

FACTUAL HISTORY

On December 16, 2002 appellant, then a 38-year-old employee development specialist, filed a claim alleging that he worked in a hostile environment and was harassed and threatened by a coworker. OWCP accepted his claim for acute stress reaction and later expanded his claim to include post-traumatic stress disorder. Appellant stopped work on July 30, 2003 and did not return to the employing establishment. On October 29, 2007 he began working full time in the private sector. At the time of appellant's injury he was a level GS-9 step 5 with an annual salary of \$43,664.00.

Appellant was treated by Dr. Carol Martin, a Board-certified psychiatrist, on April 18, 2007, who diagnosed acute stress reaction and post-traumatic stress disorder, prolonged. Dr. Martin advised that appellant's work-related conditions were still present and disabling from working for the employing establishment. She advised that appellant was currently training for a new career in lieu of a job with the employing establishment and did not need vocational rehabilitation as he was educating himself.

In a letter dated December 4, 2007, appellant informed OWCP that he started a job at American Airlines as a domestic and international reservationist. He indicated that his job was contingent on completing the required training which began on October 29, 2007. On a January 15, 2008 telephone log, appellant reported that he was now a permanent employee.

By decision dated May 8, 2008, OWCP indicated that appellant had been employed as a full-time reservations representative for American Airlines effective October 29, 2007, which was over 60 days, and that the pay in that position was \$401.35 per week. It concluded that the position of full-time reservations representative fairly and reasonably represented appellant's wage-earning capacity and was considered suitable to his partially disabled condition. OWCP advised that it was reducing his monetary compensation effective October 29, 2007 based on his actual earnings in this position.

In a letter dated February 8, 2009, appellant requested reconsideration of his wage-earning capacity determination. He indicated that he was employed full time with American Airlines beginning October 29, 2007 but that his category had changed to part-time employment on August 7, 2008 because he had problems grasping and learning concepts working in the fast-paced call center. Appellant submitted an April 2, 2008 report from Dr. Martin who diagnosed acute stress reaction and post-traumatic stress disorder. Dr. Martin noted that appellant's work-related condition was present and disabling. She noted that appellant was currently working a part-time job and experienced persistent difficulty remembering information such as standard codes.

In a letter dated March 2, 2009, OWCP advised that appellant had returned to a full-time position with American Airlines effective October 29, 2007 and a formal wage-earning determination was issued on May 8, 2008. On February 8, 2009 appellant advised that he changed his position to part time on August 7, 2008. OWCP advised him of the standard for modifying a wage-earning capacity determination and the criteria for a recurrence of disability if he believed his medical condition changed.

On March 16, 2009 appellant filed a CA-2a, notice of recurrence of disability, alleging that on April 1, 2008 he had difficulty performing his job due to concentration issues, forgetfulness and anxiety when dealing with angry and rude customers. He submitted an April 3, 2009 report from Dr. Martin who diagnosed acute stress reaction and post-traumatic stress disorder. Dr. Martin noted that appellant was currently working a part-time job and experienced persistent difficulty remembering information, had extreme stress due to high volume, fast-paced airline call center and strained to handle demanding, irate callers some of whom cursed at him with racial slurs. She noted that appellant's current part-time schedule allowed him to accumulate less daily stress from which to recover.

On April 27, 2009 OWCP denied appellant's claim for a recurrence of disability.

On May 25, 2009 appellant requested reconsideration of the April 27, 2009 decision. Thereafter, he submitted reports from Dr. Martin dated March 24, 2010 and March 31, 2011 who reiterated his diagnosis.

In a letter dated April 12, 2011, appellant's attorney, Martin Kaplan, Esq., advised that he was the authorized representative for appellant; however, he had not received the decision or correspondence and appellant was prejudiced by OWCP's error.

In a decision dated November 22, 2011, OWCP denied appellant's request for reconsideration as it was untimely and did not establish clear evidence of error.

By decision dated November 28, 2011, OWCP vacated the May 8, 2008 decision as appellant's representative had not been served with the decision. It reissued the decision, with proper service, on November 29, 2011, but failed to include appeal rights.

By decision dated December 6, 2011, again OWCP reissued the May 8, 2008 decision with proper appeal rights.

On December 12, 2011 appellant requested an oral hearing which was held on April 12, 2012. He submitted an April 11, 2012 report from Dr. Martin who diagnosed acute stress reaction and post-traumatic stress disorder, prolonged. Dr. Martin noted that appellant's work-related condition was present and disabling from his work at the employing establishment and had not resolved. She noted that appellant was currently working a part-time job and noted that appellant became sensitive to the usual stresses of the job triggering flashbacks from his employment injury. Dr. Martin noted that appellant could only work part time four hours per day.

