



## **FACTUAL HISTORY**

The Office accepted that appellant sustained a thoracic muscle strain and myofascial pain syndrome superimposed on preexisting degenerative changes, as a result of her federal employment. On September 15, 1989 appellant accepted a job offer as a part-time flexible distribution clerk. On October 11, 1994 she accepted a job offer as a regular distribution clerk.

The record indicates that on June 19, 1998 appellant stopped working and filed a notice of recurrence of disability. She received compensation for temporary total disability and returned to work on October 3, 1998 at six hours per day. The record indicates, however, that appellant filed claims for a recurrence of total disability for the periods October 13 to November 17, 1998, December 8, 1998 to February 9, 1999 and March 3 to April 5, 1999. The Office paid her compensation for two hours per day as of October 10, 1998; it is not clear from the record whether appellant received compensation for total disability for the periods claimed.

Appellant continued to work six hours per day. On June 16, 2003 she accepted a light-duty position as a mail processing clerk.<sup>1</sup>

In a letter dated August 12, 2003, the Office notified appellant that it proposed to reduce her compensation to zero, retroactive to her return to work on October 3, 1998. The Office determined that her actual earnings met or exceeded the current wage of the job held when injured and according to 5 U.S.C. §§ 8115 and 8106, her entitlement of compensation ended when she was reemployed with no loss of wage-earning capacity. According to an accompanying worksheet, the pay rate for the date-of-injury job on October 3, 1998 was \$526.96 per week, while appellant's actual earnings as of that date were \$608.24 per week.

By decision dated October 8, 2003, the Office found that appellant's actual earnings since October 3, 1998 fairly and reasonably represented her wage earning. The Office determined that she was not entitled to compensation after October 3, 1998.

In a letter dated October 8, 2003, the Office advised appellant of a preliminary determination that a \$39,912.38 overpayment of compensation occurred for the period October 3, 1998 to October 3, 2003. The Office stated that appellant was not entitled to compensation after October 3, 1998 and compensation for wage loss paid represented an overpayment. With respect to fault, the Office made a preliminary finding that appellant was not at fault and could submit financial evidence with respect to waiver of the overpayment.

By decision dated December 9, 2003, the Office's Branch of Hearings and Review determined that appellant's request for a review of the written record postmarked November 8, 2003 was untimely as to the October 8, 2003 decision. The Branch of Hearings and Review denied the request on the grounds that the issue could equally well be addressed through a request for reconsideration.

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<sup>1</sup> The written offer indicated that the position was full time; however, it did not appear that appellant worked eight hours per day as she continued to claim two hours of compensation.

In a decision dated January 22, 2004, the Office finalized its decision that an overpayment of \$39,912.38 occurred. The Office also denied waiver of the overpayment on the grounds that recovery of the overpayment would not defeat the purpose of the Federal Employees' Compensation Act or be against equity and good conscience.

### **LEGAL PRECEDENT -- ISSUE 1**

Under section 8115(a) of the 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.<sup>2</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>3</sup>

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 her ability to work.<sup>4</sup>

### **ANALYSIS -- ISSUE 1**

In the present case, the record is not well developed with respect to the relevant factual background. The record indicates that appellant began to work for six hours per day as of October 3, 1998; it is not entirely clear what specific duties were performed. The job accepted in 1994 was apparently a regular distribution clerk position and appellant may have continued to work in that position for six hours per day. In June 2003, she accepted a light-duty position as a mail processing clerk and the written offer indicated that it was a full-time position. It is not evident from the record whether this represented a new position or whether appellant had been performing similar duties prior to June 2003, nor is it clear whether she worked six or eight hours.

The Office made a determination that the six-hour-a-day position that appellant began in October 3, 1998 represented her wage-earning capacity as of that date. The Office did not acknowledge in its decision that appellant stopped working on October 13, 1998 and claimed total disability until November 17, 1998. In addition, she claimed total disability from December 8, 1998 to February 8, 1999 and March 3 to April 5, 1999. Appellant, therefore, did not work continuously for 60 days from October 3, 1998, and the work stoppages were claimed to be the result of the accepted work injury.

