

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of TAMRA McCAULEY and U.S. POSTAL SERVICE,  
POST OFFICE, Rancho Cordova, CA

*Docket No. 98-1820; Submitted on the Record;  
Issued March 17, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's wage-earning capacity was represented by her actual earnings in a light-duty position.

In the present case, the Office accepted that appellant sustained a fracture of the right big toe in the performance of duty on May 12, 1987. Appellant returned to a light-duty position on April 4, 1988 and in August 1988 she accepted a permanent offer as a limited-duty carrier. She continued to work in the light-duty position; she filed a claim for an emotional condition in July 1993.<sup>1</sup> Based on the submission of medical evidence regarding her emotional condition, the employing establishment offered appellant a part-time position in September 1993, which she accepted and then a full-time position in November 1993, which was rejected. Appellant did not return to work after November 1993.

By decision dated March 8, 1995, the Office determined that appellant's light-duty position from 1988 to 1993 represented her wage-earning capacity, and that she had no loss of wage-earning capacity.

By decisions dated April 2, 1996 and May 19, 1997, the Office reviewed the case on its merits and denied modification of the wage-earning capacity determination.

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

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

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<sup>1</sup> This claim was subsequently denied by the Office, and is not before the Board on this appeal.

reasonably represent his wage-earning capacity.<sup>2</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>3</sup>

In the present case, the Office performed a retroactive wage-earning capacity determination after appellant had stopped working. The Office's procedure manual provides that a retroactive determination may be made where the claimant has worked in the position for at least 60 days, the employment fairly and reasonably represents wage-earning capacity, and the work stoppage did not occur because of any change in the claimant's injury-related condition affecting her ability to work.<sup>4</sup> The Board has concurred that the Office may perform a retroactive wage-earning capacity determination in accord with its procedures.<sup>5</sup>

There is no indication that the work stoppage in this case was due to a change in the accepted right foot injury, as no medical evidence was provided showing a change in the accepted employment injury as of November 1993. Appellant performed the position from 1988 to 1993 and there is no evidence that the position was seasonal, temporary or make-shift work.<sup>6</sup> The Board accordingly finds that the Office properly made a retroactive wage-earning capacity determination based on appellant's actual earnings. The actual earnings in the position are compared with the current wages of the date-of-injury position to determine loss of wage-earning capacity.<sup>7</sup> The record indicates, and appellant does not contest, that her actual earnings commencing in April 1988 were equal to or greater than the current (as of April 1988) wages for the date-of-injury position. Accordingly, she has no loss of wage-earning capacity.

Appellant argues that the Office should not have performed a retroactive determination in this case, because she had not worked for over a year and the Office simultaneously issued a favorable decision on her claim. The record indicates only that the Office issued a separate decision on March 8, 1995, in response to a notice of recurrence of disability claim filed in February 1993, that appellant did have continuing residuals from the employment injury and remained entitled to medical benefits.<sup>8</sup> This does not preclude the Office from determining that the position appellant held from 1988 represented her wage-earning capacity as of that date.

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<sup>2</sup> 5 U.S.C. § 8115(a).

<sup>3</sup> *Dennis E. Maddy*, 47 ECAB 259 (1995).

<sup>4</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(e) (May 1997).

<sup>5</sup> *See, e.g., Elbert Hicks*, 49 ECAB \_\_\_\_ (Docket No. 95-1448, issued January 20, 1998).

<sup>6</sup> *See Mary Jo Colvert*, 45 ECAB 575 (1974); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (July 1997).

<sup>7</sup> *Albert C. Shadrick*, 5 ECAB 376 (1953); 20 C.F.R. § 10.303.

<sup>8</sup> The Form CA-2a did not specify dates of claimed disability, and the Office advised appellant that she could claim disability for wage loss through an appropriate form.

To the extent that appellant seeks modification of the wage-earning capacity, it is her burden of proof.<sup>9</sup> Once the wage-earning capacity of an injured employee 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.<sup>10</sup> In this case, appellant has not submitted probative evidence establishing that modification of the wage-earning capacity determination is warranted. An attending physician, Dr. Stephen Cyphers, an orthopedic surgeon, indicated in a report dated August 4, 1994 that appellant continued to have residual discomfort in the foot, but he did not report a material change in the condition. In a report dated February 10, 1995, Dr. Gregory A. Joy, an orthopedic surgeon serving as an Office referral physician, also noted residual symptoms, stating that appellant's disability status had been permanent and stationary since April 1988.

The Board finds that appellant has not met any of the requirements for modification of the wage-earning capacity determination in this case.

The decision of the Office of Workers' Compensation Programs dated May 19, 1997 is affirmed.

Dated, Washington, D.C.  
March 17, 2000

Michael J. Walsh  
Chairman

George E. Rivers  
Member

Michael E. Groom  
Alternate Member

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<sup>9</sup> *Sue A. Sedgwick*, 45 ECAB 211 (1993).

<sup>10</sup> *Id.*