In a decision dated August 6, 2012, the hearing representative affirmed the finding that appellant's actual earnings as a full-time reservations representative represented appellant's wage-earning capacity as of October 28, 2007 and found that appellant had not established that modification of the wage-earning capacity determination was required.

LEGAL PRECEDENT -- ISSUE 1

Section 8115(a) of FECA² provides that in determining compensation for partial disability, “the wage-earning capacity of an employee is determined by his actual earnings if his earnings fairly and reasonably represent his wage-earning capacity.”³ OWCP procedures indicate that a determination regarding whether actual wages fairly and reasonably represent wage-earning capacity should be made after a claimant has been working in a given position for more than 60 days,⁴ and OWCP may determine wage-earning capacity retroactively after the claimant has stopped work,⁵ actual earnings will be presumed to fairly and reasonably represent wage-earning capacity only in the absence of contrary evidence.⁶

OWCP’s procedure manual states that, 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, the claims examiner must determine whether the earnings in the alternative employment fairly and reasonably represent the employee’s wage-earning capacity.⁷

ANALYSIS -- ISSUE 1

In the present case, appellant was a full-time employee development specialist at level GS-9 step 5 when he stopped work with an annual salary of \$43,664.00. OWCP accepted his claim for acute stress reaction and post-traumatic stress disorder. Appellant stopped work on July 30, 2003. Based on his medical release from Dr. Martin, appellant returned to work on October 29, 2007, in a permanent full-time position as an American Airline reservation representative. The pay in that position was \$382.48 per week. The job description noted that appellant would answer incoming calls, assist customers in reaching solutions to their needs, apply sales techniques while providing schedules, fare and flight information to customers, respond to callers inquiries in the nonairline-related ventures and operate a computer terminal and standard keyboard. The job required a minimum age of 18, a high school diploma or GED, an ability to work a variety of shifts, full-time work, 40 hours per week and the ability to read, write, fluently speak and understand English. The position was in compliance with the medical restrictions set forth by Dr. Martin. OWCP noted that this decision was initially issued on May 8, 2008; however, appellant’s attorney was not sent a copy of the original decision. Therefore, on November 28, 2011 the May 8, 2008 decision was vacated and reissued on December 6, 2011.

² *Id.*

³ *Id.* at § 8115(a).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (July 1997); see *William D. Emory*, 47 ECAB 365 (1996).

⁵ *Id.* at Chapter 2.814.7(e) (July 1997).

⁶ See *Mary Jo Colvert*, 45 ECAB 575 (1994).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (July 1997).

OWCP properly determined that appellant has actual earnings resulting from his work as an American Airlines reservation representative beginning October 29, 2007 and continuing through August 7, 2008. Generally, wages actually earned are the best measure of a wage-earning capacity and, in the absence of evidence showing they do not fairly and reasonably represent the injured employee's wage-earning capacity must be accepted as such measure.⁸ OWCP determined that appellant's current position provided him with a wage-earning capacity. It compared his actual weekly earnings in his new job, \$382.48, to the current pay rate of his date-of-injury job, \$1,011.98. This showed that appellant had the capacity to earn 38 percent of his previous wages, but still had a 62 percent loss of wage-earning capacity as a result of his employment injury, for which he remained entitled to compensation. OWCP concluded that the position of full-time reservations representative fairly and reasonably represented his wage-earning capacity and was considered suitable to his partially disabled condition. It confirmed that appellant had completed 60 days of successful work in the job. The Board finds that the American Airlines reservation representative position that appellant began working on October 29, 2007 is consistent with his work restrictions and abilities. Appellant worked in the position for over 60 days. His performance of this position in excess of 60 days is persuasive evidence that the position represents his wage-earning capacity.⁹ Moreover, there is no evidence that the position was seasonal, temporary or make-shift work designed for appellant's particular needs.¹⁰ OWCP thus properly determined appellant's wage-earning capacity.¹¹

LEGAL PRECEDENT -- ISSUE 2

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.¹² Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.¹³ OWCP's procedure manual provides that, if a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss.¹⁴ In this instance the claims examiner will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity.¹⁵

⁸ *Dennis E. Maddy*, 47 ECAB 259 (1995).

⁹ *See supra* note 4.

¹⁰ *Elbert Hicks*, 49 ECAB 283 (1998).

¹¹ *Gregory A. Compton*, 45 ECAB 154 (1993).

¹² *D.M.*, 59 ECAB 164 (2007).

¹³ *Katherine T. Kreger*, 55 ECAB 633 (2004); *see Robert H. Merritt*, 11 ECAB 64 (1959).

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995). *See Mary E. Marshall*, 56 ECAB 420 (2005).

¹⁵ Federal (FECA) Procedure Manual, *supra* note 4. *See Harley Sims, Jr.*, 56 ECAB 320 (2005).

