

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

RON D. CROUSE, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Fort Worth, TX, Employer**

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**Docket No. 04-1563
Issued: December 1, 2004**

Appearances:
Ron D. Crouse, pro se
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On June 1, 2004 appellant filed a timely appeal of a February 27, 2004 decision of the Office of Workers' Compensation Programs, denying his request for a hearing regarding a December 22, 2003 Office decision that found he had no loss of wage-earning capacity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly determined that appellant's actual earnings commencing January 7, 2002 represented his wage-earning capacity; and (2) whether the Office properly denied appellant's request for a hearing.

FACTUAL HISTORY

On January 28, 2000 appellant, then a 45-year-old city carrier, filed an occupational disease claim and claim for compensation (Form CA-2) alleging that his plantar fasciitis was causally related to his federal employment. The Office accepted the claim for bilateral tarsal

tunnel syndrome and bilateral plantar fibromatosis. Appellant underwent foot surgery on June 20, 2001.

On January 2, 2001 the employing establishment offered appellant a full-time limited-duty position as a modified city carrier. The position included physical restrictions based on the medical evidence at that time, such as one hour intermittent walking three hours intermittent work on flat surfaces. The pay rate was equal to the current pay rate for the date-of-injury position. Appellant returned to work on January 7, 2002. In a duty status report (Form CA-17), the attending orthopedic surgeon, Dr. Linden Dillin, diagnosed bilateral foot pain due to the employment injury and provided work restrictions. On April 17, 2002 the employing establishment offered appellant another light-duty carrier position, with physical restrictions that included one-hour walking and two hours standing. Appellant accepted the job offer. On September 25, 2002 the employing establishment again offered appellant a light-duty carrier position, with restrictions that included walking up to 3 hours a day, 4 hours standing, 3 hours driving and a 35-pound lifting restriction. Appellant also accepted this position.

Dr. Dillin completed a duty status report (Form CA-17) dated March 21, 2003 indicating that appellant's restrictions included no lifting, standing or walking. In a memorandum dated April 7, 2003, an employing establishment compensation specialist indicated that an amended limited-duty job assignment needed to be prepared reflecting the new work restrictions. In a Form CA-17 dated August 12, 2003, Dr. Dillin provided restrictions that included two hours of standing and intermittent lifting of five pounds, and also noted that appellant was working five days per week but needed one day of resting his feet. He again indicated that the diagnosis was due to the employment injury.

By decision dated December 22, 2003, the Office determined that appellant's actual earnings effective January 7, 2002 as a modified carrier fairly and reasonably represented his wage-earning capacity. The Office found that appellant's actual earnings met or exceeded the current wages of the date-of-injury position and therefore he did not have a loss of wage-earning capacity.

In a letter postmarked January 27, 2004, appellant requested an oral hearing before an Office hearing representative. By decision dated February 27, 2004, the Office determined that the request was untimely and therefore appellant was not entitled to a hearing as a matter of right. The Office further stated that it had considered appellant's request and it was further denied because the issue in the case could be equally well addressed through the reconsideration process.

LEGAL PRECEDENT -- ISSUE 1

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.¹ Generally, wages actually earned are the best measure of a wage-earning capacity and, in the absence of evidence showing that they do not

¹ 5 U.S.C. § 8115(a).

fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.²

The Office's procedures provide requirements for a proper determination of wage-earning capacity based on actual earnings.³ A determination of wage-earning capacity may be made when a claimant is currently working in a position and after working for 60 days, a determination as to whether actual earnings fairly and reasonably represent wage-earning capacity can be made. If the claimant is no longer working in the position, a retroactive determination may be appropriate.⁴

ANALYSIS -- ISSUE 1

In this case, the Office attempted to determine appellant's wage-earning capacity based on actual earnings as of January 7, 2002. The Office stated that appellant had been employed as a "modified carrier" effective January 7, 2002, had worked more than two months, and the position was found to fairly and reasonably represent wage-earning capacity. To the extent that the Office was treating the actual earnings as resulting from one position that had been performed continuously since January 2, 2002, the record does not support such a finding. The employing establishment modified the job position and made formal offers on April 17 and September 25, 2002. Moreover, appellant's work restrictions changed after September 25, 2002 and it appears that appellant was working with new restrictions as of March 21, 2003, although the record does not include additional formal amended job offers.

To the extent that the Office was attempting to make a retroactive determination of wage-earning capacity based on the job that appellant performed as of January 7, 2002, the Board finds a retroactive determination is not appropriate in this case. The medical evidence in this case indicated that appellant's injury-related condition resulted in new work restrictions. The reason appellant was not performing the January 7, 2002 position was a change in his injury-related condition, and therefore a retroactive determination is not appropriate. The Board also notes that a claimant must work in the position for at least 60 days,⁵ and it is not entirely clear from the record how long appellant actually performed the job, since Dr. Dillin began providing new work restrictions on January 21, 2002.

Accordingly, the Board finds that the Office did not properly determine appellant's wage-earning capacity based on actual earnings effective January 7, 2002. Appellant did not work in the same position since January 7, 2002 and a retroactive determination is not appropriate. In view of the Board's holding, the denial of the hearing issue will not be addressed.

² *Dennis E. Maddy*, 47 ECAB 259 (1995).

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.7 (July 1997).

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

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.7(e) (May 1997).

CONCLUSION

The Office did not properly determine wage-earning capacity based on actual earnings as of January 7, 2002 because appellant was not currently working in the position and a retroactive determination is not supported by the record.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 22, 2003 is reversed.

Issued: December 1, 2004
Washington, DC

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member