

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KATHY M. JONES and U.S. POSTAL SERVICE,
POST OFFICE, Merrifield, VA

*Docket No. 99-2287; Submitted on the Record;
Issued October 12, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's position as a modified mail processor fairly and reasonably represented her wage-earning capacity.

The Office accepted that appellant sustained cervical subluxation at C5-6 as a result of her federal employment and appellant received wage-loss compensation through January 1998. On January 28, 1998 the employing establishment offered appellant a temporary, limited-duty position as a mail processor. The offered position accommodated the physical limitations imposed by appellant's chiropractor, which included, among other things, that she work only four hours per day. Appellant accepted the position on February 6, 1998 and she returned to work on a part-time basis beginning on February 14, 1998. She continued to work in this capacity until July 12, 1998.

By decision dated June 1, 1999, the Office advised appellant that a determination had been made that the position of modified mail processor, with a weekly salary of \$698.29, fairly and reasonably represented her wage-earning capacity. The Office also advised appellant that she was not entitled to any further compensation benefits inasmuch as her actual wages met or exceeded the wages of the job she held when injured, and therefore, she was no longer disabled for wage loss.

The Board finds that the Office improperly determined that the position of modified mail processor fairly and reasonably represented appellant's wage-earning capacity.

Once the Office has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.¹ In the instant case, the Office has failed to meet its burden.

¹ *Curtis Hall*, 45 ECAB 316 (1994).

Section 8115(a) of the Federal Employees' Compensation Act provides that in determining compensation for partial disability, "the wage-earning capacity of an employee is determined by his actual earnings if his earnings fairly and reasonably represent his wage-earning capacity...."² Generally, wages actually earned are the best measure of wage-earning capacity, and in the absence of evidence showing they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.³

Appellant returned to work in a part-time, limited-duty capacity on February 14, 1998. While appellant held the position of modified mail processor for approximately five months, this fact alone is insufficient to establish that the position represents her wage-earning capacity.⁴ In concluding that the modified mail processor position represented appellant's wage-earning capacity, the Office neglected to consider that the position was not only "temporary," as clearly indicated on the January 28, 1998 limited-duty job offer, but also a part-time position. Inasmuch as appellant's date-of-injury position was both full time and permanent the Office erred in concluding that her part-time, temporary position as a modified mail processor fairly and reasonably represented her wage-earning capacity.⁵ The Office also erred in concluding that appellant sustained no wage loss in light of her ability to earn wages of \$698.29 per week as a modified mail processor. Had appellant worked full time as a modified mail processor she would have garnered an annual salary of \$36,311.00, which would exceed her date-of-injury pay rate.⁶ The employing establishment, however, indicated that appellant had only worked four hours per day through July 12, 1998. The Office's determination that appellant had wages of \$698.29 per week as a modified mail processor was based on the erroneous conclusion that she

² *George E. Williams*, 44 ECAB 530, 533 (1993).

³ 5 U.S.C. § 8115(a).

⁴ 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).

⁵ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a)(1), (3) (July 1997); *Elbert Hicks*, 49 ECAB ____ (Docket No. 95-1448, issued January 20, 1998).

⁶ The Office had previously paid wage-loss compensation based on an annual salary of \$35,363.00.

worked full time in her position.⁷ The Office erred in finding that the position of modified mail processor fairly and reasonably represented appellant's wage-earning capacity.

The June 1, 1999 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, DC
October 12, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

⁷ The calculated weekly wage of \$698.29 represents 1/52 of the \$36,311.00 annual salary appellant could have earned had she worked full time as a modified mail processor. There is no evidence of appellant's actual earnings as a modified mail processor nor is there any indication from the record that appellant received wage-loss compensation from the Office following her return to part-time work in February 1998.