United States Department of Labor
Employees' Compensation Appeals Board

EDWARD R. STRAPKOVIC, Appellant	)	
and	)	**Docket No. 05-1149**
	)	**Issued: September 2, 2005**
U.S. POSTAL SERVICE, POST OFFICE, San Antonio, TX, Employer	)	

Appearances:
Edward R. Strapkovic, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 26, 2005 appellant filed a timely appeal of the December 8, 2004 merit decision of the Office of Workers' Compensation Programs, which determined his wage-earning capacity. Appellant also timely appealed the Office's February 11, 2005 decision denying his request for review of the written record. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.[1]

ISSUES

The issues are: (1) whether appellant's actual earnings as a modified mail processor effective May 23, 2003 fairly and reasonably represent his wage-earning capacity; and (2) whether the Office properly denied appellant's request for review of the written record.

[1] The record on appeal includes evidence received after the Office issued the February 11, 2005 decision. The Board may not consider evidence that was not before the Office at the time it rendered its final decision. 20 C.F.R. § 501.2.

FACTUAL HISTORY

On September 11, 2002 appellant, then a 50-year-old flat sorting machine operator, sustained a traumatic injury at work when he caught his foot on some screws sticking up from the floor and lost his balance and fell. He underwent surgery that same day to repair a right comminuted distal radius fracture.[2] On October 16, 2002 the Office accepted appellant's claim for right wrist fracture. Appellant received appropriate wage-loss compensation and the Office placed him on the periodic compensation rolls effective December 1, 2002.

On May 22, 2003 appellant accepted a full-time position as a modified mail processor, with a reported annual base salary of $43,863.00 (Level 6, Step 0). His new duties included working the USAA table and the guard shack-ID badge table and performing mail inventory. The position allowed appellant to stand or sit as his pain dictated. He was expected to lift items weighing between one to five ounces, perform simple grasping and fine manipulation, and write intermittently. The job description further indicated that appellant could work at his own pace according to his pain tolerance, consistent with the April 16, 2003 permanent limitations imposed by Dr. Earle.[3] Appellant's scheduled tour was 11:30 p.m. until 8:00 a.m. and he returned to work on the evening of May 23, 2003.

In a decision dated May 25, 2004, the Office found that appellant had been reemployed as a modified mail processor with actual earnings of $972.13. The Office further found that his actual earnings fairly and reasonably represented his wage-earning capacity. Because appellant's actual earnings as a modified mail processor met or exceeded the current wages ($959.18) of his date-of-injury job, the Office reduced his wage benefits to zero.

On November 9, 2004 an Office hearing representative set aside the May 25, 2004 decision. The hearing representative noted that the Office incorrectly identified the date of reemployment as April 27, 2003. The hearing representative also found that the Office had improperly calculated appellant's date-of-injury pay rate as $912.01. He noted that the Office relied on a weekly base pay of $821.63 instead of $827.63.[4] The hearing representative instructed the Office to utilize a date-of-injury pay rate of $918.01, which included a weekly base pay of $827.63 plus $41.08 of Sunday premium pay and $49.30 for night differential.

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[2] On September 11, 2002 Dr. Michael A. Earle, a Board-certified orthopedic surgeon, performed a decompression fasciotomy, flexor aspect of the right forearm, median nerve decompression at the wrist with ulnar nerve decompression and an open reduction internal fixation, distal radius with allograft.

[3] Dr. Earle indicated that appellant was unable to resume his regular duties, but could perform limited duty as of April 16, 2003. He advised that appellant had permanent restrictions and should be permitted to sit and stand as his pain dictated. Dr. Earle also indicated that appellant required a chair with arm rests and he should not perform any overhead activity. He imposed a right upper extremity lifting restriction of no more than five pounds intermittently or one to two pounds frequently. Dr. Earle also noted that appellant should be allowed to wear a wrist splint on his right wrist as needed.

[4] Appellant submitted a September 27, 2002 pay stub that identified his annual base pay as $43,037.00. However, his September 13, 2002 pay stub indicated an annual base pay of $42,725.00. The hearing representative accepted appellant's argument that his date-of-injury pay rate should be calculated on a weekly base pay of $827.63.

On December 8, 2004 the Office issued a new decision, superceding the May 25, 2004 decision. The Office identified the effective date of reemployment as May 24, 2003 and relied on a date-of-injury pay rate of $918.01, as instructed by the hearing representative. However, the result remained the same. Appellant's actual earnings as a modified mail processor ($972.13) exceeded the current wages of his date-of-injury position ($959.18) and, therefore, he had zero percent loss of wage-earning capacity. The Office further advised that, while wage-loss compensation had ceased, appellant remained eligible for medical benefits.

On February 9, 2005 the Office received appellant's request for a review of the written record. While the request was dated January 5, 2005, the postmark on the envelope was January 10, 2005. The Branch of Hearings and Review denied appellant's request by decision dated February 11, 2005.

