

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ROBERTA R. MONCRIEF and DEPARTMENT OF TRANSPORTATION,  
FEDERAL AVIATION ADMINISTRATION, TECHNICAL CENTER, Atlantic City, NJ

*Docket No. 00-116; Submitted on the Record;  
Issued July 3, 2001*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly determined appellant's loss of wage-earning capacity effective October 8, 1998.

On November 22, 1988 appellant, then a 45-year-old program analyst, filed a claim for a stress-related seizure on September 19, 1988. On August 24, 1990 appellant filed a claim for an occupational disease for temporal lobe seizures and severe migraine headaches. The Office accepted that appellant sustained anxiety attacks aggravated by conditions of her employment and paid compensation for temporary total disability beginning December 31, 1989.

At the Office's direction and expense, appellant underwent vocational rehabilitation, with a goal of returning to work as an administrative assistant or manager. On December 13, 1996 appellant was granted an associate's degree from Edison Community College in business administration and management. On April 28, 1997 appellant accepted a job variously called a travel receptionist, sales representative, or reservation agent for a wholesale hotel room reservation company at a rate of \$300.00 per week.

On October 14, 1997 the Office issued a notice of proposed reduction of compensation based on appellant's capacity to earn wages in the position of programmer-analyst in the amount of \$575.00 per week. By decision dated October 7, 1998, the Office reduced appellant's compensation effective October 8, 1998 based on her ability to earn wages as a programmer-analyst in the amount of \$575.00 per week.

Appellant requested a hearing, which was held on April 8, 1999. Appellant testified that she had been employed by the same company since April 1997, but was now working as an accounts receivable clerk earning \$400.00 per week. By decision dated June 21, 1999, an Office hearing representative found that the position of programmer-analyst fairly and reasonably represented appellant's wage-earning capacity and affirmed the Office's October 7, 1998 decision reducing appellant's compensation.

The Board finds that the Office improperly determined appellant's loss of wage-earning capacity effective October 8, 1998.

Section 8115 of the Federal Employees' Compensation Act,<sup>1</sup> titled "Determination of Wage-Earning Capacity" states in pertinent part: "In determining compensation for partial disability, ... 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." Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.<sup>2</sup> In situations where an employee has earned actual wages for a substantial period, there is "an affirmative requirement for the Office to determine whether the position in which the employee earns actual wages fairly and reasonably represents his or her wage-earning capacity prior to making any determination regarding the suitability of any other position as a measure of wage-earning capacity.... [A]ctual wages are the preferred measure of wage-earning capacity if they fairly and reasonably represent such capacity."<sup>3</sup> The Office's procedure manual provides that the Office "will make every reasonable effort to arrange for employment of a partially disabled claimant," and that "as a last resort, benefits will be reduced on the basis of an estimated earning capacity, based upon a job not actually held by the claimant...."<sup>4</sup>

The Board and the Office have defined criteria to determine whether the position in which an employee has actual earnings fairly and reasonably represents his or her wage-earning capacity. The Office's procedure manual states that, if the kind of appointment and tour of duty are not at least equivalent to those of the job held on the date of injury, such as part-time versus full-time, seasonal versus year-round, or temporary versus permanent, the position cannot represent the employee's wage-earning capacity.<sup>5</sup> The Board has stated that a position in which actual wages are earned cannot be used to fairly and reasonably represent an employee's wage-earning capacity if it is not a position available in the open labor market,<sup>6</sup> if the medical evidence indicates it is inappropriate,<sup>7</sup> or if the employee was able to obtain the position only through a direct job placement search by a vocational rehabilitation service.<sup>8</sup> None of these criteria apply to the position, in which appellant has had actual earnings since April 1997.

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<sup>1</sup> 5 U.S.C. § 8115.

<sup>2</sup> *Hubert F. Myatt*, 32 ECAB 1994 (1981); *Lee R. Sires*, 23 ECAB 12 (1971).

<sup>3</sup> *Michael E. Moravec*, 46 ECAB 492, 498 (1995).

<sup>4</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.3 (December 1995).

<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7a (June 1996).

<sup>6</sup> *William D. Emory*, 47 ECAB 365 (1996).

<sup>7</sup> *Mary Jo Colvert*, 45 ECAB 575 (1994).

<sup>8</sup> *Elizabeth E. Campbell*, 37 ECAB 224 (1985).

The Office hearing representative's June 21, 1999 decision is improper in that it does not address whether appellant's actual earnings fairly and reasonably represent her wage-earning capacity. The Office's initial decision dated October 7, 1998 also does not address this question, although the Office's notice of proposed reduction of compensation, which was incorporated into the October 7, 1998 decision by reference, noted that an Office rehabilitation specialist stated in an April 24, 1997 report: "The IW's [injured worker's] new job does not accurately reflect her maximum wage-earning potential, based on the IW's completion of the OWCP sponsored training program at Atlantic Community College, her prior education, work experience and transferable job skills." In a June 30, 1997 report, this rehabilitation specialist recommended that a constructed position be used because appellant was "not employed at her maximum earning potential at her current job."

An Office rehabilitation specialist's assertion that appellant theoretically could earn higher wages in a position different from the one in which she was earning actual wages is not sufficient to establish that her actual wages do not fairly and reasonably represent her wage-earning capacity.<sup>9</sup> Although appellant has some experience and training in the computer field, the Office did not consider that, at the time of its October 7, 1998 decision, finding her wage-earning capacity was represented by the position of programmer-analyst, appellant had not worked in this field for almost nine years. The Office also did not consider that appellant's attending Board-certified psychiatrist recommended that appellant obtain "a position with less computer interface than her previous job."

If the Office believed that appellant's wage-earning capacity was best represented by the position of programmer-analyst, it should have directed its rehabilitation efforts to training appellant for such a position. Instead, the Office rehabilitated appellant by sponsoring her associate's degree in business management and appellant obtained a position compatible with this rehabilitation. Not in effect at the time of the Office's initial decision, but in effect at the time of the Office hearing representative's June 21, 1999 decision, the Office's regulations now state: "The position determined to be the goal of a training plan is assumed to represent the employee's earning capacity if it is suitable and performed in sufficient numbers so as to be reasonably available, whether or not the employee is placed in such a position."<sup>10</sup> The Office's procedure manual states: "In some situations, vocational rehabilitation efforts do not succeed and the claimant's WEC [wage-earning capacity] must be determined on the basis of a position deemed suitable but not actually held."<sup>11</sup> The Office's rehabilitation efforts in appellant's case succeeded and the Office improperly found that appellant's actual earnings did not fairly and reasonably represent her wage-earning capacity. The case will be remanded to the Office for payment of compensation for partial disability based on appellant's actual earnings.

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<sup>9</sup> See *Radames Delgado-Serrano*, 47 ECAB 650 (1996) (the Board found that it was improper to use a constructed position to represent the employee's wage-earning capacity, where the Office did not first determine whether the employee's actual earnings fairly and reasonably represented the employee's wage-earning capacity.)

<sup>10</sup> 20 C.F.R. § 10.520.

<sup>11</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8 (June 1996).

The June 21, 1999 decision of the Office of Workers' Compensation Programs is reversed and the case remanded to the Office for action consistent with this decision of the Board.

Dated, Washington, DC  
July 3, 2001

David S. Gerson  
Member

Willie T.C. Thomas  
Member

Bradley T. Knott  
Alternate Member