

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CAROLYN M. BOSLEY and U.S. POSTAL SERVICE,
POST OFFICE, Fresno, CA

*Docket No. 99-28; Submitted on the Record;
Issued April 20, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant is entitled to an increase in her compensation on the basis that she was employed in a learner's capacity at the time of her May 6, 1991 employment injury.

The Office of Workers' Compensation Programs accepted that appellant's May 6, 1991 employment injury resulted in a left trapezoid strain and a cervical spine strain. The Office began paying appellant compensation for disability beginning August 22, 1991. On September 16, 1991 the employing establishment terminated appellant's employment on the basis that she was unable to perform the duties of her position. The Office continued to pay compensation for disability until appellant obtained other employment on February 4, 1996. In paying this compensation, the Office used appellant's rate of pay at the time of her injury on May 6, 1991. By decision dated April 3, 1992, the Office found that appellant's rate of pay at the time of her injury was the proper basis of her compensation payments.

By letter dated September 17, 1994, appellant contended that the Office should have used the rate of pay she began earning on June 29, 1991, when she received a career appointment as a mail processor, because she was in a learner's capacity at the time of her May 6, 1991 employment injury. By decision dated June 6, 1995, the Office found that appellant's request for reconsideration was not timely filed and did not show clear evidence of error. In letters dated January 31 and July 16, 1997, appellant contended that the Office had not responded to her September 17, 1994 letter. By decision dated August 11, 1997, the Office found that appellant was not employed in a learner's capacity at the time of her May 6, 1991 injury, as she was not enrolled in a formal training program with a specified period for completion followed by an automatic promotion. Appellant requested a hearing, which was held before an Office hearing representative on January 24, 1998. By decision dated May 18, 1998, this Office hearing representative found that the evidence did not show that appellant was employed in a learner's capacity at the time of her May 6, 1991 employment injury "as she was not participating in a formal training program with a specific period for completion after which she would have automatically been promoted to a higher grade."

Section 8113(a) of the Federal Employees' Compensation Act¹ provides:

“If an individual -- (1) was a minor or employed in a learner's capacity at the time of injury; and (2) was not physically or mentally handicapped before the injury; the Secretary of Labor, on review under section 8128 of this title after the time the wage-earning capacity of the individual would probably have increased but for the injury, shall recompute prospectively the monetary compensation payable for disability on the basis of an assumed monthly pay corresponding to the probable wage-earning capacity.”

The Board has delineated the circumstances under which an employee will be considered to have been employed in a learner's capacity at the time of his or her injury. These include whether the employee was in a formal training program, whether the job classification described an “in-training” or learning position, whether the position held was one in which the employee could have remained indefinitely and whether any advancement would have been contingent upon ability, past experience or other qualifications.² The fact that the effects of an employment injury preclude the employee from obtaining a higher-paying job does not establish a loss of wage-earning capacity, nor does it establish that the employee was employed in a learner's capacity at the time of the injury.³

The Board finds that appellant is not entitled to an increase in her compensation on the basis that she was employed in a learner's capacity at the time of her May 6, 1991 employment injury.

The evidence does not establish that appellant was in a formal training program at the time of her May 6, 1991 employment injury. The employing establishment's August 22, 1990 letter offering appellant a casual appointment as an OCR operator stated: “The purpose of this temporary assignment is to grant you the opportunity to demonstrate the completeness of your rehabilitation and to provide you an avenue back to [p]ostal employment.” Although this letter stated that, given acceptable performance, appellant would remain a casual employee until June 28, 1991, and would be reinstated to a career appointment effective June 29, 1991, as a mail processor, this specified period for promotion does not show that appellant was in a learner's capacity. As shown by the employing establishment's August 22, 1990 letter, the purpose of appellant's casual appointment was not training, but rather an opportunity for appellant to demonstrate rehabilitation. The fact that periodic evaluations of appellant's performance were done does not demonstrate she was employed in a learner's capacity, as such periodic evaluations are commonplace in government employment. That appellant received on-the-job training in her position as an OCR operator also does not demonstrate that she was in a formal training program.

¹ 5 U.S.C. § 8113(a).

² *Deborah D. Jones*, 37 ECAB 609 (1986); *James L. Parkes*, 13 ECAB 515 (19962); *Carter C. Swinson*, 10 ECAB 281 (1958).

³ *John Olejarski*, 39 ECAB 1138 (1988).

In addition, appellant is not entitled to an increase in her compensation on the basis that she was employed in a learner's capacity at the time of her May 6, 1991 employment injury because she actually received the career appointment as a mail processor effective June 29, 1991. This is the position appellant contends the Office should have used to compute her compensation. Section 8113(a) of the Act, however, contemplates an increase in compensation when an employee's injury prevents the employee from obtaining the higher-paying position at the end of a training program. Appellant's injury did not prevent her from obtaining the position of mail processor and for this reason alone, section 8113(a) of the Act does not apply to her situation.

The decision of the Office of Workers' Compensation Programs dated May 18, 1998 is affirmed.

Dated, Washington, D.C.
April 20, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member