

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

R.R., Appellant

and

**U.S. POSTAL SERVICE, COLORADO-
WYOMING PERFORMANCE CLUSTER,
Denver, CO, Employer**

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**Docket No. 11-2063
Issued: June 12, 2012**

Appearances:
Gregory A. Hall, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

ORDER REVERSING CASE

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge

On September 12, 2011 appellant, through his attorney, timely filed an application for review from the March 16, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) concerning his wage-earning capacity. The Board assigned Docket No. 11-2063.

OWCP accepted that on January 25, 1991 appellant, then a 34-year-old letter carrier, sustained herniated L4-5 and L5-S1 discs. The claim was later expanded to include a consequential pain disorder and major depressive disorder. At the time of his January 25, 1991 work injury, appellant was working on a full-time basis for the employing establishment.¹

On July 21, 2004 appellant returned to a light-duty work as a modified letter carrier for the employing establishment, working four hours per day for a total of 20 hours per week. In an August 6, 2010 decision, OWCP reduced appellant's compensation based on its determination that his actual earnings in the modified letter carrier position fairly and reasonably represented

¹ Appellant's regular work schedule was 6:30 a.m. to 3:00 p.m., Tuesday through Saturday.

his wage-earning capacity.² In a March 16, 2011 decision, an OWCP hearing representative affirmed OWCP's August 6, 2010 decision.

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 wages. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.³ Section 8115(a) of FECA provides that, in determining compensation for partial disability, 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.⁴ Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.⁵

OWCP's Procedure Manual provides that the factors to be considered in determining whether the claimant's work fairly and reasonably represented his wage-earning capacity include the kind of appointment and the tour of duty. The manual states that reemployment may not be considered suitable when the actual earning job is part time, unless the claimant was a part-time worker at the time of injury.⁶

OWCP found that appellant's actual earnings in part-time reemployment for 20 hours per week fairly and reasonably represented his wage-earning capacity. Appellant was a full-time worker at the time of his January 25, 1991 work injury. As the above-noted procedure makes clear, the Director of OWCP has determined that, when the tour of duty is not at least equivalent to that of the job held at the time of injury, OWCP will not consider the reemployment suitable for a wage-earning capacity determination. The Board finds, therefore, that OWCP abused its discretion in determining appellant's wage-earning capacity based on a part-time position.⁷ The Board will reverse OWCP's March 16, 2011 decision.

² In a September 22, 2004 decision, OWCP reduced appellant's compensation based on its determination that his actual earnings as a modified letter carrier fairly and reasonably represented his wage-earning capacity. In a June 8, 2006 decision, the Board set aside OWCP's September 22, 2004 decision noting that OWCP had not adequately explained the basis for its wage-earning capacity determination. Docket No. 05-1901 (issued June 8, 2006).

³ See *Katherine T. Kreger*, 55 ECAB 633 (2004); 5 U.S.C. § 8115 (regarding determination of wage-earning capacity).

⁴ See 5 U.S.C. § 8115.

⁵ See 5 U.S.C § 8115(a); *Loni J. Cleveland*, 52 ECAB 171 (2000).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (October 2009).

⁷ *O.V.*, Docket No. 11-98 (issued September 30, 2011); *S.M.*, Docket No. 10-2382 (issued September 28, 2011).

ORDER

IT IS HEREBY ORDERED THAT the March 16, 2011 decision of the Office of Workers' Compensation Programs is reversed.

Issued: June 12, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board