

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of KENNETH D. WILLIAMS and U.S. POSTAL SERVICE,  
POST OFFICE, West Covina, CA

*Docket No. 99-1224; Submitted on the Record;  
Issued July 19, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant had no loss of wage-earning capacity based on his actual earnings as a modified mail processor.

On March 6, 1995 appellant filed a notice of traumatic injury and claim for compensation (Form CA-1), alleging that on February 23, 1996 he sustained a left shoulder injury while performing his work duties. He was diagnosed with tendinitis of the left shoulder. Appellant stopped work the day after the alleged injury and returned on March 8, 1995 to modified duties.

On May 23, 1996 appellant filed a second CA-1 form alleging that on May 13, 1996 he suffered from muscle spasms in his neck and shoulder while performing his work duties. He was diagnosed with muscle strain of the left posterior shoulder. Appellant was evaluated for his injury and restricted to modified work duties by his attending physicians.

On December 5, 1997 appellant filed a third CA-1 form alleging that on November 23, 1997 he experienced left shoulder pain while performing his work duties. He was evaluated for his injury and restricted to modified work duties by his primary physician, Dr. Kim Thai, a Board-certified specialist in physical medicine and rehabilitation and other attending physicians.

On March 6, 1998 Dr. Thai submitted a final comprehensive report dated February 19, 1998, in which she related the history of appellant's November 23, 1997 injury. She summarized the findings of a January 7, 1998 magnetic resonance imaging (MRI) scan of the cervical spine, which revealed a large left paracentral disc protrusion at C6 and C7, that displaced the cervical cord as well as the exiting nerve root. Dr. Thai noted that appellant had been referred to Dr. Johannes Bernbeck, a Board-certified orthopedic surgeon, who gave the same diagnosis determined by an MRI scan and opined that appellant's symptoms would worsen in the future. Dr. Thai conducted a physical examination of the cervical spine and upper extremity and found that appellant's condition of left C7 cervical radiculopathy secondary to C6-

7 cervical disc herniation was caused by the November 23, 1997 injury. Dr. Thai determined that vocational rehabilitation was necessary and that appellant would be restricted from repetitive neck forward and lateral bending and heavy lifting at work.

On March 12, 1998 the Office accepted appellant's November 23, 1997 injury for left shoulder strain and cervical disc herniation.

On April 17, 1998 appellant filed a CA-7 claim for a schedule award dated March 23, 1998 on account of his accepted injury.

In a report dated June 15, 1998, the District medical adviser reviewed Dr. Thai's February 19, 1998 findings and assessed that appellant had a 13 percent total impairment of the left upper extremity. The Office medical adviser further noted that appellant reached maximum medical improvement on February 19, 1998.

By decision dated June 30, 1998, the Office issued appellant a schedule award, based upon his rate of pay, for 13 percent loss of use of the left upper extremity from February 19, 1998, the date he reached a permanent and stationary condition, to November 29, 1998.

On September 8, 1998 appellant was offered a position as a modified mail processor at level PS 04 Step 0 with an annual salary of \$36,745.00, to permanently accommodate his work limitations. He raised concerns to his employing establishment regarding some of the work duties and a meeting was commenced with appellant, the employing establishment and Dr. Thai to discuss the position. Dr. Thai subsequently indicated that the position was suitable for appellant on September 24, 1998.

In a note to the file dated November 25, 1998, the Office verified that the position remained open. It then allotted appellant 30 days to accept the position before a final decision would be made regarding the suitable work offered him. In a facsimile dated December 9, 1998, appellant explained that he was told that he could remain on light duty until an appropriate chair was made available and then he could begin work in the rehabilitation position. On December 18, 1998 appellant submitted a signed but undated copy of the job offer, indicating that he accepted the modified mail processor position.

By decision dated January 22, 1998, the Office determined that appellant's actual earnings as a modified mail processor fairly and reasonably represented his wage-earning capacity. It found that appellant's actual wages have met or exceeded the wages of the job he held when he was injured and that no loss of wages had occurred.

The Board finds that the Office improperly determined in its January 22, 1998 decision, that appellant had no loss of wage-earning capacity based on his actual earnings as a modified mail processor.

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 the employee's wage-earning capacity.<sup>1</sup> 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.<sup>2</sup> Office procedure provides that a determination regarding whether actual earnings fairly and reasonably represent wage-earning capacity shall be made after an employee has been working in a given position for more than 60 days.<sup>3</sup> In *Corlisia L. Sims*,<sup>4</sup> the Board explained that the 60-day period is a minimum period of reemployment before the Office can make a determination that the position fairly and reasonably represents wage-earning capacity. If the Office makes a determination on wage-earning capacity prior to the expiration of the 60-day period, the decision must be set aside.<sup>5</sup>

In the present case, the Office determined on January 22, 1998 that because appellant had worked in the position of modified mail processor for more than 60 days and that his actual wages exceeded the pay rate in his position at the time of his injury, appellant's rehabilitation position fairly represented his wage-earning capacity. The Office made this determination after a claims examiner noted in a memorandum to the Director that appellant formally accepted the rehabilitation position at the elevated rate of pay on September 24, 1998. The record, however, indicates that appellant had not begun work in the rehabilitation position until sometime after December 9, 1998. The record contains a signed offer letter from Dr. Thai, noting her approval of the position on September 24, 1998 yet; appellant had not signed the letter. In a letter dated October 8, 1998, appellant requested that a few of his questions regarding his proposed duties be answered before he accepted the position. The employing establishment subsequently responded to his questions in a letter dated October 22, 1998. A note to appellant's file and a letter to appellant dated November 25, 1998 establish that the position remained open even at that late date. Appellant indicated by letter dated December 9, 1998 that he was given permission to continue his modified duties until an appropriate chair was provided and then he could begin the position as a modified mail processor. It was not until December 18, 1998 that appellant submitted an undated but signed copy of the offer letter to the Office.

The record does not indicate the exact date that appellant began performing the duties of the rehabilitation position before the January 22, 1998 decision, however, it is clear that appellant did not work for the minimum 60-day period before the Office made its determination on January 22, 1998. Therefore, the Office's decision was improper and must be set aside.

The decision of the Office of Workers' Compensation Programs dated January 22, 1998 is reversed.

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<sup>1</sup> 5 U.S.C. § 8115(a).

<sup>2</sup> *Monique L. Love*, 48 ECAB 378 (1997); *Nancy L. Christiansen*, 48 ECAB 579 (1997); *Joseph M. Popp*, 48 ECAB 624 (1997).

<sup>3</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1993).

<sup>4</sup> 46 ECAB 172 (1994).

<sup>5</sup> *Id.*

Dated, Washington, D.C.  
July 19, 2000

Michael J. Walsh  
Chairman

David S. Gerson  
Member

A. Peter Kanjorski  
Alternate Member