

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHERYL L. DECAVITCH and U.S. POSTAL SERVICE,
POST OFFICE, Warren, Ohio

*Docket No. 96-1490; Submitted on the Record;
Issued May 25, 1999*

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant had no loss of wage-earning capacity.

On September 30, 1993 appellant, then a temporary letter carrier, sustained injury when she slipped and fell on wet cement steps, striking her left elbow and buttocks. She stopped work on October 5, 1993. The Office accepted appellant's claim for contusions of the sacrum, coccyx, left elbow and right hand/thumb. She received continuation of pay for the period October 5 through November 18, 1993. Appellant returned to limited duty on November 19, 1993 under restrictions set forth by Dr. C.A. Akpom, her attending physician and a specialist in occupational medicine.

In a December 3, 1993 report, Dr. Akpom reviewed his treatment of appellant and noted that her primary complaint was of continuing pain radiating down both legs. He noted that the x-rays of September 30, 1993 were negative for fracture or abnormality of the coccyx or sacrum. Based on appellant's complaint of pain, repeat x-rays of October 22, 1993 were obtained and were negative for fracture, dislocation or significant arthritis. Dr. Akpom stated that he released appellant to return to limited-duty work for six to eight hours a day following an examination on November 19, 1993 with lifting restrictions of 30 pounds and no prolonged standing. He stated that the examination on December 3, 1993 showed localized pain over the sacrum, coccyx and L5-S1 junction. Dr. Akpom noted that physical testing was negative but appellant exhibited a lot of grimacing and pain reaction. He listed an impression of questionable radiculopathy of the L5-S1 nerve roots, noting appellant's symptoms were highly subjective. Dr. Akpom recommended an orthopedic referral.

Appellant was referred by Dr. Akpom for examination on February 8, 1994 to Dr. R. Geoffrey Wilber, an orthopedic surgeon. Based on her continuing complaint of pain, Dr. Wilber obtained a magnetic resonance imaging (MRI) scan of the lumbosacral spine. On June 6, 1994 Dr. Galterius A. Grajo, a Board-certified radiologist, reported a normal lumbar

spine on the MRI scan. He found normal alignment of the vertebral bodies, no narrowing of disc spaces, no evidence of a herniated disc and normal termination of the spinal cord. However, in a June 14, 1994 report, Dr. Wilber interpreted the MRI scan as revealing a degenerative disc at L5-S1 with a questionable left-sided bulge which accounted for appellant's symptoms. He recommended conservative therapy and a sacrum fusion if appellant did not improve.

The record reflects that appellant's temporary appointment with the employing establishment expired on March 31, 1994.¹

By letter dated November 29, 1994, the Office advised Dr. Wilber that it had accepted appellant's claim for contusions of the coccyx and sacrum and to further explain his diagnosis in light of the radiologist's interpretation of the June 6, 1994 MRI scan. Appellant was requested to describe any employment activities since the expiration of her temporary appointment on March 31, 1994. Appellant responded that she collected unemployment from May 4 to December 6, 1994 and was currently employed as a part-time barber-stylist.

By letter dated December 14, 1994, the Office referred appellant to Dr. V.G. Raghavan, an orthopedic surgeon, for a second opinion. In a report dated January 18, 1995, he set forth his findings on examination of appellant, noting that the June 6, 1994 MRI scan was a normal study with no evidence to suggest a herniated disc. Examination of the back revealed evidence of a moderate to severe kyphosis with an exaggerated swayback, tenderness over the left sacroiliac joint and soft tissue tenderness in the lumbosacral region. Straight leg raising was reported as pain free to 90 degrees on the right with motion on the left to 90 degrees producing a complaint of low back pain but no sciatica. Reflexes were reported as normal and no measurable atrophy in either the calf or the thigh. X-rays were reviewed which revealed evidence of disc disease in the lumbosacral region. Dr. Raghavan diagnosed a sacroiliac strain on the left, partially resolved; antecedent disc degeneration in the lumbosacral region; and a lumbosacral strain, partially resolved. He indicated that appellant would be precluded from returning to work as a letter carrier as her strains would be aggravated by such job duties. He advised, however, that appellant was capable of lifting up to 30 pounds, with inside work consisting of sitting, standing and walking for eight hours a day.

Thereafter, the Office authorized physical therapy consisting of a water exercise program as recommended by Dr. Wilber. In a February 28, 1995 progress note, he indicated that another MRI scan was obtained on February 28, 1995 which revealed a central disc herniation at L5-S1 with mild spinal stenosis; mild disc bulging at L4-5 with minimal spinal stenosis; and degenerated mild disc bulging at T11-12. Dr. Wilber advised continuing physical therapy.

In an April 13, 1995 decision, the Office found that appellant had the wage-earning capacity of a modified letter carrier. The Office noted that appellant had returned to work in the position on November 22, 1993 with no loss of wages and that she was employed in the position for a period of over 60 days. The Office found that the position conformed with appellant's physical limitations as set forth by Dr. Raghavan and that appellant was terminated from the employing establishment due to the expiration of her temporary term of employment and not due

¹ Appellant was hired on April 7, 1993 as a temporary letter carrier.

to residuals of her accepted injury. Appellant was advised that she had no current entitlement to wage-loss compensation but that she was still entitled to medical benefits as a result of her September 30, 1993 employment injury.

