

² The Board notes that OWCP received new evidence following the February 9, 2012 decision. Appellant has also submitted new evidence with her appeal. However, the Board may only review evidence that was in the record at the time OWCP issued its final decision. See 20 C.F.R. § 501.2(c)(1); *M.B.*, Docket No. 09-176 (issued September 23, 2009); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

On appeal, appellant contends that she is permanently and totally disabled from working in any capacity.

FACTUAL HISTORY

This case has previously been before the Board. On March 15, 2011 the Board set aside a November 4, 2009 nonmerit OWCP decision and remanded the case for consideration of the merits.³ In a November 4, 2009 decision, OWCP denied appellant's request for reconsideration of an October 18, 2007 decision terminating her wage-loss benefits pursuant 5 U.S.C. § 8106(c) on the grounds that she abandoned suitable work. The Board found that she raised a relevant legal argument not previously considered. The facts as set forth in the Board's decision are incorporated by reference.⁴

On remand, OWCP requested that appellant provide information regarding her private sector employment with RENEW. It noted that her rationale for abandoning/refusing the job offer from the employing establishment was that RENEW paid her at a higher salary beginning September 5, 2007.

In response to OWCP's request for information, appellant stated that she began employment with RENEW on September 5, 2007 at an hourly rate of \$12.00. She left the position on March 12, 2008 because of her back condition and that she had not worked in any capacity since July 15, 2009.

By decision dated June 8, 2011, OWCP issued a loss of wage-earning capacity determination based on appellant's actual wages. It found that her actual earnings exceeded the wages in her date-of-injury position and reduced her wage-loss compensation to zero.

On July 14, 2011 OWCP received appellant's undated reconsideration request.

By decision dated February 9, 2012, OWCP denied modification of the June 8, 2011 loss of wage-earning capacity decision.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.⁵ An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-

³ Docket No. 10-758 (issued March 15, 2011).

⁴ On January 30, 2007 appellant, then a 34-year-old temporary nursing assistant, filed an occupational disease claim alleging that she sustained an L5-S1 herniated disc as a result of employment duties. OWCP accepted the claim for aggravated L5-S1 herniated disc, aggravation of lumbar herniated disc and urinary incontinence and authorized the February 6, 2007 surgical intervention. The February 6, 2007 surgery was for a complete laminectomy, facetectomy and foraminotomy bilaterally at L5-S1 with instrumentation.

⁵ *H.N.*, Docket No. 09-1628 (issued August 19, 2010); *T.F.*, 58 ECAB 128 (2006); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

earning capacity.⁶ Under section 8115(a) of FECA, wage-earning capacity is determined by the actual wages received by an employee if such earnings fairly and reasonably represent her wage-earning capacity.⁷ 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, will be accepted as such measure.⁸

When an employee cannot return to the date-of-injury job because of disability due to work-related injury or disease, but does return to alternative employment with an actual wage loss, OWCP must determine whether the earnings in the alternative employment fairly and reasonably represent the employee's wage-earning capacity.⁹ The Board has held that reemployment may not be suitable if the job is part time, seasonal or of a temporary nature.¹⁰ After the employee has worked for 60 days, OWCP will determine whether his or her actual earnings represent his or her wage-earning capacity. In doing so, OWCP will apply the *Shadrick* formula in determining the claimant's monetary entitlement.¹¹

The Federal (FECA) Procedure Manual provides that OWCP may make a retroactive wage-earning capacity determination if an employee has worked in the position for at least 60 days, the position fairly and reasonably represented his or her wage-earning capacity and the work stoppage did not occur because of any change in the injury-related condition affecting the ability to work.¹²

ANALYSIS

The Board finds that OWCP did not properly determine appellant's loss of wage-earning capacity. When OWCP learns that an employee has returned to alternative work more than 60 days after the fact, the claims examiner may consider a retroactive loss of wage-earning determination. Such a determination is generally appropriate where a recipient of compensation held private employment and had substantial earnings, which were not reported to OWCP or were otherwise not used in adjusting entitlement.¹³

⁶ 20 C.F.R. §§ 10.402, 10.403.

⁷ *M.A.*, 59 ECAB 624 (2008); *Sherman Preston*, 56 ECAB 607 (2005). See 5 U.S.C. § 8115(a).

⁸ *S.B.*, 59 ECAB 482 (2008); *Lottie M. Williams*, 56 ECAB 302 (2005).

⁹ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (October 2009).

¹⁰ *Id.* See *Connie L. Potratz-Watson*, 56 ECAB 316 (2005).

¹¹ *Id.* See *Albert C. Shadrick*, 5 ECAB 376 (1953). This has been codified by regulation at 20 C.F.R. § 10.403.

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(e) (October 2009)

¹³ *Id.*

The June 8, 2011 OWCP decision constitutes a retroactive wage-earning capacity determination. Appellant began work with RENEW on September 5, 2007 and worked until March 12, 2008. She informed OWCP of this employment in an October 1, 2009 letter requesting reconsideration of the termination of her compensation benefits pursuant to 5 U.S.C. § 8106(c) for abandoning suitable work. Appellant informed OWCP that her job at RENEW ended on March 12, 2008 and that she has not worked in any capacity since July 15, 2009. OWCP reduced her compensation in its June 8, 2011 decision finding that her actual earnings with RENEW represented her wage-earning capacity as she held the position for more than 60 days. It found only that the position was suitable because appellant had demonstrated her ability to perform the duties for at least two months. OWCP did not address how such employment fairly or reasonably represented her wage-earning capacity or whether her subsequent work stoppage on March 12, 2008 was due to her injury-related condition, as required by its procedures.¹⁴ It did not address the medical evidence submitted by appellant. There was no consideration of the October 18, 2007 termination decision on her claim for monetary compensation. Accordingly, OWCP did not fully consider all criteria for making a retroactive wage-earning capacity determination.

CONCLUSION

The Board finds that OWCP improperly determined appellant's loss of wage-earning capacity. OWCP did not follow its procedures in making a retroactive loss of wage-earning capacity decision.

¹⁴ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 9, 2012 is reversed.

Issued: December 20, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board