

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of SHIRLEY A. ERVIN and U.S. POSTAL SERVICE,  
POST OFFICE, Palatine, IL

*Docket No. 01-796; Submitted on the Record;  
Issued April 25, 2002*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant had no loss of wage-earning capacity; and (2) whether appellant met her burden of proof to establish entitlement to continuing compensation for the periods April 3 to 28 and May 1 to 31, 2000.

On June 24, 1997 appellant, then a 50-year-old transitional employee, filed an occupational disease claim (Form CA-2), alleging that she developed carpal tunnel syndrome in the performance of duty. On October 14, 1997 the Office accepted appellant's claim for bilateral carpal tunnel syndrome and began paying appropriate compensation benefits.<sup>1</sup>

On May 20, 1999 Dr. Michael R. Treister, an attending Board-certified orthopedic surgeon, released appellant to light duty beginning June 2, 1999, stipulating that appellant should avoid fast repetitive movements with the hands and should have a chair with arms, but did not have any specific lifting restrictions.

On December 5, 1999 appellant accepted the limited-duty job of modified manual distribution clerk offered by the employing establishment. The job offer stated that appellant was to be a casual employee and the position was not to exceed 120 days.<sup>2</sup> Appellant worked until the end of her appointment on April 3, 2000.

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<sup>1</sup> Appellant stopped work on April 15, 1997 and returned to limited duty on April 25, 1997. Appellant stopped work again on June 29, 1997 and returned to full-time limited duty on March 13, 1998. She worked until the end of the offered position on June 21, 1998. On November 20, 1998 appellant underwent right carpal tunnel release surgery, authorized by the Office. She remained off work until December 5, 1999.

<sup>2</sup> As the transitional employee category had been eliminated by the employing establishment, appellant was reemployed as a casual employee and her pay was adjusted accordingly.

In a decision dated July 17, 2000, the Office determined that appellant's wage-earning capacity was represented by her actual earnings as a casual modified distribution clerk for the employing establishment. The Office found that appellant had actual earnings of \$518.52 per week as of December 5, 1999 and a retroactive determination was made that this represented appellant's wage-earning capacity.

In a decision dated July 19, 2000, the Office denied appellant's claims for continuing compensation for the periods April 3 to 28 and May 1 to 31, 2000.

The Board finds that the Office properly determined that appellant had no loss of wage-earning capacity.

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 or her wage-earning capacity.<sup>3</sup> 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.<sup>4</sup> After the Office determines that appellant's actual earnings fairly and reasonably represent his or her wage-earning capacity, application of the principles set forth in the *Alfred C. Shadrick*<sup>5</sup> decision will result in the percentage of the employee's loss of wage-earning capacity.<sup>6</sup>

In this case, the Office performed a retroactive wage-earning capacity determination after appellant stopped working. The Office's procedure manual provides that a retroactive determination may be made where the claimant has worked in the position for at least 60 days, the employment fairly and reasonably represents wage-earning capacity and the work stoppage did not occur because of any change in the claimant's work-related condition affecting her ability to work.<sup>7</sup> The Office procedures further state that reemployment of a term or transitional employee in another term or transitional position is proper, as long as it will last at least 90 days.<sup>8</sup> The Board has concurred that the Office may perform a retroactive wage-earning capacity determination in accord with its procedures.<sup>9</sup>

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<sup>3</sup> 5 U.S.C. § 8115(a).

<sup>4</sup> *Dennis E. Maddy*, 47 ECAB 259 (1995).

<sup>5</sup> 5 ECAB 376 (1953).

<sup>6</sup> See *Hattie Drummond*, 39 ECAB 904 (1988); *Albert C. Shadrick*, *supra* note 5.

<sup>7</sup> Federal (FECA) Procedure Manual, Part 1 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(e) (May 1997).

<sup>8</sup> Federal (FECA) Procedure Manual, Part 1 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (May 1997); see *Leonard W. Larson*, 48 ECAB 507 (1997).

<sup>9</sup> See *Tamra McCauley*, 51 ECAB \_\_\_\_ (Docket No. 98-1820, issued March 17, 2000); *Elbert Hicks*, 49 ECAB 283 (1998).

In this case, the record indicates that appellant worked in a full-time light-duty position for the period December 5, 1999 to April 3, 2000, when her term expired. There is no medical evidence with respect to any disability for work commencing April 3, 2000, or an opinion that appellant's work stoppage was causally related to a change in her employment-related condition. In treatment notes dated January 13 and February 1 and 14, 2000, appellant's attending physician, Dr. Treister, documented her symptoms and complaints, indicated that he had approved the modified-duty position, noted that appellant continued to perform light duty, but otherwise did not discuss her ability to perform the duties of the position. In a report dated March 23, 2000, Dr. Daniel J. Nagle, a Board-certified orthopedic surgeon and Office second opinion physician, noted that appellant was examined on that day and that she appeared to be tolerating her light-duty activities and recommended that she continue to perform them. In a report dated May 18, 2000, Dr. Treister noted that appellant had limited range of motion and stocking anesthesia and numbness of her right hand, but further stated that these symptoms were related to appellant's diabetic neuropathy. In a report dated June 1, 2000, Dr. Treister stated that in his opinion, appellant should be working light duty as before and that he did not consider her totally disabled for work.