The Office did not explain its finding that as of October 3, 1998 the six hour position fairly and reasonably represented her wage-earning capacity. Appellant had been off work from

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<sup>2</sup> 5 U.S.C. § 8115(a).

<sup>3</sup> *Dennis E. Maddy*, 47 ECAB 259 (1995).

<sup>4</sup> See *Elbert W. Hicks*, 49 ECAB 283 (1998); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.7(e) (May 1997).

June 19 to October 3, 1998 then was off work for extended intermittent periods through April 1999. The only finding made by the Office was that she worked in the position for more than 60 days and therefore it fairly and reasonably represented her wage-earning capacity. The evidence of record indicates that appellant did not work 60 days continuously after October 3, 1998, had not worked for several months prior to October 1998 and worked only intermittently for the following several months. Under these circumstances the Office has not provided sufficient evidence to support its finding that, as of October 3, 1998, the six-hour position fairly and reasonably represented appellant's wage-earning capacity.

The Board finds that the Office failed to make an appropriate wage-earning capacity determination pursuant to 5 U.S.C. § 8115. The Office did not properly develop the relevant facts, such as identifying the specific job duties as of October 3, 1998 the period the job was performed, identifying when and how the job duties may have changed and whether any change was due to the employment injury. The record does not establish that the requirements for a wage-earning capacity determination as of October 3, 1998, set forth in Board case law and Office procedures, have been met in this case.

### **LEGAL PRECEDENT -- ISSUE 2**

The Act provides that an employee shall receive compensation for partial disability equal to  $66 \frac{2}{3}$  percent of the difference between her monthly pay and her monthly wage-earning capacity after the beginning of partial disability.<sup>5</sup> An employee who is properly found to have no loss of wage-earning capacity is not entitled to continuing compensation<sup>6</sup> and receipt of compensation for loss of wage-earning capacity may result in an overpayment.<sup>7</sup>

### **ANALYSIS -- ISSUE 2**

The overpayment decision in this case was based on a finding that appellant had no loss of wage-earning capacity as of October 3, 1998. The Board finds that the Office did not establish that appellant had no loss of wage-earning capacity as of October 3, 1998 and, therefore, the factual basis for the overpayment was incorrect and the case is not in posture for decision on the overpayment issue. The Board notes that, while the Office may offset compensation during periods of actual earnings,<sup>8</sup> there are factual issues in the case that must be resolved before an appropriate decision can be issued. Appellant did claim periods of total disability, but the record transmitted to the Board does not clearly indicate whether the Office paid compensation for total disability during the periods claimed. On return of the case record, the Office should make proper findings with respect to appellant's work history and her entitlement to compensation for any period of total disability. After such further development as the Office deems necessary, it should issue an appropriate decision.

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<sup>5</sup> 5 U.S.C. § 8106(a).

<sup>6</sup> See *Domenick Pezzetti*, 45 ECAB 787 (1994).

<sup>7</sup> See, e.g., *Michael H. Wacks*, 45 ECAB 791, 795 (1994)

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.7(d)(3) (June 1996).

In view of the Board's holding on the above issues, the Board will not address waiver or the denial of the request for a review of the written record.<sup>9</sup>

**CONCLUSION**

The Board finds that the Office failed to properly determine appellant's wage-earning capacity as of October 3, 1998 under 5 U.S.C. § 8115. With respect to the overpayment issues, the Board finds that the case is not in posture for decision and will be remanded for appropriate development.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated October 8, 2003 is reversed. The January 22, 2004 and December 9, 2003 decisions are set aside and the case remanded for further action consistent with this decision of the Board.

Issued: September 1, 2004  
Washington, DC

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>9</sup> It is noted that the 30<sup>th</sup> day following the October 8, 2003 decision was November 7, 2003 and appellant's request was postmarked November 8, 2003.