

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JACKIE L. SELIX and U.S. POSTAL SERVICE,
POST OFFICE, Colorado Springs, CO

*Docket No. 99-1297; Submitted on the Record;
Issued November 28, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's actual earnings in a modified letter carrier position fairly and reasonably represented her wage-earning capacity.

In this case, the Office accepted that appellant sustained right elbow tendinitis and aggravation of thoracic outlet syndrome causally related to her letter carrier duties. She returned to a modified letter carrier position in 1992, accepting a permanent reassignment on August 7, 1992. On April 20, 1994 appellant resigned from federal employment, indicating in her notice of resignation that her husband had been transferred to another state.

By decision dated June 26, 1997, the Office determined that appellant's actual earnings in the modified position fairly and reasonably represented her wage-earning capacity. The Office found that her actual wages met or exceeded her date-of-injury wages, and therefore she had no loss of wage-earning capacity. In a decision dated February 12, 1998, an Office hearing representative affirmed the June 26, 1997 decision. By decision dated January 27, 1999, the Office reviewed the case on its merit and denied modification.

The Board has reviewed the record and finds that the Office properly determined that appellant's actual earnings in the modified position fairly and reasonably represented her wage-earning capacity.

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury, it has the burden of justifying a subsequent reduction of compensation benefits.¹

¹ *Gregory A. Compton*, 45 ECAB 154 (1993).

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 his wage-earning capacity.² 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 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 his ability to work.⁴

In this case, there is no question that appellant worked longer than 60 days in the modified position. Appellant accepted a permanent reassignment in August 1992, and she continued to work until April 1994. The stated reason for stopping work was a personal reason, with no indication that the work stoppage was related to a change in the employment injury. Under the Office's procedures noted above, a retroactive wage-earning capacity determination may be performed if the employment fairly and reasonably represents wage-earning capacity. In this regard, the Board notes that there is no indication that the position was part-time, sporadic, seasonal or temporary work.⁵

Appellant argues that the modified letter carrier position was essentially a makeshift or odd lot position unsuitable for a wage-earning capacity determination. A makeshift position is a position that is specifically tailored to an employee's particular needs,⁶ and generally lacks a position description with specific duties, physical requirements and work schedule.⁷ In this case, the modified position was a permanent, full-time position with recognized job duties and requirements, and it cannot be considered a makeshift position.

As noted above, actual earnings are generally the best measure of wage-earning capacity, and the Board finds no contrary evidence in this case. Since appellant worked for more than 60 days, did not stop due to the employment injury, the Board finds that the Office properly performed a retroactive wage-earning capacity determination. The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick*

² 5 U.S.C. § 8115(a).

³ *Dennis E. Maddy*, 47 ECAB 259 (1995).

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

⁵ *See Monique L. Love*, 48 ECAB 378 (1997).

⁶ *See William D. Emory*, 47 ECAB 365 (1996) (appellant was able to baby-sit grandchildren because of a special arrangement with his family, allowing him flexibility to work when he was able).

⁷ *James D. Champlain*, 44 ECAB 438 (1993) (the Board found that a clerk position was not a makeshift position, noting that it contained a position description).

decision,⁸ has been codified at 20 C.F.R. § 10.403. The Office first calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the "current" pay rate. The Office found that the actual earnings were equal to or greater than the current pay rate for the date-of-injury job, and there is no contrary evidence. The Office therefore properly found that appellant had no loss of wage-earning capacity in this case.

The decision of the Office of Workers' Compensation Programs dated January 27, 1999 is affirmed.

Dated, Washington, DC
November 28, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member

⁸ 5 ECAB 376 (1953).