The record, therefore, indicates that appellant worked at the light-duty position for more than 60 days, with no probative evidence that the work stoppage was due to a change in the employment-related condition. Furthermore, while the light-duty position was for a limited term, this was appropriate as appellant was a transitional employee when she was injured.<sup>10</sup> As noted above, actual wages earned are generally the best measure of wage-earning capacity and the Board finds that the Office properly found that the actual earnings fairly and reasonably represented appellant's wage-earning capacity. The requirements for a retroactive wage-earning capacity determination have accordingly been met in this case. The employing establishment indicated that the actual wages were equal to the current date-of-injury position wages and thus the Office properly determined that appellant had no loss of wage-earning capacity.<sup>11</sup>

The Board further finds that appellant failed to meet her burden of proof to establish entitlement to additional wage-loss compensation.

Once loss of wage-earning capacity is determined, a modification of such determination is not warranted unless there is material change in the nature and extent of the injury-related condition, the employee has been retrained, or the original determination was in fact erroneous. The burden of proof is on the party seeking modification of the award.<sup>12</sup>

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<sup>10</sup> Federal (FECA) Procedure Manual, Part 1 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (May 1997); see *Leonard W. Larson, supra* note 8.

<sup>11</sup> The formula for determining the loss of wage-earning capacity based on actual earnings, developed in the *Shadrick* decision, has been codified at 20 C.F.R. § 10.403. The Office first calculates the employee's wage-earning capacity in terms of a percentage by dividing her actual earnings by the current date-of-injury pay rate. In this case, the Office properly used appellant's actual earnings of \$518.52 per week and a current pay rate for her date-of-injury job of \$518.52 per week to determine that she had no loss of wage-earning capacity. The Board finds that the Office properly determined that appellant's actual earnings fairly and reasonably represent her wage-earning capacity and the Office properly reduced appellant's wage-loss compensation to zero in accordance with the *Shadrick* formula.

<sup>12</sup> *Don J. Mazuek*, 46 ECAB 447 (1995); see also *Odessa C. Moore*, 46 ECAB 681 (1995).

To establish a causal relationship between the condition, as well as any attendant disability claimed and the employment injury, an employee must submit rationalized medical evidence, based on a complete factual and medical background, supporting such a causal relationship.<sup>13</sup> Causal relationship is a medical issue,<sup>14</sup> and the medical evidence required to establish a causal relationship is rationalized medical evidence. Rationalized medical evidence is medical evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>15</sup> The weight of the medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.<sup>16</sup>

On April 14 and 27, 2000 after the expiration of her light-duty position, appellant submitted additional claims for compensation (Forms CA-7) for the periods April 3 through 28 and May 1 through 31, 2000. Appellant did not submit any evidence to show that the Office's original determination with regard to her wage-earning capacity was erroneous. In this case, the Office based appellant's loss of wage-earning capacity on a determination that her actual earnings as a casual modified distribution clerk beginning on December 5, 1999 represented her wage-earning capacity.<sup>17</sup> As noted above, this determination was consistent with section 8115(a) of the Act, which 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."<sup>18</sup> Therefore, appellant has not shown that the Office's original determination with regard to her wage-earning capacity was erroneous.

In addition, the record establishes that appellant's employment ended not because she was unable to perform her duties, but because her term of employment expired on April 3, 2000. There is no rationalized medical opinion in the record indicating that there was a material change in the nature and extent of appellant's injury-related condition, such that she was unable to perform light-duty position eight hours a day.<sup>19</sup> The medical reports dated March 23, May 18

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<sup>13</sup> See 20 C.F.R. § 10.110(a); *Kathryn Haggerty*, 45 ECAB 383 (1994).

<sup>14</sup> *Mary J. Briggs*, 37 ECAB 578 (1986).

<sup>15</sup> *Gary L. Fowler* 45 ECAB 365 (1994) ; *Victor J. Woodhams*, 41 ECAB 345 (1989).

<sup>16</sup> *James Mack*, 43 ECAB 321 (1991).

<sup>17</sup> Disability is defined in the implementing federal regulations as "the incapacity, because of employment injury, to earn the wages the employee was receiving *at the time of injury*." (Emphasis added). 20 C.F.R. § 10.5(f). The Office applied the principles enunciated in *Albert C. Shadrick*, *supra* note 5, in order to calculate the adjustment in appellant's compensation.

<sup>18</sup> 5 U.S.C. § 8115(a).

<sup>19</sup> See *Vicky L. Hannis*, 48 ECAB 538 (1997); *George Randolph Taylor*, 6 ECAB 986, 988 (1954) (finding that a medical opinion not fortified by medical rationale is of little probative value).

and June 1, 2000 from Drs. Treister and Nagle indicate that appellant was tolerating her light duty and that she should continue to perform such light duty. While appellant has documented ongoing hand wrist and elbow symptoms, there is no indication in the record that these symptoms prevent appellant from performing limited duty. For these reasons, appellant has not met her burden of proof to establish entitlement to additional wage-loss compensation.

The July 19 and 17, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.<sup>20</sup>

Dated, Washington, DC  
April 25, 2002

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

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<sup>20</sup> The Board notes that, by letter dated July 19, 2000, the Office informed appellant that a preliminary determination had been made that appellant was at fault in the creation of an overpayment in compensation in the amount of \$1,266.00. Appellant requested an oral hearing before the Office and in a decision dated January 30, 2001, the Office denied appellant's request on the grounds that it was untimely. In addition, in a letter dated October 12, 2000, the Office preliminarily denied appellant's additional claims for compensation through September 13, 2000. The Board's jurisdiction to consider and decide appeals from decisions of the Office extends only to final decisions, not preliminary findings and only to those final decisions issued within one year prior to the filing of the appeal. 20 C.F.R. §§ 501.2(c), 501.3(d)(2). As appellant filed her appeal with the Board on September 18, 2000, the only decisions properly before the Board are the Office's July 19, 2000 decision and July 17, 2000, wage-earning capacity decision.