

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

V.L., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
New York, NY, Employer**

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**Docket No. 12-834
Issued: February 25, 2013**

Appearances:
Thomas S. Harkins, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

ORDER REVERSING CASE

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge

On March 5, 2012 appellant, through her attorney, timely filed an application for review from the November 1, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for modification of an OWCP wage-earning capacity determination dated November 16, 2006. The Board assigned Docket No. 12-834.

OWCP accepted that on February 3, 2004 appellant, then a 48-year-old customer service supervisor, sustained a herniated cervical disc at C6-7 after pushing large metal containers containing parcels. At the time of her February 3, 2004 work injury, appellant was working on a full-time basis for the employing establishment.

On April 4, 2005 appellant returned to light-duty work as a modified customer service supervisor for the employing establishment, working four hours per day for a total of 20 hours per week. In a September 6, 2005 decision, OWCP reduced appellant's compensation based on its finding that her actual earnings fairly and reasonably represented her wage-earning capacity. Appellant stopped work on September 29 and October 13, 2005. On November 3, 2005 OWCP accepted that appellant sustained a recurrence of disability on September 29 and October 13, 2005. On October 14, 2005 appellant returned to light-duty work as a modified customer service supervisor for the employing establishment, working four hours per day for a

total of 20 hours per week. Appellant stopped work on June 8, 2006 and claimed recurrence of disability.¹ In a November 16, 2006 decision, OWCP reduced appellant's compensation based on its determination that her actual earnings as a modified customer service supervisor fairly and reasonably represented her wage-earning capacity. In decisions dated May 3 and November 13, 2007, August 7 and November 21, 2008, July 2, 2009, January 15 and August 9, 2010 and November 1, 2011, OWCP denied appellant's request for modification of its November 16, 2006 wage-earning capacity determination.

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.² Section 8115(a) of FECA provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his or her actual earnings if his or her actual earnings fairly and reasonably represent his or her wage-earning capacity.³ Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.⁴

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.⁵ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁶

OWCP's procedures provide that the factors to be considered in determining whether the claimant's work fairly and reasonably represented her wage-earning capacity include the kind of appointment and the tour of duty. The manual states that reemployment may not be considered suitable when the actual earning job is part time, unless the claimant was a part-time worker at the time of injury.⁷

OWCP found that appellant's actual earnings in part-time reemployment for 20 hours per week fairly and reasonably represented her wage-earning capacity. Appellant was a full-time worker at the time of her February 3, 2004 work injury. As the above-noted procedure makes clear, the Director of OWCP has determined that when the tour of duty is not at least equivalent

¹ On October 23, 2006 OWCP denied the claim for recurrence of disability.

² See *Katherine T. Kreger*, 55 ECAB 633 (2004); 5 U.S.C. § 8115 (regarding determination of wage-earning capacity).

³ See 5 U.S.C. § 8115.

⁴ See 5 U.S.C. § 8115(a); *Loni J. Cleveland*, 52 ECAB 171 (2000).

⁵ *Sharon C. Clement*, 55 ECAB 552 (2004).

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

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (October 2009).

to that of the job held at the time of injury, OWCP will not consider the reemployment suitable for a wage-earning capacity determination. The Board finds, therefore, that OWCP abused its discretion in determining appellant's wage-earning capacity based on a part-time position.⁸ The Board will reverse OWCP's November 1, 2011 decision.

IT IS HEREBY ORDERED THAT the November 1, 2011 decision of the Office of Workers' Compensation Programs is reversed.

Issued: February 25, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

⁸ *O.V.*, Docket No. 11-98 (issued September 30, 2011); *S.M.*, Docket No. 10-2382 (issued September 28, 2011).