

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

A.J., Appellant)
)
and)
) **Docket No. 10-619**
) **Issued: June 29, 2010**
U.S. POSTAL SERVICE, POST OFFICE,)
Seattle, WA, Employer)
_____)

Appearances:
John Eiler Goodwin, Esq., for the appellant
Jaclyn D. Goldstein-Spitz, Esq., for the Director

Oral Argument April 8, 2010

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 4, 2010 appellant, by counsel, filed a timely appeal of a September 29, 2009 merit decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly denied modification of the September 26, 2003 wage-earning capacity determination.

FACTUAL HISTORY

This is appellant's second appeal to the Board. Previously, she appealed the Office's July 11, 2007 decision, which affirmed a November 6, 2006 decision finding that she failed to meet her burden of proof to modify the Office's September 26, 2003 loss of wage-earning capacity (LWEC) determination. In a December 3, 2008 order, the Board remanded the case to the Office for further development as to whether a modification of the LWEC was warranted by

a consequential emotional condition and whether the limited-duty position was makeshift, thereby rendering the original LWEC determination erroneous.¹

On April 2, 1995 appellant, then a 26-year-old clerk, filed an occupational disease claim alleging that she developed a shoulder condition as a result of repetitive employment activity. Her claim was accepted for bilateral shoulder tendinitis and pain disorder.² Appellant stopped work on September 30, 2001 to begin a pain management program. She was referred to the Office's vocational rehabilitation program to develop placement with her previous employer. Appellant was treated by Dr. Karl L. Singer, a Board-certified orthopedic surgeon, who on October 19, 2001 released her to return to work with restrictions, including a raised work surface and a "warm" working environment.³

On January 16, 2002 the employing establishment offered appellant a temporary limited-duty job assignment. Duties included working "short paid" international mail, letters, parcels and express and working "target mail," including preparation and dispatch work. Lifting was limited to 20 pounds and appellant was advised that she was required to work within her restrictions. She did not accept the offer. In a September 14, 2002 second opinion report, Dr. Patrick N. Bays, a Board-certified orthopedic surgeon, opined that appellant was capable of performing the duties described in the proposed January 16, 2002 temporary limited-duty job assignment but was not able to perform her date-of-injury job. He stated that restrictions regarding climate and shift times were not medically necessary.

On October 21, 2002 the employing establishment again offered appellant a temporary limited-duty job assignment. Duties included working "short paid international mail," letters, parcels and express and working "target mail," including preparation and dispatch. Lifting was limited to 20 pounds and appellant was advised that she was required to work within her restrictions. On November 2, 2002 the Office informed her that it found the limited-duty position suitable to her work capabilities.

In a letter dated November 18, 2002, appellant's counsel contended that the October 21, 2002 temporary limited-duty job offer was not suitable. The offer did not contain a detailed description of the duties to be performed; did not contain pay rate information required by Office procedures; did not contain any limitation on reaching; and did not contain restrictions on pushing or pulling. In a December 10, 2002 letter, the Office informed appellant's representative that it had notified the employing establishment that the October 21, 2002 offer was not sufficient in detail of the assigned tasks to ensure that limitations would be accommodated. It stated that it would "continue to work with the employer to develop a detailed temporary limited[-]duty assignment that will accommodate the restrictions set forth by the second opinion examiner."

¹ Docket No. 08-1940 (issued December 3, 2008).

² Appellant's February 3, 2004 emotional condition claim (File No. xxxxxx936) was initially denied. On April 18, 2007 the Office accepted that her pain disorder was causally related to her accepted bilateral shoulder tendinitis. These claims were combined, with File No. xxxxxx996 serving as the master file. Other subsidiary claims include File Nos. xxxxxx959, xxxxxx187 and xxxxxx902.

³ Dr. Singer stated that appellant's work environment should be between 68 and 72 degrees.

