

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TONY G. BROXTON and U.S. POSTAL SERVICE,
POST OFFICE, Pensacola, FL

*Docket No. 98-1751; Submitted on the Record;
Issued February 10, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensations Programs properly determined that the modified letter carrier position, which appellant performed, fairly and reasonably represented his wage-earning capacity.

The Board has duly reviewed the record in the present appeal and finds that the Office properly determined the modified letter carrier position, which appellant performed, fairly and reasonably represented his wage-earning capacity.

Section 8115(a) of the Federal Employees' Compensation Act provides that, in determining compensation for partial disability, "the wage-earning capacity of an employee is determined by his actual earnings if his earnings fairly and reasonably represent his wage-earning capacity."¹ Office procedures indicate that a determination regarding whether actual wages fairly and reasonably represent wage-earning capacity should be made after a claimant has been working in a given position for more than 60 days.²

On August 22, 1995 appellant, then a 36-year-old letter carrier, sustained a back injury when he tripped over a sign and fell while in the performance of his employment duties. The Office accepted appellant's claim for lumbar strain and aggravation of spondylolisthesis and subsequently authorized surgical lumbar fusion and insertion of pedicle screws and rods. Appellant stopped work on July 16, 1996 the day of his surgery and returned to a position as a modified letter carrier, eight hours a day, on October 4, 1996.

¹ 5 U.S.C. § 8115(a).

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

In a decision dated January 30, 1997, the Office noted that appellant had been working successfully for at least 60 days and, therefore, found that the modified letter carrier position, with wages of \$702.90 per week, fairly and reasonably represented appellant's wage-earning capacity. The Office further determined that, as appellant's actual wages as a modified letter carrier exceeded the wages of the job he held when injured, appellant had no loss of wages and was no longer entitled to wage-loss compensation.³

By letter dated February 11, 1997, appellant requested an oral hearing before an Office representative. At the hearing held on January 13, 1998 appellant requested additional compensation for loss of wage-earning capacity, on the grounds that, because of his employment injury and resultant physical limitations, he was restricted from working more than eight hours a day and, therefore, was unable to work overtime.

In a decision dated February 19, 1998, an Office hearing representative denied appellant's request for additional wage-loss compensation for lost overtime and affirmed the Office's January 30, 1997 decision finding that appellant had no loss of wages in his position as a modified letter carrier.

In the present case, the Office, in its January 30, 1997 and February 19, 1998 decisions, based its decision that appellant has no loss of wage-earning capacity on a determination that his actual earnings as a full-time modified letter carrier at the employing establishment beginning October 4, 1996, which earns more than his prior position as a letter carrier, represented his wage-earning capacity. This determination was consistent with section 8115(a) of the Act,⁴ which 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." 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."⁵ In this case, there is no evidence that the modified position constituted part-time, sporadic, seasonal or temporary work.⁶ Moreover, appellant worked in the position for more than 60 days prior to the Office's initial wage-earning capacity determination and the record does not reveal that the position was a makeshift position designed for appellant's particular needs.⁷ The Board, therefore, finds that the Office properly determined, based on appellant's actual earnings as a modified letter carrier, that appellant has no loss of wage-earning capacity as a result of his employment injury.

³ The Office determined that the current pay rate of appellant's date-of-injury job was \$689.40 a week.

⁴ 5 U.S.C. § 8115(a).

⁵ *Floyd A. Gervais*, 40 ECAB 1045, 1048 (1989); *Clyde Price*, 32 ECAB 1932, 1934 (1981).

⁶ *See William D. Emory*, 47 ECAB 365 (1996).

⁷ *Id.*

The Office also correctly rejected appellant's argument that he was entitled to more compensation because he could no longer work overtime, as the Act specifically excludes overtime pay as a factor in calculating the pay rate for compensation purposes.⁸

The decision of the Office of Workers' Compensation Programs dated February 19, 1998 is hereby affirmed.

Dated, Washington, D.C.
February 10, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member

⁸ 5 U.S.C. § 8114(e)(1).