

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BETTY OCILKA and U.S. POSTAL SERVICE,
PEARLBROOK STATION, Cleveland, OH

*Docket No. 03-1184; Submitted on the Record;
Issued August 8, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation benefits to zero effective May 1, 2001 based on its determination that her position of modified regular clerk represented her wage-earning capacity.

Appellant, a 32-year-old letter carrier, filed a notice of traumatic injury on January 7, 1986 alleging that she fractured and displaced her coccyx in the performance of duty on January 6, 1986. The Office accepted appellant's claim for fracture of the coccyx as well as recurrences of disability on March 14, 1986 and December 30, 1987. Appellant underwent surgery for a coccygectomy on November 3, 1988 and returned to light-duty work on February 6, 1989.

Appellant, a full-time letter carrier, filed a second notice of traumatic injury on January 18, 1995 alleging that she sustained a low back injury in the performance of duty on January 3, 1995. The Office accepted appellant's claim for lumbosacral strain on January 31, 1996. On April 10, 1996 the Office accepted appellant's claim for the additional condition of aggravation of preexisting degenerative disc disease at L4-5. Appellant sustained an additional recurrence of total disability on January 10, 1997 and returned to duty on January 26, 1997. In a decision dated August 20, 1997, the Office found that appellant's wage-earning capacity was represented by her position as a full-time distribution clerk.

Appellant sustained a recurrence of total disability on January 19, 2000 and underwent a laser-assisted arthroscopic discectomy on January 20, 2000. Appellant returned to work on June 6, 2000 working four hours a night. Appellant stopped work on June 24, 2000 attributing her total disability to chronic pain and stress.¹

¹ The Office completed a statement of accepted facts noting that appellant lost time from June 22, 2000 to May 4, 2001 due to accepted work-related conditions.

On April 24, 2001 the employing establishment offered appellant the position of modified regular clerk at a salary of \$41,483.00 per year. Appellant accepted this position on April 26, 2001. In a letter dated May 31, 2001, the employing establishment informed appellant that her position description offered an incorrect pay level. The employing establishment stated, "The job offer had it listed as PS 6/0 when in fact it should have been PS 5/0."

By decision dated February 8, 2002, the Office found that appellant returned to work on May 5, 2001 in the position of modified regular clerk with a base annual salary of \$41,483.00. The Office found that this position reasonably and fairly represented appellant's wage-earning capacity and reduced appellant's compensation benefits to zero as she had no loss of wage-earning capacity as the actual earnings of her position exceeded those of her date-of-injury position.²

Appellant requested an oral hearing on May 7, 2002. At the oral hearing on October 24, 2002 appellant alleged that she was entitled to compensation for eight hours a day from July 7, 2000 until May 5, 2001 and that she received compensation for only four hours a day during this period. She further alleged that the employing establishment reduced her pay rate one month after she accepted the light-duty position increasing her loss of wage-earning capacity and that she had an emotional condition as a consequence of her accepted employment injuries.

By decision dated January 14, 2003, the hearing representative affirmed the Office's February 8, 2002 decision finding that appellant's limited-duty position represented her wage-earning capacity. However, he remanded the case to the Office to determine appellant's current pay rate in that position and to modify the wage-earning capacity determination if necessary; as well as to determine whether she was entitled to additional compensation benefits from July 7, 2000 to May 5, 2001; and to issue a final decision on appellant's claim for an emotional condition.³

The Board finds that the Office failed to meet its burden of proof to reduce appellant's compensation benefits to zero effective May 1, 2001 based on its determination that her position of modified regular clerk represented her wage-earning capacity.

² Appellant alleged a recurrence of disability on July 1, 2002. The Office accepted this aspect of her claim on November 22, 2002.

³ Following the hearing representative's January 14, 2003 decision, appellant submitted additional new evidence to the Office. As the Office did not consider this evidence in reaching a final decision, the Board will not review this evidence for the first time on appeal. Furthermore, the Board notes that the Office has not issued a final decision regarding appellant's entitlement to compensation from July 7, 2000 to May 5, 2001 nor on her claim for an emotional condition. Therefore, the Board will not address these issues on appeal. 20 C.F.R. § 501.2(c)

Section 8115 of the Federal Employees' Compensation Act,⁴ titled "Determination of wage-earning capacity," states in pertinent part:

"(1) 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...."

Generally, wages actually earned are the best measure of a 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.⁵

In the present case, appellant worked as a modified regular clerk from May 5, 2001 through July 1, 2002. Appellant's performance of this position for more than one year is persuasive evidence that it represents her wage-earning capacity. There is no evidence that this position is seasonal, temporary, less than full-time or make-shift work designed for appellant's particular needs.⁶

The Office determined that appellant's date-of-injury pay rate was \$41,483.00 per year or \$797.75 per week.⁷ The Office relied on the pay rate of \$41,483.00 listed in the limited-duty offer in concluding that appellant had no loss of wage-earning capacity and reducing her compensation benefits to zero in its February 8, 2002 decision. However, the Board finds that the Office did not meet its burden of proof to reduce appellant's compensation benefits to zero based on this position as the Office did not properly address the issue of appellant's actual earnings in this position. The employing establishment provided appellant with a limited-duty position offering a listed salary of \$41,483.00 per year. The record establishes that appellant accepted the position on May 5, 2001 and by letter dated May 31, 2001 the employing establishment stated that it offered appellant the limited-duty position at an incorrect pay rate. The employing establishment stated that the pay level was listed at PS 6/0 when in fact it should have been PS 5/0. Appellant provided the Office with a copy of this letter and inquired about the appropriate pay rate for her position in June 2001. The Office did not undertake further development of this issue and the record does not clearly establish what earnings appellant had while employed in this position. Without this factual information regarding her actual pay rate, the Office could not meet its burden of proof to reduce appellant's compensation based on the actual earnings that she received. As the Office did not properly reduce appellant's compensation based on her actual wage-earning capacity, the Board finds that the Office failed to establish appellant's wage-earning capacity and that the January 14, 2003 decision must be reversed.

⁴ 5 U.S.C. § 8115.

⁵ *Elbert Hicks*, 49 ECAB 283, 284 (1998).

⁶ *Monique L. Love*, 48 ECAB 378, 380 (1997). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity* (Chapter 2.814.7) (December 1993).

⁷ *Jeffrey T. Hunter*, 52 ECAB 503 (2001).

The January 14, 2003 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, DC
August 8, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member