

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

V.D., Appellant)

and)

**DEPARTMENT OF THE NAVY, HUMAN
RESOURCES SERVICE CENTER --
SOUTHWEST, San Diego, CA, Employer**)

**Docket No. 12-1034
Issued: October 9, 2012**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 17, 2012 appellant, through her attorney, timely appealed the February 29, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) which determined her loss of wage-earning capacity. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUE

The issue is whether OWCP properly determined that appellant's part-time, limited-duty assignment as a clerk fairly and reasonably represented her wage-earning capacity as of May 9, 2011.

¹ 5 U.S.C. §§ 8101-8193.

² The record includes evidence received after the February 29, 2012 decision. As this evidence was not part of the record when the Branch of Hearings and Review issued the February 29, 2012 decision, the Board is precluded from considering it for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

FACTUAL HISTORY

On September 5, 2000 appellant, then a 47-year-old full-time administrative support assistant, injured her back lifting boxes in the performance of duty. OWCP accepted her claim for herniated lumbosacral disc. Between March 2002 and June 2006 appellant underwent three OWCP-approved lumbar surgical procedures. OWCP subsequently accepted postlaminectomy syndrome and lumbosacral intervertebral disc disorder/spondylosis. Appellant received wage-loss compensation for temporary total disability.³

On May 9, 2011 appellant returned to work in a part-time, limited-duty capacity as a clerk.⁴ She worked 4 hours per day, 20 hours per week, with weekly wages of \$260.00.⁵

In a September 13, 2011 decision, OWCP determined that appellant's current weekly wages as a part-time clerk fairly and reasonably represented her wage-earning capacity as of May 9, 2011. Appellant demonstrated her ability to perform the part-time clerk duties for at least two months and it was considered suitable to her partially disabled condition. Appellant currently earned \$260.00 a week as of May 9, 2011. Had she been able to continue performing her prior full-time position, appellant would have currently earned \$742.49 per week. The difference represented a 65 percent loss in wage-earning capacity.

Appellant requested a hearing which was held on December 14, 2011. She testified that the employing establishment sent her home on October 3, 2011 and placed her on leave without pay status. Appellant also noted that the clerk position required lifting in excess of 25 pounds. The employing establishment disputed her claim that she was required to lift 25 pounds or more.

By decision dated February 29, 2012, the hearing representative affirmed the September 13, 2011 LWEC determination.

LEGAL PRECEDENT

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-earning capacity.⁶ An employee's actual earnings generally best reflect his or her wage-earning capacity.⁷ Absent

³ The employing establishment discharged appellant effective June 10, 2001 because of her medical inability to perform essential job functions.

⁴ OWCP had previously advised appellant that it considered the clerk position suitable because it was in accordance with the January 17, 2011 limitations recommended by her treating physician, Dr. Jean-Jacques Abitbol, a Board-certified orthopedic surgeon, who found that appellant was able to work 4 hours per day with a 25-pound, 30-minute lifting restriction. Appellant could also sit for 4 hours and walk and stand for 30 minutes each. Dr. Abitbol precluded all twisting and he limited appellant to 10 minutes of kneeling and climbing.

⁵ On June 2, 2011 OWCP advised appellant that it was reducing her wage-loss compensation based on her actual earnings as a part-time clerk effective May 9, 2011.

⁶ 5 U.S.C. § 8115(a); 20 C.F.R. §§ 10.402, 10.403; *see Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

⁷ *Hayden C. Ross*, 55 ECAB 455, 460 (2004).

evidence that actual earnings do not fairly and reasonably represent the employee's wage-earning capacity, such earnings must be accepted as representative of the individual's wage-earning capacity.⁸ Compensation payments are based on the wage-earning capacity determination, and it remains undisturbed until properly modified.⁹

Factors to be considered in determining if a position fairly and reasonably represents the injured employee's wage-earning capacity include: (1) whether the kind of appointment and tour of duty are at least equivalent to those of the date-of-injury job; (2) whether the job is part-time (unless the claimant was a part-time worker at the time of injury) or sporadic in nature; (3) whether the job is seasonal in an area where year-round employment is available; and (4) whether the job is temporary where the claimant's previous job was permanent.¹⁰

Assuming the position is both vocationally and medically suitable and conforms to the above-noted criteria, the position will generally be deemed to represent the employee's wage-earning capacity after he or she has successfully performed the required duties for at least 60 days.¹¹

ANALYSIS

The record establishes that prior to her September 5, 2000 accepted employment injury, appellant worked full time as an administrative support assistant. The September 13, 2011 wage-earning capacity determination was based on part-time employment. The Board finds that OWCP failed to adhere to its procedure manual as it erroneously relied on appellant's part-time reemployment as a basis for finding that her earnings beginning May 9, 2011 fairly and reasonably represented her wage-earning capacity. The procedure manual provides that the reemployment may not be considered suitable when the job is part-time, unless the claimant was a part-time worker at the time of injury.¹² Because appellant was a full-time employee when injured in September 2000, her part-time reemployment in May 2011 is not an appropriate measure of her wage-earning capacity. The Board finds that OWCP abused its discretion in determining that appellant's actual earnings in part-time reemployment fairly and reasonably represented her wage-earning capacity. Accordingly, the September 13, 2011 LWEC determination was issued in error.¹³

⁸ *Id.*

⁹ See *Katherine T. Kreger*, 55 ECAB 633, 635 (2004). Modification of an LWEC determination is unwarranted 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 erroneous. *Tamra McCauley*, 51 ECAB 375, 377 (2000). The burden of proof is on the party seeking modification of the wage-earning capacity determination. *Id.*

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7a (October 2009).

¹¹ *Id.* at Chapter 2.814.7c(1).

¹² *Id.* at Chapter 2.814.7(a).

¹³ See *E.F.*, Docket No. 11-2056 (issued May 14, 2012); *O.V.*, Docket No. 11-98 (issued September 30, 2011).

CONCLUSION

OWCP erred in finding that appellant's part-time, limited-duty clerk position fairly and reasonably represented her wage-earning capacity as of May 9, 2011.

ORDER

IT IS HEREBY ORDERED THAT the February 29, 2012 decision of the Office of Workers' Compensation Programs is reversed.

Issued: October 9, 2012
Washington, DC

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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

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