



OWCP accepted the claim for aggravation of bilateral pes planus deformity. It paid him compensation benefits for total disability.

On September 18, 2003 appellant accepted a modified, rehabilitation position as a carrier technician. The job was tailored to his physical restrictions and allowed him to work for eight hours per day, with route walking not exceeding two hours per shift, standing not exceeding two consecutive hours, with a 15-minute break between periods of standing. The offer stated that "If you accept this job offer, the effective date will be October 4, 2003."

By decision dated November 26, 2003, OWCP issued a formal wage-earning capacity decision. It found that appellant had worked more than 60 days in the modified position and that the actual wages he earned in the modified position of carrier technician, \$829.46 per week, fairly and reasonably represented his wage-earning capacity.

Appellant worked at his modified job until June 1, 2010. By letter dated June 17, 2010, OWCP advised him that it had received a Form CA-7 claim for wage-loss compensation from him, claiming compensation as of June 1, 2010 under claim numbers xxxxxx915 and xxxxxx950.<sup>2</sup> It stated that the available evidence showed that the employing establishment had withdrawn specific hours of appellant's limited-duty assignment effective June 1, 2010, as part of its National Reassessment Process. OWCP informed him that, if he believed modification of the November 26, 2003 loss of wage-earning capacity (LWEC) determination was warranted, he needed to submit factual evidence, legal argument or medical evidence in support of his claim.

Appellant submitted a March 17, 2003 surgical report, which indicated that he underwent a first metacarpal fusion procedure of the right foot. Dr. Snehal C. Dalal, Board-certified in orthopedic surgery, performed the procedure to ameliorate first metatarsophalangeal degenerative arthritis of the right foot. He also submitted several progress reports from his treating physician, Daniel S. Toutant, a specialist in podiatry, from 2009 and 2010.

By decision dated July 30, 2010, OWCP denied modification of its November 26, 2003 LWEC decision. It denied appellant's claims for wage-loss compensation, finding that he failed to submit evidence sufficient to establish one of the three criteria required to modify the LWEC decision.

By letter dated January 26, 2011, appellant, through his representative, requested a review of the written record.

By decision dated March 10, 2011, an OWCP hearing representative affirmed the July 23, 2009 LWEC decision. He found that appellant had failed to establish that the November 26, 2003 wage-earning capacity warranted modification. The hearing representative also denied the claim for compensation for wage loss as of June 1, 2010 and continuing.

---

<sup>2</sup> The instant record does not contain a copy of this claim.

## 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 wages. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.<sup>3</sup> 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.<sup>4</sup> Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.<sup>5</sup>

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.<sup>6</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>7</sup>

OWCP's procedure manual provides that factors to be considered in determining whether the claimant's work fairly and reasonably represents his 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.<sup>8</sup> OWCP procedures provide that a determination regarding whether actual earnings fairly and reasonably represent wage-earning capacity should be made after an employee has been working in a given position for more than 60 days.<sup>9</sup>

## ANALYSIS

In its June 17, 2010 and March 10, 2011 decisions, OWCP denied modification of the November 26, 2003 LWEC determination. It found that the modified carrier technician position that was the subject of the original LWEC fairly and reasonably represented appellant's wage-earning capacity. 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. Appellant's representative does not contend that modification of the November 26, 2003 LWEC

---

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

<sup>4</sup> See 5 U.S.C. § 8115 (determination of wage-earning capacity).

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

<sup>6</sup> *Sharon C. Clement*, 55 ECAB 552 (2004).

<sup>7</sup> *T.M.*, Docket No. 08-975 (issued February 6, 2009); *Tamra McCauley*, 51 ECAB 375, 377 (2000).

<sup>8</sup> *Id.*

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (July 1997).

determination was warranted due to a material change in the nature and extent of the injury-related condition, nor does the evidence establish that he has been retrained or otherwise vocationally rehabilitated. He contends, rather, that the original determination was, in fact, erroneous.

The Board finds that the wage-earning capacity determination was erroneous when issued.

Appellant had been employed in a full-time position as a letter carrier at the time he became totally disabled due to his accepted aggravation of bilateral pes planus deformity condition. He assumed the modified carrier technician job which was the basis of the November 26, 2003 LWEC when he returned to work, effective October 4, 2003. The Board finds that the November 26, 2003 wage-earning capacity determination was in error. OWCP failed to follow its procedures in determining that appellant had worked in the position for at least 60 days. The record establishes that he accepted the modified carrier technician job on September 18, 2003; the job offer, however, stated that the position did not become effective until October 4, 2003. Thus the evidence of record supports that appellant did not work in the position offered by the employing establishment for more than 60 days prior to the November 26, 2003 OWCP wage-earning capacity determination. The Board, therefore, finds that OWCP failed to follow its established procedures as it did not show that appellant performed the modified carrier technician position consistently for 60 days.<sup>10</sup> Thus, OWCP failed to meet its burden of proof. Accordingly, the Board finds that the October 4, 2003 position did not fairly and reasonably represent appellant's wage-earning capacity.

### CONCLUSION

The Board finds that appellant has met his burden of proof to modify the November 26, 2003 wage-earning capacity decision on the grounds that the original decision was in error, as he had not worked in the October 4, 2003 position for 60 days before OWCP issued the November 26, 2003 wage-earning capacity decision. Accordingly, the Board finds that OWCP improperly denied modification of the November 26, 2003 wage-earning capacity determination.

---

<sup>10</sup> See *Amalia Stys*, Docket No. 96-521 (issued June 9, 1998) (where the Board found that, as the claimant was terminated after 56 days of employment, she did not have 60 days of actual wages from which OWCP could derive a fair and reasonable representation of her wage-earning capacity).

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 10, 2011 decision of the Office of Workers' Compensation Programs is reversed.

Issued: January 19, 2012  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

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

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