

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BLANCA E. ANDERSON and U.S. POSTAL SERVICE,
POST OFFICE, San Francisco, CA

*Docket No. 00-738; Submitted on the Record;
Issued September 27, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs reduced appellant's compensation on the grounds that her actual earnings fairly and reasonably represented her wage-earning capacity.

On October 31, 1990 appellant, then a 29-year-old full-time letter carrier, filed a traumatic injury claim (Form CA-1) alleging that she sprained her neck and suffered a concussion when she lost her balance going down the stairs and hit her head against the wall. The Office accepted the claim for head contusion, neck sprain, left shoulder impingement syndrome, right trapezius strain and left shoulder contusion. Appellant stopped work on November 1, 1990, returned to light-duty work on December 2, 1990 and had intermittent periods of wage loss until she stopped work on October 10, 1994.

On July 23, 1999 the employing establishment offered appellant the position of modified carrier working four hours per day and earning a yearly salary of \$37,831.00. Appellant accepted the position under protest and returned to work August 24, 1999.

By decision dated November 2, 1999, the Office reduced appellant's compensation based upon her actual earnings for 60 days as a modified clerk beginning September 10, 1999. The Office found that appellant had a weekly wage loss of \$272.12 and that the position fairly and reasonably represented her wage-earning capacity.

The Board finds that the Office improperly reduced appellant's compensation on the grounds that her actual earnings fairly and reasonably represented her wage-earning capacity.

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.¹ In

¹ *James R. Verhine*, 47 ECAB 460 (1996); *Bettye F. Wade*, 37 ECAB 556 (1986); *Ella M. Garner*, 36 ECAB 238 (1984).

this case, the Office accepted that appellant sustained occupational conditions of head contusion, neck sprain, left shoulder impingement syndrome, right trapezius strain and left shoulder contusion.

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 wage-earning capacity.² 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.³

In the present case, appellant accepted the employing establishment's offer of permanent part-time work and returned to work on August 24, 1999. The job offer indicated that appellant was to work four hours per day, at a salary of \$363.75 per week. Based on this evidence, the Office concluded that her wages of \$363.75 per week fairly and reasonably represented her wage-earning capacity.

In reviewing whether actual wages fairly and reasonably represent wage-earning capacity, the Board examines the record for evidence that the employment "constitutes part-time, sporadic, seasonal, or temporary work."⁴ The Office's procedure manual provides guidelines for determining wage-earning capacity based on actual earnings:

"a. *Factors considered.* To determine whether the claimant's work fairly and reasonable represents his or her WEC [wage-earning capacity], the CE [claims examiner] should consider whether the kind of appointment and tour of duty (see FECA PM 2.900.3) are at least equivalent to those of the job held on date of injury. Unless they are, the CE may not consider the work suitable.

"For instance, reemployment of a temporary or casual worker in another temporary or casual (USPS) [United States Parcel Service] position is proper, as long as it will last at least 90 days, and reemployment of a term or transitional USPS worker in another term or transitional position is likewise acceptable. However, the reemployment may not be considered suitable when:

- (1) *The job is part-time* (unless the claimant was a part-time worker at the time of injury) or sporadic in nature;
- (2) *The job is seasonal* in an area where year-round employment is available....

² 5 U.S.C. § 8115(a).

³ *Dennis E. Maddy*, 47 ECAB 259 (1995).

⁴ *See Monique L. Love*, 48 ECAB 378 (1997).

(3) *The job is temporary* where the claimant's previous job was permanent."⁵

It is evident that in this case appellant's job was part time; she indicated that she worked four hours per day, five days per week. Her date-of-injury position was a full-time position as a letter carrier. As the above provision indicates, a part-time position is generally not appropriate for a wage-earning capacity determination unless the date-of-injury position was also part time. The Office made no reference to this provision or otherwise attempted to explain why a part-time position was appropriate in this case. The Board finds that the Office did not follow its own procedures in determining appellant's wage-earning capacity. It is the Office's burden to reduce compensation and they failed to meet their burden in this case.

The decision of the Office of Workers' Compensation Programs dated November 2, 1999 is hereby reversed.⁶

Dated, Washington, DC
September 27, 2001

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.7 (July 1997).

⁶ On appeal appellant contends that the Office erred in failing to note her lower back problems as an accepted injury. A review of the record indicates that in a decision dated April 28, 1994, the Office did not accept appellant's lumbosacral condition as arising out of her October 31, 1990 employment injury. The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal. *Martha L. Street*, 48 ECAB 641, 644 (1997). As appellant filed this appeal with the Board on December 6, 1999, the Office's November 2, 1999 decision is the sole decision within the Board's jurisdiction.