LEGAL PRECEDENT -- ISSUE 1

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 her wage-earning capacity.[5] 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.[6] The actual earnings in the position are compared with the current wages of the date-of-injury position to determine loss of wage-earning capacity.[7]

ANALYSIS -- ISSUE 1

Appellant's limited-duty assignment as a modified mail processor, which he began on the evening of May 23, 2003, was consistent with the April 16, 2003 restrictions identified by his treating physician, Dr. Earle. Appellant's performance of this position in excess of 60 days is persuasive evidence that the position represents his wage-earning capacity.[8] Moreover, there is no evidence that the position was seasonal, temporary or make-shift work designed for appellant's particular needs.[9] Additionally, appellant's current weekly earnings of $972.13 as a

[5] 5 U.S.C. § 8115(a); *see Loni J. Cleveland*, 52 ECAB 171, 176-77 (2000).

[6] *Loni J. Cleveland, supra* note 5.

[7] 20 C.F.R. § 10.403(c)(1999); *Albert C. Shadrick*, 5 ECAB 376 (1953).

[8] Office procedure provides that a determination regarding whether actual earnings fairly and reasonably represent wage-earning capacity should be made after an employee has been working in a given position for more than 60 days. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1993).

[9] *Elbert Hicks*, 49 ECAB 283 (1998).

modified mail processor exceeded the current weekly wages of his date-of-injury position, which the Office identified as $959.18.[10] Therefore, he had no loss of wage-earning capacity under the *Shadrick* formula.[11]

LEGAL PRECEDENT -- ISSUE 2

Any claimant dissatisfied with a decision of the Office shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record. A request for either an oral hearing or a review of the written record must be submitted, in writing, within 30 days of the date of the decision for which a hearing is sought.[12] If the request is not made within 30 days, a claimant is not entitled to a hearing or a review of the written record as a matter of right. However, the Office has discretion to grant or deny a request that was made after this 30-day period.[13] In such a case, the Office will determine whether a discretionary hearing should be granted and, if not, will so advise the claimant with reasons.[14]

ANALYSIS -- ISSUE 2

Although appellant's request was dated January 5, 2005, he did not mail it until January 10, 2005, as evidenced by the postmarked envelope included in the record. Because appellant's request was postmarked more than 30 days after the Office's December 8, 2004 decision, he is not entitled to review of the written record as a matter of right.[15] Moreover, the Office considered whether to grant a discretionary review and correctly advised appellant that

[10] At the time of his September 11, 2002 injury appellant received an annual base pay of $42,725.00 (Level 6, Step 0), which represented a weekly pay rate of $821.63. In addition to his base pay, appellant received an 8 percent night differential for 30 hours a week ($49.30) and a 25 percent Sunday premium for 8 hours each week ($41.08). Therefore, his average weekly wage at the time of injury was $912.01. He was reemployed in May 2003 at the then-current Level 6, Step 0 base pay of $43,863.00. Appellant continued to receive a 25 percent Sunday premium for 8 hours each week. He also continued to receive 30 hours of night differential pay, albeit at a higher 10 percent premium. On April 28, 2004 the employing establishment indicated that appellant's weekly pay rate in his current position, including Sunday premium pay and night differential, was $972.13. As appellant was reemployed in May 2003 at the same level and step of his date-of-injury position (Level 6, Step 0) and he continued to receive premium pay, his current wages equal or exceed the current pay of his date-of-injury position.

The Office hearing representative improperly identified appellant's date-of-injury pay rate as $918.01. The September 27, 2002 pay stub he relied on to establish a weekly base pay of $827.36 does not clearly indicate that this was the pay in effect at the time of the September 11, 2002 injury. Furthermore, the hearing representative applied night differential and Sunday premium pay figures that were calculated based on a percentage of the weekly pay of $821.63. If appellant had, in fact, earned a weekly base pay of $827.63 at the time of his injury, the premium pay figures would have to be adjusted upward as they are calculated based on a percentage of the applicable base pay.

[11] *Albert C. Shadrick, supra* note 7.

[12] 20 C.F.R. § 10.616(a) (1999).

[13] *Herbert C. Holley*, 33 ECAB 140 (1981).

[14] *Rudolph Bermann*, 26 ECAB 354 (1975).

[15] 20 C.F.R. § 10.616(a) (1999).

the issue could equally well be addressed by requesting reconsideration.[16] Accordingly, the Office properly exercised its discretion in denying appellant's request for review of the written record.

CONCLUSION

The Board finds that appellant's actual earnings as a modified mail processor fairly and reasonably represent his wage-earning capacity. Furthermore, because his actual earnings meet or exceed the current wages of his date-of-injury position, appellant has zero percent loss of wage-earning capacity. The Board further finds that the Branch of Hearings and Review properly denied appellant's request for review of the written record.[17]

ORDER

IT IS HEREBY ORDERED THAT the February 11, 2005 and December 8, 2004 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 2, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

[16] The Board has held that a denial of review on this basis is a proper exercise of the Office's discretion. *E.g., Jeff Micono*, 39 ECAB 617 (1988).

[17] In his brief, appellant alleged that he was owed additional compensation because the Office had not paid him for his loss of Sunday premium pay and night differential. The record indicates that the Office previously paid wage-loss compensation based on a pay rate ($821.63) that did include the premium pay appellant earned at the time of his September 11, 2002 injury. The Board, however, lacks jurisdiction over this issue because the December 8, 2004 and February 11, 2005 decisions currently on appeal do not address appellant's entitlement to wage-loss compensation prior to his return to work on May 23, 2004.