In a May 5, 1995 letter, appellant, through her attorney, requested a hearing before an Office hearing representative. Appellant submitted a May 11, 1995 report from Dr. Wilber who stated that he had reviewed Dr. Raghavan's report. Dr. Wilber stated that appellant did not have documentation of any significant problems to her spine prior to her employment injury and therefore disagreed with Dr. Raghavan's conclusion that there was a preexisting condition of the lumbar spine which predated the injury. Dr. Wilber stated that appellant had a strain to the lumbar spine but, in addition, she had injuries to both the L4-5 and L5-S1 disc spaces. He stated that appellant was precluded from working as a letter carrier unless surgical intervention was entertained. Dr. Wilber noted, however, that appellant was a candidate "for some type of job employment with potential for a lighter duty type of job."

Following a hearing held on November 29, 1995, the Office hearing representative affirmed the April 13, 1995 wage-earning capacity determination by decision dated March 13, 1996.

The Board finds that the Office properly determined appellant's wage-earning capacity.

It is well established that once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.² After it has determined that an employee has disability causally related to his or her federal employment, the Office may not reduce compensation without establishing that the disability has ceased or that it is no longer related to the employment.

In the present case, the record establishes that appellant was hired on or about April 7, 1993 as a temporary letter carrier. Following her injury on September 30, 1993, appellant's claim was accepted for contusions of the sacrum, coccyx, left elbow and right hand/thumb and she received continuation of pay from October 5 to November 18, 1993. She returned to limited duty on November 19, 1993 under physical limitations as set forth by Dr. Akpom, with lifting restricted to 30 pounds and intermittent standing, sitting and walking. Her duties included casing mail, writing up certified mailings and answering telephones. Appellant worked in this position and had actual earnings until March 31, 1994, when her temporary appointment expired.

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 or her actual earnings if such actual earnings fairly and reasonably represent the employee's wage-earning capacity.³ 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

² See *Lawrence D. Price*, 47 ECAB 120 (1995); *Charles E. Minniss*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

³ 5 U.S.C. § 8115(a); see *Dennis E. Maddy*, 47 ECAB 259 (1995).

reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.⁴ The evidence reflects that appellant returned to work with a "saved pay rate" earning \$12.08 an hour, the same pay rate as on the date of injury.⁵

The Office's procedure manual sets forth the procedures for determining entitlement to compensation after reemployment and for determining wage-earning capacity. It is generally recognized that in the preliminary assessment of the position to which an employee returns, a temporary job will be considered unsuitable unless the claimant was a temporary employee when injured and the temporary position reasonably represents the claimant's wage-earning capacity.⁶ The record establishes that appellant was hired as a temporary letter carrier under a term with the employing establishment which expired March 31, 1994. With regard to the termination of employment, the Office's procedures note that a reemployed employee may face removal from employment due to the termination of temporary employment.⁷ Such an occurrence is not considered a recurrence of disability and the claims examiner is directed to take action on a wage-earning capacity determination. If a loss of wage-earning capacity determination has not been made and the claimant has worked in the position for at least 60 days, the claims examiner is directed to consider a retroactive loss of wage-earning capacity determination, "even if the claimant is a federal employee, since general availability of the job need not be considered for a position actually held."⁸

In this case, as appellant's term of employment expired on March 31, 1994, the Office proceeded with a retroactive wage-earning capacity determination as she had worked in the limited-duty position for a period in excess of 60 days. Appellant's claim for wage loss following March 31, 1994 does not constitute a recurrence of disability as she did not stop work due to any change in the nature or extent of her employment-related conditions. Rather, the evidence establishes that her work stoppage was due to the expiration of her temporary employment. For

⁴ *Gregory A. Compton*, 45 ECAB 154 (1993); *Hubert F. Myatt*, 32 ECAB 1994 (1981).

⁵ Under the Act, the term "disability" means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury. Disability is not synonymous with physical impairment, which may or may not result in an incapacity to earn wages. An employee who has a physical impairment causally related to a federal employment injury, but who nevertheless has the capacity to earn the wages she was receiving at the time of injury, has no disability as that term is used in the Act; see *Maxine J. Sanders*, 46 ECAB 835 (1995).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(b)(3) (December 1993).

⁷ *Id.* at Chapter 2.814.12.

⁸ *Id.* at Chapter 2.814.12(b).

this reason, appellant is not entitled to further wage-loss compensation but remains entitled to compensation for medical benefits for treatment of her accepted employment-related conditions.⁹

The November 29, 1995 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, D.C.
May 25, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

⁹ The Board notes that appellant has submitted evidence from Dr. Wilber, who has attributed findings pertaining to discs at L4-5 and L5-S1 to her employment injury. On return of the case record, the Office should further develop this aspect of her case.