

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LINDA K. GOODWIN and NATIONAL AERONAUTICS & SPACE
ADMINISTRATION, LANGLEY RESEARCH CENTER, Hampton, VA

*Docket No. 03-1429; Submitted on the Record;
Issued November 19, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether appellant was at fault in the creation of an overpayment of compensation in the amount of \$5,189.86 for the period March 25 through September 7, 2002.

On June 7, 2000 appellant, then a 41-year-old full-time secretary, injured her back when she spent 12 hours packing and moving boxes in preparation for an office relocation. The Office of Workers' Compensation Programs accepted her claim for lumbar sprain and paid compensation for temporary total disability on the periodic compensation rolls.

Effective August 20, 2001, appellant returned to work part time as a voucher examiner. The employing establishment explained that appellant performed her usual secretarial duties, but only worked four hours a day earning a weekly salary of \$311.12. By letter dated October 12, 2001, the Office notified appellant that it was reducing her wage-loss compensation to reflect her earnings in part-time employment. The Office specifically advised appellant that, if she received any increased salary over her part-time wages, she should notify the Office immediately, as failure to do so could result in an overpayment of compensation. In a decision dated January 28, 2002, the Office formalized its October 21, 2001 letter and reduced appellant's compensation based upon her actual earnings for 60 days as a modified clerk beginning August 20, 2001. The Office found that appellant had a weekly wage loss of \$287.62 and that appellant's wages as a voucher examiner fairly and reasonably represented her wage-earning capacity. Appellant returned to work full time on March 25, 2002 but continued to receive compensation checks for temporary total disability.

On September 13, 2002 the Office issued a preliminary determination that an overpayment of \$5,189.86 occurred when appellant received both regular full-time pay and compensation for four hours per day, pursuant to the January 28, 2002 wage-earning capacity decision, for the period March 25 through September 7, 2002. The Office also made a preliminary determination that appellant was at fault in the creation of the overpayment because she had been informed by letter dated October 12, 2001, that an increase in salary could result in

an overpayment and, therefore, she knew or should have been expected to know that she was not entitled to simultaneously receive partial wage-loss compensation and her regular salary.

In response, appellant completed the overpayment recovery questionnaire provided by the Office, indicating her monthly income and expenses and asked that the Office make a final decision based on the written evidence on the issues of fault and possible waiver of the overpayment. Appellant also submitted copies of her earnings statements, receipts and bills in support of her claimed income and expenses.

By decision dated February 28, 2003, the Office finalized its preliminary determinations. The Office found that appellant was at fault in the creation of the overpayment that occurred from March 25 through September 7, 2002, because appellant received wage-loss compensation payments that she knew or reasonably should have known she was not entitled to. The Office reviewed appellant's overpayment questionnaire and determined that appellant was capable of paying \$200.00 per month to satisfy the overpayment.¹

The Board finds that the Office has not established an overpayment of compensation.

In this case, the Board must first review the Office's loss of wage-earning capacity determination which served as the basis for the Office's finding that an overpayment in compensation had occurred.

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.² In this case, the Office accepted that appellant sustained a lumbar sprain.

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.³ 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.⁴

In the present case, appellant accepted the employing establishment's offer of permanent part-time work and returned to work on August 20, 2001. The job offer indicated that appellant was to work four hours per day, at a salary of \$311.12 per week. Based on this evidence, the

¹ In a letter dated March 24, 2003, appellant requested reconsideration. However, the Board notes that the only review of a final decision concerning an overpayment is to this Board. The provisions of 5 U.S.C. § 8124(b) concerning hearings and 5 U.S.C. § 8128(a) concerning reconsiderations do not apply to such a decision. 20 C.F.R. § 10.440(b).

² *James R. Verhine*, 47 ECAB 460 (1996); *Betty F. Wade*, 37 ECAB 556 (1986); *Ella M. Garner*, 36 ECAB 238 (1984).

³ 5 U.S.C. § 8115(a).

⁴ *Dennis E. Maddy*, 47 ECAB 259 (1995).

Office concluded that her wages of \$311.12 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.”⁵ 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 Postal 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....
- (3) *The job is temporary* where the claimant’s previous job was permanent.”⁶

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. While appellant eventually returned to full-time work, the Office based its wage-earning capacity determination on the part-time position. Her date-of-injury position was a full-time position as a secretary. 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 and did not otherwise attempt 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. In addition, the Board finds that in this case, as appellant’s continuing receipt of compensation benefits under the Office’s wage-earning capacity determination was the sole basis for the Office’s subsequent finding that appellant received an overpayment of

⁵ See *Monique L. Love*, 48 ECAB 378 (1997).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.7 (July 1997).

compensation in the amount of \$5,189.86 for the period March 25 through September 7, 2002, this determination is also improper.⁷

The decision of the Office of Workers' Compensation Programs dated February 28, 2003 is hereby reversed.

Dated, Washington, DC
November 19, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

⁷ The Board notes, however, that this finding does not suggest that no overpayment exists in this case, as appellant did receive wage-loss compensation at the same time she was earning wages from full-time employment.