The record contains a February 3, 2003 job analysis performed by Jerie Longacre, a vocational rehabilitation counselor who described the essential functions of the limited-duty clerk position as sorting and processing mail, particularly the mail that needs additional postage while sitting at a desk; determining postage needed on packages or envelopes manually or by operating a postage calculating machine and scale; sticking labels on the mail showing postage, caution and special directions; and transporting mail within the employing establishment. At no time was the position to include “casing” tasks, which involves manually sorting mail into slots. The shift hours were from 3:00 p.m. to 11:30 p.m., with Saturdays and Sundays off. Physical demands included sitting for 80 percent of the shift and standing or walking for 20 percent of the shift; lifting or carrying from one to five pounds; no kneeling; no driving; bending or stooping one to eight times per hour; no overhead reaching; no twisting of the torso; no repetitive arm motion; occasional repetitive hand motion to manipulate keyboard, stamp mail, retrieve labels; constant use of hands to open mail, etc.; frequent fingering; frequent flexing of head forward to handle mail; and a maximum of 2 pounds of pressure to push or pull empty carts, up to 10 pounds of push/pull with a full hamper. If appellant needed to self-restrict and decided she could not push a hamper, she was to request assistance from her supervisor. The temperature was to remain “comfortable,” with the use of space heaters, if needed.

On February 10, 2003 the employing establishment offered another limited-duty assignment to appellant. Duties included sorting and processing mail requiring additional postage; determining postage needed; applying appropriate labels to mail; and transporting mail to other areas. The offer referenced an attached job analysis. Medical restrictions included lifting, carrying, pushing and pulling less than 20 pounds; no overhead reaching; no prolonged cervical flexion; and no graveyard shift. On February 20, 2003 the Office informed appellant that the February 10, 2003 job offer was suitable.

In a March 11, 2003 letter, appellant’s representative contended that the February 3, 2003 job analysis should be included as part of the February 10, 2003 job offer. He also requested that additional restrictions be included, namely no reaching above the shoulder and no graveyard shift.

In a letter dated April 8, 2003, the employing establishment offered appellant a limited-duty assignment, which conformed with March 18, 2003 restrictions provided by an impartial medical examiner, Dr. Kenneth Briggs, a Board-certified orthopedic surgeon.⁴ The title of the position offered was “limited[-]duty assignment.” Duties included: sorting and processing mail requiring additional postage; determining additional postage needed; applying appropriate labels to mail; and transporting mail to other areas. Medical restrictions included: lifting, carrying, pulling and pushing less than 20 pounds; no reaching above the shoulders; no prolonged cervical flexion; and no graveyard shift. The letter stated that the employing establishment would abide by the terms of the February 3, 2003 job analysis performed by appellant’s vocational rehabilitation counselor, Ms. Longacre.

⁴ The Office referred appellant to Dr. Briggs in order to resolve a conflict in medical opinion as to whether it was medically necessary for her to work a day shift. Dr. Briggs found no objective evidence to preclude her working a 3.00 p.m. to 11.30 p.m. shift, provided that she was restricted from lifting more than 20 pounds or working in an environment that was not well heated.

On May 7, 2003 appellant accepted the limited-duty assignment, based upon the employer's agreement to abide by the terms of the February 3, 2003 job analysis. She returned to work on May 14, 2003.

On September 26, 2003 more than 60 days after appellant began working in the modified position, the Office issued a formal wage-earning capacity decision. It found that the wages she actually earned in the modified position fairly and reasonably represented her wage-earning capacity. Appellant worked in her limited-duty job until January 5, 2006, when the employing establishment informed her that there was no productive work available for her. On January 19, 2006 she filed a claim for a recurrence of disability based on the employing establishment's withdrawal of her limited-duty position. Appellant alleged that the employing establishment was unable to accommodate her medical condition.

The record contains a memorandum of a November 2, 2006 telephone conversation between Carolyn Schwab, of the Office, and Ida Tunch, of the employing establishment. Ms. Tunch stated that appellant had continued to work in the same clerk job from September 26, 2003 until she was terminated in January 2006. She confirmed that the rated position (clerk) was permanent and that when they removed her, they used the same personnel procedures they would use for any other permanent employee.

In a November 6, 2006 decision, the Office found that appellant had failed to meet her burden of proof to modify the September 26, 2003 LWEC determination. By decision dated July 11, 2007, an Office hearing representative affirmed the November 6, 2006 decision. In a decision dated December 3, 2008, the Board remanded the case for further development on the basis that the Office's July 11, 2007 decision did not consider whether appellant's consequential emotional condition resulted in a material change in the nature and extent of her employment-related condition thereby warranting a modification of the September 26, 2003 LWEC determination. The Board also instructed the Office to consider appellant's contention that the position of a limited-duty distribution clerk was makeshift.

