

**United States Department of Labor
Employees' Compensation Appeals Board**

LOU E. HUNT, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE, Ada,
OK, Employer**

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 03-1053
Issued: December 23, 2003**

Appearances:
Lou E. Hunt, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On March 18, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated February 18, 2003. Pursuant to 20 C.F.R. § 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly determined that the position of modified rural letter carrier associate fairly and reasonably represented appellant's wage-earning capacity effective December 14, 2002, the date it adjusted her compensation.

FACTUAL HISTORY

On October 13, 1984 appellant, then a 48-year-old part-time rural letter carrier, filed a notice of traumatic injury and claim for compensation (Form CA-1), alleging that she was injured when she was pinned between two vehicles while in the performance of her federal duties. The claim was accepted for lumbosacral strain and pelvic contusion. At the time of her injury, appellant was working an average of 13.64 hours a week. Appellant returned to work

four hours a week in 1986 and received partial wage-loss benefits until December 14, 2002 when she accepted a modified rural letter carrier position.

In a June 5, 2002 letter, the Office requested that appellant submit an updated medical report. In response, appellant submitted a March 14, 2002 report from Dr. Anne Christopher, a specialist in pain management and a treating physician. Dr. Christopher found that appellant continued to have chronic low back pain that radiated down her left hip and leg and most severe in the left low buttock and hip area. On examination, Dr. Christopher found that appellant walked with a significant limp on the left side; could stand on her toes and heels without difficulty; strength testing was slightly asymmetric, weaker on the left; and pain inhibition was present, particularly with hip flexion, abduction and extension. Straight leg raising was negative on the right but the left revealed tightness in the hamstring and quadriceps. The range of motion at the hip was significantly diminished on the left side. Dr. Christopher noted that palpation of the back and spine revealed mild tenderness on the spinous process of L4 and L5, with significant spasticity and hypertonicity in the quadratus lumborum and the gluteal and buttock muscles on the left. She diagnosed acute and chronic left-sided low back pain with radiation toward the knee, with possible hip arthritis and left sacral dysfunction. Dr. Christopher opined that appellant could work four hours a day with restrictions of one and one-half hours on standing and walking and no climbing. In an August 15, 2002 report, Dr. Christopher diagnosed degenerative joint and disc disease in the lumbar spine with muscle imbalance and muscle spasticity causing chronic pain. Compared to appellant's last appointment, the bursitis in her left hip was worse and there was increased spasticity in the piriformis muscle and an exacerbated imbalance that was possibly related to her limp and asymmetric gait. Dr. Christopher noted that appellant had excellent relief of pain shortly after a cortizone injection.

In an October 4, 2002 letter, the employing establishment offered appellant a job as modified rural carrier consisting of clerical duties, including answering the telephone, processing and filing forms. The position was to be up to 14 hours a week and was consistent with appellant's medical restrictions. In an October 28, 2002 letter, the Office found the job offer suitable and appellant accepted the modified position effective December 14, 2002.

In a February 28, 2003 decision, the Office informed appellant that, as she had performed in the modified position for over two months and was earning wages greater than at the time of her accepted injury, her entitlement to wage-loss compensation ended effective December 14, 2002, the date she returned to work. Appellant was advised of her entitlement to continuing medical benefits.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.¹ The

¹ *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.²

Section 8115(a) of the Federal Employees' Compensation Act provides that 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."³ 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."⁴

ANALYSIS

In reaching its determination of appellant's wage-earning capacity, the Office properly noted that appellant had been reemployed at the employing establishment and received actual earnings as a modified rural letter carrier for more than 60 days. The record establishes that she returned to work on December 14, 2002. At a salary of \$18.24 an hour. At the time of injury, appellant's salary was \$7.50 an hour. The employing establishment advised that the current pay rate for appellant's date-of-injury position was \$15.60 an hour. This evidence establishes that appellant returned to modified duty at a salary greater than her date-of-injury salary updated.⁵

The Board has carefully reviewed the Office's wage-earning capacity decision in the context of the relevant evidence of record and finds that, in addition to determining that appellant had actual wages as a modified rural letter carrier, it properly found that such wages fairly and reasonably represented her wage-earning capacity. The record does not contain any evidence showing that the modified rural letter carrier associate position constitutes, sporadic, seasonal or temporary work.⁶ Moreover, the record does not reveal that the position is a make-shift position designed for appellant's particular needs.⁷

The Board has found in certain circumstances that a claimant's actual wages did not fairly and reasonably represent his or her wage-earning capacity. For example, in *Michael A. Wittman*,⁸ the Board found that the evidence did not support a finding that a position with the National Guard fairly and reasonably represented the claimant's wage-earning capacity based on

² See *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

³ 5 U.S.C. § 8115(a).

⁴ *Floyd A. Gervais*, 40 ECAB 1045, 1048 (1989); *Clyde Price*, 32 ECAB 1932, 1934 (1981).

⁵ Office procedure provides that a determination regarding whether actual earnings fairly and reasonably represent wage-earning capacity should be made after an employee has been working in a given position for more than 60 days; see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2-814.7c (December 1993).

⁶ See *William D. Emory*, 47 ECAB 365 (1996); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7a (December 1993).

⁷ See *William D. Emory*, *supra* note 6.

⁸ 43 ECAB 800 (1992).

the fact that the claimant did not appear every month as normally required and did not perform the same duties as other employees who held the same job title. In *Elizabeth E. Campbell*,⁹ the Board found that the evidence did not support a finding that the position of baseball cover sorter fairly and reasonably represented the claimant's wage-earning capacity based on the fact that the position tended to be seasonal and provided for coworker assistance in lifting duties such that it was apparent these duties were tailored for the claimant's particular needs. The Board notes, however, that the factual circumstances of appellant's case bear no similarity to the facts in these cases.

CONCLUSION

For these reasons the Board finds that the Office properly determined that the position of modified rural letter carrier fairly and reasonably reflected appellant's wage-earning capacity effective December 14, 2002, the date that it adjusted her compensation.

ORDER

IT IS HEREBY ORDERED THAT the February 18, 2003 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Issued: December 23, 2003
Washington, DC

Alec J. Koromilas
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

⁹ 37 ECAB 224 (1985).