actual earnings as a valet parking supervisor fairly and reasonably represented his wage-earning capacity effective that date.

Appellant's attending physician determined that he could perform work with restrictions and appellant participated in vocational rehabilitation efforts. Appellant started work on October 1, 2008 at the Bay Medical Center as a valet parking supervisor. The job was for 40

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[5] *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

[6] 5 U.S.C. § 8115(a).

[7] *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*." (Emphasis added.) 20 C.F.R. § 10.5(f). Once it is determined that the actual wages of a given position fairly and reasonably represent an 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.

[8] *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), (2) (July 1997).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment*: *Determining Wage-Earning Capacity*, Chapter 2.814.7a (3) (July 1997).

[10] *See id.* at Chapter 2.814.7c (December 1993).

hours per week and paid a salary of $400.00 per week. Appellant's vocational rehabilitation counselor indicated that the position of valet parking supervisor would allow appellant to apply accounting skills he acquired by participating in rehabilitation training. The Office properly compared appellant's actual earnings as a valet parking supervisor for more than 60 days in the position with the wages he was receiving at the time of injury. As appellant's actual earnings met or exceeded those at the time of injury, the Office properly reduced his wage-loss compensation to zero.[11] The Office properly found that his actual wages fairly and reasonably represented his wage-earning capacity. There is no evidence showing that the position of valet parking supervisor does not fairly and reasonably represent appellant's wage-earning capacity. The record does not establish that the position constituted part-time, sporadic, seasonal or temporary work. Moreover, the record does not reveal that the position is a make-shift position designed for appellant's particular needs.[12]

CONCLUSION

The Board finds the Office properly determined that appellant's actual earnings as a valet parking supervisor fairly and reasonably represents his wage-earning capacity effective October 1, 2008.

[11] *Id*.

[12] *See supra* notes 8 and 9.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' December 2, 2008 decision is affirmed.

Issued: October 26, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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