In a March 4, 2009 decision, the Office denied modification of the September 26, 2003 LWEC determination, finding that the limited-duty position was not makeshift, as it "was not designed for the claimant's particular needs" and the duties described were considered "normal duties performed by a clerk." It also denied her claim for recurrence of disability for the period January 5, 2006 through March 5, 2007. The Office noted, however, that a second opinion examiner had determined that as of March 6, 2007 appellant was disabled from work and that her pain disorder was a contributing factor.

At a July 15, 2009 oral hearing, appellant testified that she spent most of her day doing nonproductive work, such as playing cards, reading novels or helping with union grievances. She stated that she spent six to seven hours a day on union grievances.

By decision dated September 29, 2009, an Office hearing representative found that the March 4, 2009 decision should be affirmed in part and vacated and remanded in part. He found that the light-duty position on which the September 26, 2003 LWEC determination was based, fairly and reasonably represented appellant's wage-earning capacity and was not makeshift in

nature.⁵ The hearing representative found that the case was not in posture for a decision as to whether appellant was entitled to compensation for total disability from January 5, 2006 through March 5, 2007 and remanded the case for further development as to whether she sustained a consequential injury or a worsening of her condition such that she was disabled from performing the duties of the modified position.

Appellant disagreed with the hearing representative's decision and sought review by the Board. On appeal, counsel for appellant contended that her limited-duty distribution clerk position was makeshift and that the Office's September 29, 2009 decision was erroneously based on her failure to provide witness statements to corroborate her undisputed testimony regarding her nonproductive work activities. He asserts that her undisputed testimony regarding her nonproductive work activities was sufficient to establish the makeshift nature of the job. Counsel also contends that the fact that the employing establishment terminated appellant's light-duty assignment on January 5, 2006 is *prima facie* evidence that the position was temporary and that a temporary assignment cannot form the basis of an LWEC determination.

The Director filed a Motion to Remand and Cancel Oral Argument, contending that the case was not in posture for a decision. The Director argued that the relevant issue was modification of the 2003 LWEC, not whether there was a recurrence of disability during the specified period and that the entire case should be analyzed using only the criteria for determining whether a modification is warranted. In an April 1, 2010 order, the Board denied the Director's motion.⁶

At the April 8, 2010 oral argument and in subsequent pleadings, appellant's counsel reiterated arguments previously made. He contended that the makeshift nature of the limited-duty assignment upon which the LWEC decision was based was clearly established by the undisputed fact that appellant did not perform the duties of a clerk.⁷ Therefore, the September 26, 2003 LWEC decision was erroneous and should be modified. Counsel for the Director contends that the September 29, 2009 decision erroneously bifurcated the issues, thereby giving the Office and the Board simultaneous jurisdiction over the case. To the extent the Board has jurisdiction, counsel for the Director contends that the limited-duty clerk position was not makeshift, as it required the performance of many regular clerk duties.

LEGAL PRECEDENT

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

⁵ The hearing representative noted that appellant had not provided any evidence, such as witness statements, to support her claim that she did not perform the duties outlined in the limited-duty job offer.

⁶ Docket No. 10-619 (issued April 1, 2010).

⁷ Counsel contends that the hearing representative's determination was based solely on the fact that there were no witness statements corroborating appellant's testimony that she did not routinely perform the duties of the assigned position. *Citing Lillard Watts*,⁷ he argues that there is no need for witness statements when the sworn testimony of the injured worker is not disputed.

wages.⁸ 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 her actual earnings if her actual earnings fairly and reasonably represent her wage-earning capacity.⁹ Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.¹⁰

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.¹¹ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.¹²

The Office's procedure manual provides that factors to be considered in determining whether the claimant's work fairly and reasonably represents her wage-earning capacity include the kind of appointment, that is, whether the position is temporary, seasonal or permanent and the tour of duty, that is, whether it is part time or full time.¹³ Further, a makeshift¹⁴ or odd-lot position designed for a claimant's particular needs will not be considered suitable.¹⁵

ANALYSIS

In its September 29, 2009 decision, an Office hearing representative affirmed the March 4, 2009 decision denying modification of the September 26, 2003 LWEC determination prior to March 6, 2007.¹⁶ He found that the duties of the modified position that was the subject of the original LWEC fairly and reasonably represented appellant's wage-earning capacity.

⁸ See 5 U.S.C. § 8115 (determination of wage-earning capacity).

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

¹⁰ *Sharon C. Clement*, 55 ECAB 552 (2004).

