

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DEBRA GLOCKVINING and U.S. POSTAL SERVICE,
DOWNTOWN STATION, Daytona Beach, FL

*Docket No. 97-2714; Submitted on the Record;
Issued October 20, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for modification of the May 20, 1996 loss of wage-earning capacity determination.

On February 15, 1994 appellant, then a 36-year-old temporary mail carrier, filed a notice of traumatic injury, claiming that she hurt her left shoulder and side when a motorcycle rider knocked her down as she was delivering mail the day before. The Office accepted the claim for a sprain of the left shoulder and contusion of the left hip. Appellant returned to light duty, but her position appointment expired on September 11, 1994 and she relocated to New York.

Subsequently, the Office accepted left shoulder impingement and appellant underwent an arthroscopic acromioplasty on January 31, 1995. On July 19, 1995 the employing establishment offered appellant the modified position of a temporary distribution clerk, conforming with the physical restrictions on use of her left shoulder, imposed by Dr. Steven B. Zelicof, a Board-certified orthopedic surgeon. On August 26, 1995 appellant accepted the offer.

On February 20, 1996 appellant returned to work for four hours a day at \$12.26 an hour and was paid compensation for the remaining four hours. Subsequently, appellant returned to full-time modified duty.

On February 27, 1996 the Office denied appellant's request for reimbursement of relocation expenses on the grounds that the position she accepted was a temporary, 359-day appointment and was not expected to lead to a permanent job. Therefore, the cost of moving back to Florida was not reimbursable.¹

¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.6(a) (July 1997).

On May 20, 1996 the Office determined that appellant's actual wages of \$500.24 a week as a modified temporary distribution clerk represented her wage-earning capacity and terminated her wage-loss compensation.

On February 28, 1997 appellant filed a claim for wage-loss compensation beginning on February 15, 1997, noting that the employing establishment had terminated her employment on February 12, 1997. On March 13, 1997 the Office denied appellant's claim on the grounds that a loss of wage-earning capacity determination had been issued on May 20, 1996 and the evidence submitted did not establish that appellant was disabled for work or suffered a loss of capacity to earn wages as a result of the accepted injury.

Appellant requested reconsideration and submitted a February 26, 1997 treatment note from Dr. Zelicof. On May 29, 1997 the Office denied appellant's request on the grounds that the evidence submitted in support of reconsideration was insufficient to warrant modification of its prior decision. The Office noted that, because appellant was initially hired as a temporary (transitional) employee, her termination as a temporary employee in a modified position did not entitle her to continuing compensation.

The Board finds that appellant has failed to meet her burden of to establish that the loss of wage-earning capacity determination should be modified.

Once loss of wage-earning capacity is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous. The burden of proof is on the party attempting to show modification of the award.²

In this case, the evidence of record does not establish that the wage-earning capacity determination should be modified. The medical evidence appellant submitted from Dr. Zelicof indicated that, while appellant still had pain and limited range of motion in her left shoulder, she had been working for the employing establishment. He recommended that she continue to avoid heavy lifting and maintain her exercise program, but failed to address the relevant issue of whether her physical condition had worsened so as to prevent her from performing her assigned duties. Appellant did not submit the medical evidence necessary to establish a material change in the employment-related condition such that she could not perform her employment duties. The medical evidence of record therefore does not establish that the wage-earning capacity determination should be modified.

Essentially, in this case appellant requested resumption of compensation benefits once her temporary employment was terminated. Appellant argued that because she was terminated by the employing establishment, her wage-loss compensation should be reinstated. Appellant is in effect arguing that the loss of wage-earning capacity was erroneous as she was no longer able to earn the wages upon which the loss of wage-earning capacity was premised.

The Office's procedures do provide guidelines for the Office to consider in evaluating whether actual earnings fairly and reasonably represent wage-earning capacity. The Office's

² *Jack E. Rohrabough*, 42 ECAB 320 (1991); *Ronald M. Yokota*, 33 ECAB 1629 (1982).

procedures specifically provide, in discussing the factors considered for determining wage-earning capacity based on actual earnings, that “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; (2) the job is seasonal; or (3) the job is temporary where the claimant’s previous job was permanent.”³

As the Office explained, appellant was a so called transitional or temporary employee when she was injured in 1994. The record indicates that this type of employee is hired for 359 days at a time -- the six-day break in service is intended to distinguish temporary employees from career employees. Unlike the latter, a temporary employee who has returned to modified duty is not entitled to wage-loss compensation or vocational rehabilitation under the Federal Employees’ Compensation Act when the term of an appointment expires. A loss of wage-earning capacity determination is proper if it is based upon wages from a temporary position, as long as the position held at the time of injury was also a temporary position. As appellant was a temporary employee on the date of injury, the Office’s loss of wage-earning capacity determination based upon a temporary position was proper. Appellant has not met her burden of proof to establish that the loss of wage-earning capacity determination was erroneous and should be modified.

The May 29 and March 13, 1997 decisions of the Office of Workers’ Compensation Programs are affirmed.⁴

Dated, Washington, D.C.
October 20, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member

³ Federal (FECA) Procedure Manual, Chapter 2.814.7 (July 1997).

⁴ The Board’s scope of review is limited to those final decisions issued within one year prior to the filing of the appeal. 20 C.F.R. §§ 501.2(c), 501.3(d)(2). Inasmuch as appellant filed her notice of appeal on August 20, 1997, the Board has no jurisdiction of the Office decision dated d May 20, 1996.