

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JANICE E. GEIGER and U.S. POSTAL SERVICE,  
POST OFFICE, Poulsbo, WA

*Docket No. 00-821; Submitted on the Record;  
Issued August 17, 2001*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly determined appellant's wage-earning capacity effective April 19, 1999.

The Board has duly reviewed the case on appeal and finds that the Office failed to properly determine appellant's wage-earning capacity effective April 19, 1999.

Appellant filed a claim on July 25, 1997 alleging that she injured her neck and shoulders in the performance of duty on July 24, 1997. The Office accepted appellant's claim for a cervical strain.<sup>1</sup> She returned to work in a modified-duty capacity on August 1, 1997, working six hours a day and eight hours a day effective August 14, 1997. On December 18, 1997 Dr. Frank Haydu, appellant's attending physician, indicated that her condition was stable and she had permanent restrictions.

The employing establishment offered appellant a limited-duty part-time flexible clerk position, based on the restrictions provided by her treating physicians, on December 12, 1997. On January 14, 1998 she indicated that she neither accepted nor rejected the position and noted that Dr. Haydu had indicated that she could not drive more than 15 or 20 minutes at a time because turning and twisting would aggravate her neck condition.

On December 17, 1997 the Office advised appellant that it had found that position suitable to her work capabilities.

In a report dated January 9, 1998, Dr. Jacquelyn A. Weiss, a Board-certified neurologist and an Office referral physician, indicated that appellant was capable of working with

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<sup>1</sup> Appellant also sustained a work-related cervical strain on February 6, 1997 and a work-related left shoulder injury on June 6, 1991.

restrictions and that the position offered by the employing establishment was appropriate for her condition.

Appellant expressed her concern that driving to work would aggravate her neck condition. The employing establishment indicated that appellant could take a bus to work. Drs. Haydu and Weiss indicated that riding a bus would not aggravate appellant's condition as she could change positions frequently to lessen discomfort.

On March 30, 1998 appellant accepted the part-time flexible clerk position and returned to work on April 13, 1998. The job duties included: typing, filing and answering the telephone; computer input; account book verification; city truck cards; second notices and box rent notices; timekeeping; training records; business reply mailers; bulk mail responsibilities; retail supply orders and inventory reports; second-class reviews; and AIS growth management. Physical restrictions included no lifting over five pounds and no overhead reaching or lifting.

By decision dated April 19, 1999, the Office determined that appellant's wages as a part-time flexible clerk fairly and reasonably represented her wage-earning capacity and, as her actual wages exceeded the wages of her job held at the date of injury, she had no loss of wage-earning capacity. Accordingly, the Office terminated her compensation benefits.

By letter dated May 3, 1999, appellant requested an oral hearing that was held on September 14, 1999. At the hearing appellant testified that the part-time flexible clerk position was a makeshift position specifically designed for her particular needs and should be used for determining her wage-earning capacity. She testified that the main duties of a clerk included the casing of mail but she performed no casing of mail. Appellant also testified that clerks were required to lift up to 70 pounds but she had a 5-pound lifting restriction. She further testified that she did not perform several of the duties listed in her job description including bulk mail duties, retail supply orders, inventory reports, second-class reviews, AIS gross management, second notices, box rent notices or typing. Appellant testified that the physical restrictions of the job were within her capabilities and it was only the makeshift nature of the job duties that caused her to dispute the Office's wage-earning capacity decision.

By decision dated December 1, 1999, an Office hearing representative affirmed the Office's April 19, 1999 decision.

The Board finds that the Office did not properly determine appellant's wage-earning capacity.

In this case, the Office based its April 19, 1999 decision that appellant had no loss of wage-earning capacity on a determination that her actual earnings as a part-time flexible clerk effective April 13, 1998 fairly and reasonably represented her wage-earning capacity.

Once the Office accepts a claim, it has the burden to justify termination or modification of compensation benefits.<sup>2</sup> Under section 8115 of the Federal Employees' Compensation Act<sup>3</sup>

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<sup>2</sup> See *Mary Jo Colvert*, 45 ECAB 575, 579 (1994).

<sup>3</sup> 5 U.S.C. § 8115(a).

the wage-earning capacity of an employee is determined by her actual earnings if her actual earnings fairly and reasonably represent her wage-earning capacity.<sup>4</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>5</sup> The Office's procedures indicate that, after a claimant has returned to work for 60 days, a determination will be made as to whether the actual earnings fairly and reasonably represent the claimant's wage-earning capacity.<sup>6</sup> However, if the position in which the claimant is working is seasonal, part time, temporary, an odd-lot or makeshift position<sup>7</sup> or is not within a claimant's medical restrictions, evidence of such may establish that the position does not fairly and reasonably represent the injured employee's wage-earning capacity.

Appellant argued that her actual earnings as a part-time flexible clerk did not fairly represent her wage-earning capacity as she did not perform one of the main duties of a clerk, casing mail, and did not perform several of the duties listed in her job description. She also argued that clerks were required to be able to lift 70 pounds but she was limited to 5 pounds. Appellant argued that the Office did not make a reasoned determination regarding whether her actual earnings as a limited-duty part-time flexible clerk fairly and reasonably represented her wage-earning capacity in that it did not adequately consider whether the position was a "sheltered" position designed only for her particular needs. In essence, she asserted that the Office made a determination of her wage-earning capacity based solely on the fact that she had actual earnings for a period of time.

Appellant's part-time flexible clerk position appears to be makeshift work designed for her particular needs. A clerk is usually required to case mail. The limited-duty position does not require any casing of mail. Appellant testified that she does not perform several of the other duties in her job description. The position description indicates a five-pound lifting restriction and no overhead reaching or lifting which is obviously an adaptation for appellant's particular needs, rather than an accurate reflection of requirements of a "clerk" position.

The Board finds that further development of this case is necessary to determine whether appellant's part-time flexible position was makeshift work designed for her particular needs.<sup>8</sup> Appellant's testimony and the description of her job lead the Board to conclude that appellant's actual earnings in her part-time flexible clerk position do not fairly and reasonably represent her wage-earning capacity.

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<sup>4</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (December 1993).

<sup>5</sup> See *Don J. Mazurek*, 46 ECAB 447, 450-51 (1995); *Floyd A. Gervais*, 40 ECAB 1045, 1048 (1989).

<sup>6</sup> *Supra* note 4.

<sup>7</sup> See *William D. Emory*, 47 ECAB 365, 371 (1996); *Jack L. Woolever*, 29 ECAB 111, 114 (1977).

<sup>8</sup> *Supra* note 2 at 580; *Elizabeth E. Campbell*, 37 ECAB 224, 227-28 (1985).

On remand, the Office should undertake further development and issue an appropriate decision regarding appellant's wage-earning capacity.

The December 1 and April 19, 1999 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further development consistent with this opinion.

Dated, Washington, DC  
August 17, 2001

David S. Gerson  
Member

Willie T.C. Thomas  
Member

Priscilla Anne Schwab  
Alternate Member