¹¹ *T.M.*, 60 ECAB ____ (Docket No. 08-975, issued February 6, 2009); *Tamra McCauley*, 51 ECAB 375, 377 (2000).

¹² *Id.*

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (July 1997).

¹⁴ A makeshift position is one that is specifically tailored to an employee's particular needs and generally lacks a position description with specific duties, physical requirements and work schedule. See *William D. Emory*, 47 ECAB 365 (1996); *James D. Champlain*, 44 ECAB 438 (1993).

¹⁵ See, e.g., *Michael A. Wittman*, 43 ECAB 800 (1992).

¹⁶ The Board notes that the hearing representative found that the criteria for modification of a wage-earning capacity determination had been met as of March 6, 2007. He also found that the case was not in posture for a decision as to whether appellant was entitled to compensation for total disability from January 5, 2006 through March 5, 2007 and remanded the case for further development of this issue. As no final decision has been issued with regard to this matter, the Board does not have jurisdiction over this issue. See 20 C.F.R. § 501.2(c) (the Board has jurisdiction to consider and decide appeals from final decisions; there shall be no appeal with respect to any interlocutory matter disposed of during the pendency of the case).

The Board finds that the September 26, 2003 wage-earning capacity determination was erroneous, as the limited-duty assignment upon which it was based was makeshift in nature. Therefore, the September 29, 2009 decision of the Office hearing representative will be reversed.

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.¹⁷ Appellant does not contend that modification of the September 26, 2003 LWEC determination was warranted prior to her termination on January 6, 2006 due to a material change in the nature and extent of the injury-related condition, nor does the evidence establish that she has been retrained or otherwise vocationally rehabilitated. Appellant contends, rather, that the original determination was, in fact, erroneous. She contends that her actual earnings in the position upon which the original LWEC was based did not fairly and reasonably represent her wage-earning capacity, as the assignment itself was make-shift in nature. The Board agrees.

The record reflects the Office's attempts to work with the employing establishment to "develop a detailed temporary limited[-]duty assignment" that would accommodate appellant's restrictions. On April 8, 2003 the employing establishment offered her a position entitled "limited[-]duty assignment." The vocational rehabilitation counselor's February 3, 2003 job analysis was incorporated into the terms of the offer. Essential functions of the limited-duty clerk position were limited to sorting and processing mail, particularly the mail that needs additional postage while sitting at a desk; determining postage needed on packages or envelopes manually or by operating a postage calculating machine and scale; sticking labels on the mail showing postage, caution and special directions; and transporting mail within the employing establishment. At no time was the position to include "casing" tasks, which involves manually sorting mail into slots. The shift hours were from 3:00 p.m. to 11:30 p.m., with Saturdays and Sundays off. Physical demands included sitting for 80 percent of the shift and standing or walking for 20 percent of the shift; lifting or carrying from one to five pounds; no kneeling; no driving; bending or stooping one to eight times per hour; no overhead reaching; no twisting of the torso; no repetitive arm motion. The position required occasional repetitive hand motion to manipulate keyboard, stamp mail, retrieve labels; constant use of hands to open mail, etc.; frequent fingering; frequent flexing of head forward to handle mail; and a maximum of 2 pounds of pressure to push or pull empty carts, up to 10 pounds of push/pull with a full hamper. If appellant needed to self-restrict and decided she could not push a hamper, she was to request assistance from her supervisor. The temperature was to remain "comfortable," with the use of space heaters, if needed.

The Board finds that the duties outlined in the "limited[-]duty assignment" were makeshift in nature and were designed to meet appellant's particular needs. The fact that the position did not have an official title or a formal position description suggests, and the employing establishment did not dispute, that the job was created specifically for appellant.¹⁸ Moreover, the strict limitations, such as lifting no more than five pounds and performing no casing duties,

¹⁷ *Supra* note 11.