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.¹⁶ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.¹⁷

ANALYSIS -- ISSUE 2

OWCP accepted that appellant developed work-related acute stress reaction and post-traumatic stress disorder. Appellant accepted the position of a full-time reservation representative for American Airlines on October 29, 2007. On December 6, 2011 OWCP reissued the May 8, 2008 decision and found that he could perform the duties of a reservation representative with American Airlines and reduced his compensation to reflect his wage-earning capacity in this job. The question is whether appellant established that the December 6, 2011 wage-earning capacity decision should be modified.

Once OWCP established the wage-earning capacity, it is appellant's burden to establish a change in his condition that would render him unable to perform those duties.¹⁸ Appellant has contended that reports from Dr. Martin establish that he was no longer able to work full time because he became overwhelmed with the stress of his reservation representative position and had flashbacks of his work-related condition. The Board finds that the record does not contain medical evidence establishing that appellant's accepted work-related conditions, acute stress reaction and post-traumatic stress disorder, had materially changed during the period in question.

Appellant submitted reports from Dr. Martin dated April 2, 2008 to March 31, 2011, who diagnosed acute stress reaction and post-traumatic stress disorder. She noted that appellant's work-related condition was present and disabling. Dr. Martin noted that appellant was currently working a part-time job and experienced persistent difficulty remembering codes, he became overwhelmed with the extreme stress of the high volume, fast-paced airline call center, and strained to handle demanding, irate callers some of whom cursed at him with racial slurs. Appellant reported that his current part-time schedule allowed him to accumulate less daily stress from which to recover. Similarly, in an April 11, 2012 report, Dr. Martin noted diagnoses and indicated that appellant became sensitive to the usual stresses of his job triggering flashbacks from his employment injury. Appellant reported performing his job functions for eight hours per day for 11 months and becoming overwhelmed with the extreme stress that he converted his job to half time. Dr. Martin noted that appellant still experienced extreme anxiety, poor concentration but believed his current part-time schedule allowed him to accumulate less stress.

These reports are insufficient to establish a material change in appellant's accepted conditions warranting modification of the 2011 wage-earning capacity determination.

¹⁶ See *D.M.*, *supra* note 3; *Stanley B. Plotkin*, 51 ECAB 700 (2000); *Tamra McCauley*, 51 ECAB 375 (2000); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

¹⁷ *Id.*; *Jack E. Rohrbaugh*, 38 ECAB 186, 190 (1986).

¹⁸ *Phillip S. Deering*, 47 ECAB 692 (1996).

Dr. Martin did not describe a change of the accepted conditions or explain how the accepted conditions had materially worsened such that appellant was unable to work as a reservation representative full time.¹⁹ Rather, he appears to attribute a worsening of appellant's emotional condition to new job stressors, including remembering codes, dealing with the extreme stress of the high volume, fast-paced airline call center, and handling demanding and irate callers, which were factors associated with his employment as a reservation representative. The exposure to the new job stressors is unrelated to appellant's prior federal employment.

For these reasons, appellant has not established that the December 6, 2011 wage-earning capacity determination should be modified.

On appeal appellant asserts that the wage-earning capacity should be based on his part-time employment that he held since 2008 and not on his full-time employment for eight months. He contends that he could not handle the job on a full-time basis because it was more stressful than anticipated and references the opinion of Dr. Martin, his psychiatrist. As noted above, Dr. Martin did not describe a change of the accepted conditions or explain how the accepted conditions had materially worsened such that appellant was unable to work as a reservation representative full time.²⁰ Rather, he appears to attribute a worsening of appellant's condition to new job stressors associated with his employment as a reservation representative which is unrelated to his prior federal job.

Appellant also asserts that the December 6, 2011 decision was a retroactive wage-earning capacity determination and that it did not conform to the guidelines as set forth in OWCP's procedure manual.²¹ The Board notes that the December 6, 2011 OWCP decision was not a retroactive wage-earning capacity determination, rather OWCP reissued the May 8, 2008 wage-earning capacity determination because appellant's counsel was not sent a copy of the original decision.

CONCLUSION

The Board therefore finds that OWCP properly determined the full-time reservation representative with American Airlines which appellant performed fairly and accurately

¹⁹ Where residuals of an accepted employment-related condition prevent an employee from performing regular duties, physical ailments that preexisted the accepted condition must be taken into consideration. Physical ailments acquired subsequent to and unrelated to the accepted injury are excluded from any wage-earning capacity determination. *Lee A. Dent*, 54 ECAB 704 (2003).

²⁰ *Id.*

²¹ 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. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(e) (October 2009). A retroactive wage-earning capacity would not have been improper in this case, given the finding that appellant's reduction in work hours was not due to his injury-related condition.

represented his wage-earning capacity. The Board further finds that OWCP properly denied modification of the established December 6, 2011 wage-earning capacity determination.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 6, 2012 is affirmed.

Issued: July 18, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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