

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

DEBBIE A. TITUS, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Harrisburg, PA, Employer**

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**Docket No. 05-360
Issued: June 3, 2005**

Appearances:

*Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On November 29, 2004 appellant filed a timely appeal from the February 13 and October 18, 2004 merit decisions of the Office of Workers' Compensation Programs, which denied her claim for compensation beginning June 27, 2003. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the Office's denial.

ISSUE

The issue is whether appellant has met her burden of proof to establish that the November 24, 1999 wage-earning capacity determination should be modified.

FACTUAL HISTORY

On January 15, 1998 appellant, then a 41-year-old casual clerk, working a temporary appointment, sustained an injury in the performance of duty lifting and loading bulk mail trays. The Office accepted her claim for cervical strain, right shoulder strain and right rotator cuff tear with surgical repair. She received compensation for temporary total disability.

Appellant began a temporary limited-duty assignment as a modified clerk on August 7, 1999. In a decision dated November 24, 1999, the Office found that this position fairly and reasonably represented her wage-earning capacity, and as the position paid wages that were equal to her date-of-injury position, she had no loss of wage-earning capacity. On April 24, 2000 an Office hearing representative affirmed, noting that the position conformed to appellant's physical restrictions, that the job paid more than her date-of-injury job, that she performed the job for more than 60 days and that there was no evidence her actual wages did not fairly and reasonably represent her wage-earning capacity.

On June 19, 2003 appellant received notice that her current appointment as a casual mail handler would be terminated with the close of business on June 27, 2003: "This action is being taken because of the expiration of your [c]asual [a]ppointment." On June 30, 2003 she filed a claim alleging a recurrence of disability beginning June 27, 2003.

The Office asked the employing establishment to clarify the basis for not offering appellant another term of casual appointment, as the file showed a pattern of reappointment to modified casual positions with a 6-day break between 90-day appointments. A Carol J. Valentine replied that appellant's appointment as a casual mail handler was due to end at the end of June 2003: "We are not allowed to move a casual employee from one craft to another when his appointment is over because of grievances that have been filed by the Unions and we no longer have any casual clerk appointments."

In a decision dated February 13, 2004, the Office denied appellant's claim of recurrence on the grounds that the termination of a temporary appointment is not considered a recurrence of disability. The Office found no reason to modify the November 1999 wage-earning capacity decision.

In a decision issued October 18, 2004, an Office hearing representative affirmed, finding that appellant did not sustain a recurrence and that there was no basis for modifying the previous determination establishing a zero percent loss of wage-earning capacity.

LEGAL PRECEDENT

Section 8115(a) of the Federal Employees' Compensation Act provides that the wage-earning capacity of an employee is determined by actual earnings if actual earnings fairly and reasonably represent the 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 fairly and reasonably represent the injured employee's wage-earning capacity must be accepted as such measure.²

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn

¹ 5 U.S.C. § 8115(a).

² *Don J. Mazurek*, 46 ECAB 447 (1995).

wages. Compensation payments are based on the wage-earning capacity determination, which remains undisturbed until properly modified.³

The Office's procedure manual provides that, if a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss: "In this instance the [claims examiner] will need to evaluate the request according the customary criteria for modifying a formal loss of wage-earning capacity."⁴

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous. The burden of proof is on the party attempting to show modification of the award.⁵

ANALYSIS

The Office properly recognized that the issue in this case was not one of recurrence. The Office had issued a formal loss of wage-earning capacity decision on November 24, 1999, so when appellant requested resumption of compensation for total wage loss beginning June 27, 2003, and not for a limited period of employment-related disability, the issue presented was whether the November 24, 1999 wage-earning capacity determination should be modified.⁶

Appellant has the burden of proof on this issue, but she submitted no evidence of a material change in the nature and extent of her injury-related condition, no evidence that she had been retrained or otherwise vocationally rehabilitated, and no evidence that the November 24, 1999 determination was, in fact, erroneous.⁷ That her temporary appointment expired on June 27, 2003 is no basis for modifying the November 24, 1999 determination of her wage-earning capacity.⁸ Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn and not on actual wages lost.⁹ So it makes no difference whether the temporary

³ *Sharon C. Clement*, 55 ECAB ____ (Docket No. 01-2135, issued May 18, 2004).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

⁵ *Sue A. Sedgwick*, 45 ECAB 211 (1993).

⁶ *Katherine T. Kreger*, 55 ECAB ____ (Docket No. 03-1765, issued August 13, 2004).

⁷ As a practical matter, retraining or vocational rehabilitation to a higher wage-earning capacity will not serve a claimant's interest in obtaining additional compensation.

⁸ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.7.a(5) (May 2003). When the employing establishment has withdrawn a light-duty assignment, which accommodated the claimant's work restrictions, and a formal loss of wage-earning capacity decision has been issued, the decision will remain in place. There is no basis for disturbing a formal loss of wage-earning capacity unless one of the three accepted reasons for modification applies.

⁹ *Roy Mathew Lyon*, 27 ECAB 186 (1975).

appointment expired or the employing establishment simply withdrew limited duty: Appellant continued to have a capacity to earn wages, as the Office determined in its November 24, 1999 decision. Absent a showing that the November 24, 1999 wage-earning capacity determination should be modified, appellant has no disability under the Act¹⁰ and is not entitled to compensation for “wage loss” after June 27, 2003.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that the November 24, 1999 wage-earning capacity determination should be modified.

ORDER

IT IS HEREBY ORDERED THAT the October 18 and February 13, 2004 decisions of the Office of Workers’ Compensation Programs are affirmed.

Issued: June 3, 2005
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁰ “Disability” means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. 20 C.F.R. § 10.5(f) (1999).