¹⁸ There is no evidence establishing that a Form SF-50 was ever issued regarding the limited-duty position.

precluded the performance of many regular clerk duties. Although appellant worked in the “limited[-]duty assignment” for approximately three years at the employing establishment, there is no evidence that she would have been able to secure a position in the community at large that required such limited duties. In a similar case, this Board found a limited-duty position that did not require any casing of mail and restricted the employee from lifting more than five pounds, was an adaptation for the employee’s particular needs, rather than an accurate reflection of requirements of a “clerk” position and therefore did not fairly represent her wage-earning capacity.¹⁹ In the instant case, the “limited[-]duty assignment” was tailored to appellant’s needs, as reflected by the provision that if she needed to “self-restrict” and decided that she could not push a hamper, she was to request assistance from her supervisor.²⁰

The evidence also supports appellant’s argument that the “limited[-]duty assignment” was temporary in nature. On January 16 and October 21, 2002 the employing establishment offered appellant temporary limited-duty job assignments. On December 10, 2002 the Office informed appellant’s representative that it would “continue to work with the employer to develop a detailed temporary limited[-]duty assignment that will accommodate appellant’s restrictions.” The Board notes that while the April 8, 2003 “limited[-]duty assignment” was not specifically identified as temporary, it also was not identified as permanent. Moreover, the fact that the employing establishment eliminated the “limited[-]duty assignment” on January 5, 2006 because it could no longer accommodate appellant’s restrictions is further evidence that the assignment was temporary.

Appellant alleged that she did not perform most of the duties required by the “limited duty assignment.” Ms. Tunch stated that appellant had continued to work in the same clerk job from September 26, 2003 until she was terminated in January 2006; she did not, however, describe the duties performed or state how she was able to monitor the performance of appellant’s duties. Appellant’s uncontroverted assertion that she did not perform any meaningful tasks further supports her claim that the position was makeshift.

The Director contends that the job was not makeshift, as the duties outlined in the job description were within the parameters of a clerical position and included regular clerical duties that were not designed solely for appellant, such as sorting and processing mail, determining postage and applying labels. He also argues that the restriction against casing mail did not render the position makeshift. For reasons stated, the Board finds that the duties described in the “limited[-]duty assignment” were not shown to be the duties of a regular clerk position and the position was makeshift.

The Director argues that, since there exists a standing LWEC decision, all issues relating to the 2003 decision should be evaluated under the criteria for modification, including the alleged period of disability from January 5, 2006 to March 5, 2007, the alleged makeshift nature of the job and the Office’s improper bifurcation of the issues. He argues that the Office and the

¹⁹ See *Janice Geiger*, Docket No. 00-821 (issued August 17, 2001).

²⁰ See *Elizabeth E. Campbell*, 37 ECAB 224 (1985) (the position was construed as makeshift, as it allowed the use of a partner to lift cartons and was eliminated when the employee was laid off). Cf. *Selden H. Swartz*, 55 ECAB 272 (2004) (where the Board found a position fairly and reasonably represented claimant’s wage-earning capacity partly due to the fact that she required no special assistance to perform the job).

Board have simultaneous jurisdiction over the issue of modification and that different conclusions would create confusion and conflict. The Director asserts that the case is not in posture for a decision and should be remanded for further development.

The Board and the Office do not have simultaneous jurisdiction over the issues in this case.²¹ Following the docketing of an appeal before the Board, the Office does not retain jurisdiction to render a further decision regarding the issue on appeal until after the Board relinquishes jurisdiction.²² Appellant appealed only that portion of the hearing representative's September 29, 2009 decision that was ripe for appeal, namely whether the original LWEC determination fairly and reasonably represented her wage-earning capacity. Moreover, the Board's determination that the original September 26, 2003 LWEC decision was erroneous renders the remaining issues moot. The Board's exercise of jurisdiction in this case is proper and in the interest of judicial economy.

The Board finds under the facts of this case that the "limited[-]duty assignment" upon which the September 26, 2003 LWEC determination was made was makeshift in nature. It was admittedly created to accommodate appellant's restrictions and was eliminated when the employing establishment could no longer do so. The restricted duties of the untitled position do not constitute a *bona fide* job that would be available to appellant in the community at large. Therefore, the position does not fairly and reasonably represent her wage-earning capacity, and the original LWEC determination was erroneous. Accordingly, the September 29, 2009 decision of the Office hearing representative will be reversed.

CONCLUSION

The Board finds that the original September 26, 2003 wage-earning capacity determination was erroneous, as the limited-duty assignment upon which it was based was makeshift in nature. Accordingly, the Board finds that the Office improperly denied modification of the September 26, 2003 wage-earning capacity determination.

²¹ See *supra* note 16.

²² See 20 C.F.R. § 501.2(c)(3).

ORDER

IT IS HEREBY ORDERED THAT the September 29, 2009 decision of the Office of Workers' Compensation Programs is reversed.

Issued: June 29, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board