

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of LUCRETIA D. JONES and U.S. POSTAL SERVICE,  
POST OFFICE, Jamaica, NY

*Docket No. 98-991; Submitted on the Record;  
Issued April 20, 2000*

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DECISION and ORDER

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

The issue is whether the Office of Workers' Compensations Programs properly determined that the modified distribution clerk position, which appellant performed, fairly and reasonably represented her wage-earning capacity.

The Board has duly reviewed the record in the present appeal and finds that the Office properly determined that the modified distribution clerk position, which appellant performed, fairly and reasonably represented her wage-earning capacity.

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."<sup>1</sup> Office procedures indicate that a determination regarding whether actual wages fairly and reasonably represent wage-earning capacity should be made after a claimant has been working in a given position for more than 60 days.<sup>2</sup>

On July 9, 1992 appellant, then a 47-year-old manual clerk, filed a claim for occupational disease alleging that she developed a bilateral knee condition as a result of her employment duties. On December 29, 1992 the Office accepted appellant's claim for aggravation of osteoarthritis of both knees. Appellant stopped work on July 18, 1992 and returned to work on August 3, 1992. Appellant sustained a recurrence of total disability on March 5, 1993.

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<sup>1</sup> 5 U.S.C. § 8115(a).

<sup>2</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (December 1993); *see William D. Emory*, 47 ECAB 365 (1996).

Appellant underwent bilateral total knee replacement surgery authorized by the Office.<sup>3</sup> After a period of recovery, it was determined that appellant could return to sedentary light duty a maximum of six hours a day. On October 25, 1997 appellant, returned to light duty, six hours a day, as a modified distribution clerk. In a decision dated January 12, 1998, the Office noted that appellant had been working successfully for at least 60 days, and, therefore, found that the modified distribution clerk position, with wages of \$614.54 per week, fairly and reasonably represented appellant's wage-earning capacity. The Office further determined that as appellant's actual wages as a modified distribution clerk exceeded the wages of the job held when injured, appellant had no loss of wages and was no longer entitled to wage-loss compensation.<sup>4</sup>

Office procedures direct that where such a determination is made, based on work performance for at least 60 days, "a formal decision should be issued no later than 90 days after the date of return to work."<sup>5</sup> The procedures indicate that factors to be considered in determining whether a claimant's position fairly and reasonably represents his or her wage-earning capacity include whether the job is part time, seasonal or temporary.<sup>6</sup> The Board notes that the position of modified distribution clerk is a permanent position and that appellant returned to this position six hours a day, five days a week, which is the maximum she is medically able to work. Therefore, based on appellant's performance of the modified distribution clerk position for at least 60 days, the Board finds that the Office properly determined that the position fairly and reasonably represented appellant's wage-earning capacity.

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<sup>3</sup> Appellant underwent right total knee replacement surgery on November 28, 1994 and left total knee replacement surgery on June 7, 1995.

<sup>4</sup> The Office applied the formula for determining loss of wage-earning capacity based on actual earnings, which was developed in *Albert C. Shadrick*, 5 ECAB 376 (1953) and codified by regulation at 20 C.F.R. § 10.303. Section (b) of this regulation provides that wage-earning capacity in terms of percentage is obtained by dividing the employee's earnings by the "current pay rate," which means current salary or pay rate for the job held at the time of injury. See also *Robin Bogue*, 46 ECAB 488 (1995).

<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c)(1) (December 1993).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (December 1993).

The decision of the Office of Workers' Compensation Programs dated January 12, 1998 is affirmed.

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

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member