

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BETTE L. KVETENSKY and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS AFFAIRS MEDICAL CENTER, Omaha, NE

*Docket No. 98-2006; Submitted on the Record;
Issued March 3, 2000*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly found that appellant had no loss of wage-earning capacity effective February 18, 1996 based on her actual earnings.

On August 24, 1993 appellant, then a 40-year-old registered nurse, filed a claim for a traumatic injury occurring on August 20, 1993 in the performance of duty. The Office accepted appellant's claim for thoracic sprain.¹

Appellant returned to work in a part-time limited-duty position as a secretary/typist with the employing establishment beginning March 20, 1995. In a work status report dated April 25, 1995, Dr. Frank P. LaMarte, Board-certified in preventive medicine, found that she could perform the duties of the position full time. On February 8, 1996 appellant accepted the employing establishment's offer of a permanent position as a full-time secretary/typist effective February 18, 1996.

Appellant submitted a claim for wage-loss compensation from March 15 to May 26, 1996 alleging that she had sustained a loss in salary. In an Office internal memorandum, a claims examiner determined that the current pay rate for appellant's date-of-injury position was \$47,263.00 per year which he divided by 2,080 hours for an hourly wage of \$22.72. The claims examiner multiplied the \$22.72 hourly wage by the 24 hours per week appellant had worked in her part-time date-of-injury position as a registered nurse and found that her weekly wage was \$545.28. The claims examiner then divided appellant's current earnings as a full-time secretary, \$38,745.00, by 52 and found that she now earned \$745.10 per week.

¹ The Office previously accepted that appellant sustained lumbosacral strain due to a traumatic injury on August 26, 1992. The Office doubled the case records for appellant's August 26, 1992 and August 24, 1993 employment injuries into file number A11-119636.

By decision dated July 11, 1996, the Office found that appellant had no loss of wage-earning capacity effective February 18, 1996. The Office determined that appellant's actual wages as a secretary/typist fairly and reasonably represented her wage-earning capacity and that she had no loss of wage-earning capacity because she received a greater salary than in her date-of-injury position.

In a letter dated August 8, 1996, appellant requested a hearing before an Office hearing representative. At the hearing, held on November 17, 1997, appellant argued that the Office should pay her the difference between her hourly wage as a nurse and her hourly wage as a secretary.

By decision dated February 11, 1998, the hearing representative affirmed the Office's July 11, 1996 decision.

The Board finds that the Office properly found that appellant had no loss of wage-earning capacity effective February 18, 1996 based on her actual earnings.

Section 8115(a) of the Federal Employees' Compensation Act² provides that in determining compensation for partial disability, "the wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity." The Board has stated, "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."³

The evidence in this case establishes that appellant's actual earnings as a full-time secretary/typist fairly and reasonably represented her wage-earning capacity. In a report dated April 25, 1995, Dr. LaMarte found that the position was within appellant's physical capabilities. In February 1996, appellant accepted the full-time position of secretary/typist and worked in this position for more than 60 days prior to the Office's wage-earning capacity determination. The evidence does not establish that the position was a make shift position designed for appellant's particular needs.⁴ Further, there is no evidence that the position was seasonal, part time, or temporary.⁵ The Office, therefore, properly determined that appellant's actual earnings as a secretary/typist fairly and reasonably represented her wage-earning capacity.

Regulations construing the Act provide that "an injured employee who is unable to return to the position held at the time of injury (or to earn equivalent wages) but who is not totally disabled for all gainful employment is entitled to compensation computed on loss of wage-

² 5 U.S.C. § 8115(a).

³ *Floyd A. Gervais*, 40 ECAB 1045 (1989).

⁴ *See James D. Champlain*, 44 ECAB 438 (1993).

⁵ *See Federal (FECA) Procedure Manual, Part 2 -- Claims, Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (July 1997).

earning capacity.”⁶ An employee who is partially disabled as a result of an employment injury is therefore entitled to a loss of wage-earning capacity determination to see whether she has met the threshold requirement of establishing that she is unable to return to her former employment or to earn equivalent wages.⁷

In the present case, appellant returned to work at a higher monthly salary than in her date-of-injury position.⁸ As she currently earns more per month as a full-time secretary/typist than she earned in her date-of-injury position as a nurse, the Office properly determined that she had no loss of wage-earning capacity.⁹

On appeal, appellant argues that she received more money per hour in her date-of-injury part-time nursing position than in her current full-time position as a secretary and thus has sustained a loss of wage-earning capacity. The Act provides for payment of loss of wage-earning capacity, such that a partially disabled employee is paid “monthly monetary compensation equal to 66 2/3 percent of the difference between his monthly pay and his monthly wage-earning capacity after the beginning of the partial disability, which is known as his basic compensation for partial disability.”¹⁰ Under section 8101(4) of the Act¹¹ the rate of pay to be used in calculating compensation is based on the greatest of either appellant’s monthly pay at the date of injury, the date disability began or the date compensable disability recurred if it recurred more than six months after appellant’s return to work. It is apparent that the provisions of the Act regarding the determination of wage-earning capacity and pay rate for compensation purposes are based on monthly pay rather than on hourly pay.

Compensation under the Act is payable only under its terms, which are specific as to the method and amount of payment of compensation.¹² Neither the Office nor the Board has the authority to enlarge the terms of the Act or to make an award of benefits under any terms other than those specified in the statute.¹³

Accordingly, the Board finds that the Office properly determined that appellant had no loss of wage-earning capacity effective February 18, 1996 based on her actual earnings.

⁶ 20 C.F.R. § 10.303.

⁷ See *Sue A. Sedgwick*, 45 ECAB 211 (1993).

⁸ The record indicates that appellant worked a part-time schedule with a fixed annual rate of pay for at least eleven months prior to her employment injury. Thus, the Office properly used her earnings as a part-time employee in its wage-earning capacity determination; see 5 U.S.C. § 8114(d)(a).

⁹ *Monique L. Love*, 48 ECAB 378 (1997) (finding that appellant’s wages as a distribution clerk (modified) were greater than the current pay for the position she held when injured and therefore she had no loss of wage-earning capacity).

¹⁰ 5 U.S.C. § 8106(a).

¹¹ 5 U.S.C. § 8101(4).

¹² *Helen A. Pryor*, 32 ECAB 1313 (1981).

¹³ *Dempsey Jackson, Jr.*, 40 ECAB 942 (1989).

The decision of the Office of Workers' Compensation Programs dated February 11, 1998 is hereby affirmed.

Dated, Washington, D.C.
March 3, 2000

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member