

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

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**M.D., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Chicago, IL, Employer**

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**Docket No. 12-29  
Issued: March 14, 2013**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On October 8, 2011 appellant filed a timely appeal from a June 23, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) which denied modification of a wage-earning capacity determination. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether OWCP properly denied modification of the August 23, 2005 wage-earning capacity determination.

**FACTUAL HISTORY**

On February 16, 2001 appellant, then a 37-year-old letter carrier, filed an occupational disease claim alleging that she suffered from continuous swelling, numbness and pain in her

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

hands as a result of casing and delivering mail at work. OWCP accepted appellant's claim for bilateral carpal tunnel syndrome. Appellant returned to full-time limited duty in March 2002. On January 18, 2005 she underwent right carpal tunnel release surgery. Appellant remained off work and received disability compensation.

In a March 24, 2005 report, Dr. Michael Jablon, a Board-certified orthopedic surgeon, authorized appellant to return to limited duty beginning April 4, 2005. He stated that when she returned to work on April 4, 2005 her work restrictions would include no lifting over 10 pounds, no carrying over 10 pounds, no repetitive motions and a 5-minute break after every 20 minutes of typing. In an attached duty status form, Dr. Jablon stated in greater detail appellant's restrictions as no lifting or carrying over 10 pounds, no climbing or kneeling and no pushing or pulling a cart. Appellant was also limited to walking and simple grasping no more than six to eight hours a day, driving a vehicle no more than four hours a day, keyboarding for only three hours a day with a 5-minute break every 20 minutes and sitting and bending no more than one to two hours a day. In a May 26, 2005 report, Dr. Jablon stated that appellant's current restrictions were permanent.

On March 31, 2005 appellant accepted a job offer as a modified letter carrier effective April 4, 2005. The duties included preparing address management systems (AMS), electronic unencoded address resolution services (EUARS), and Red Books (walking routes), editing post office complaints, processing electronic fleet reports, answering telephones and preparing mail volume reports. These duties were to be performed within the physical restrictions of no lifting or carrying over 10 pounds, no repetitive motion and a 5-minute break after 20 minutes of typing.

On July 12, 2005 appellant accepted a rehabilitation job offer as a rehabilitation carrier effective July 23, 2005. Her clerical duties included answering telephone calls, taking messages, filing postal forms and paperwork, assisting customers at caller windows and inputting and retrieving data on the computer. These duties were described as sedentary work and required simple grasping, intermittent fine manipulation, lifting less than one pound and computer work that allowed for 5-minute breaks every 20 minutes. Appellant's carrier duties included collecting keys from carriers, having them sign for any mail that was not delivered, removing expired change of address cards and reviewing carrier edit sheets. These duties were also sedentary work with no prolonged standing, no lifting more than 10 pounds, simple grasping, intermittent fine manipulation and intermittent grasping.

By letter dated July 8, 2005, appellant was offered another position entitled "Rehab Carrier" which was effective July 23, 2005. Her medical restrictions were unchanged. Appellant's job duties were specified in detail and included tasks not specified in the modified carrier position. It appears that her salary as a modified carrier was lower than her salary in the rehabilitation job. Appellant indicated her acceptance of the "Rehab Carrier" position by signing a Postal Service Rehabilitation Job Offer form on July 12, 2005.

By decision dated August 23, 2005, OWCP found that appellant's modified letter carrier position offered on March 31, 2005 and effective April 4, 2005 fairly and reasonably represented her wage-earning capacity. The decision stated that, since she had demonstrated the ability to perform her duties for two months, the modified letter carrier position fairly and reasonably

represented her wage-earning capacity. Because appellant's earnings as a modified letter carrier equaled or exceeded the current earnings of her date-of-injury position, OWCP reduced her compensation to zero.

Almost five years later, on July 15, 2010 the employing establishment offered appellant a position as a modified city carrier effective July 16, 2010. The duties included express mail scan and distribution for one and a half hours and delivery of daily assigned routes for six and a half hours. The physical activities required to perform these duties included standing, walking, lifting, carrying, writing and scanning for one and a half hours and driving, standing, lifting, carrying, bending and twisting for six and a half hours. Appellant accepted the position, but indicated that she was accepting under protest and was not in agreement. In a July 22, 2010 duty status report, Dr. Jablon restricted her to no lifting or carrying over 10 pounds, no casing, pushing or pulling a cart for four to six hours per day, keyboarding for three hours per day and driving a vehicle for six and one half hours per day.

On September 29, 2010 appellant filed a claim for recurrence of disability beginning on September 25, 2010. She stated that after her initial injury she was on limited duty for 10 years, but when she started to deliver mail again she experienced numbness, swelling and pain in her right hand. Appellant reported that she had been in a modified position, but now she was carrying a full route, which caused aggravation to her hands. She stopped work on September 25, 2010 and did not return.

On November 24, 2010 OWCP advised appellant that her recurrence of disability claim was actually a request to modify her August 23, 2005 loss of wage-earning capacity decision and advised her of the evidence needed to support her claim. In a December 12, 2010 letter, appellant requested modification of the prior wage-earning capacity determination alleging that the initial determination was erroneous.

In a decision dated January 13, 2011, OWCP denied appellant's claim for wage-loss compensation finding that she failed to establish a basis for modifying the August 23, 2005 wage-earning capacity determination. Accordingly, it also rejected the claimed wage-loss compensation on and after September 23, 2010.

On February 8, 2011 OWCP received appellant's request for a review of the written record. Appellant related that she underwent surgery for right carpal tunnel syndrome and returned to light duty in 2005 for a job that was tailored just for her. By decision dated June 23, 2011, an OWCP hearing representative found that appellant had not established a basis for modifying OWCP's August 23, 2005 wage-earning capacity determination. Accordingly, the hearing representative affirmed the January 13, 2011 decision.

### **LEGAL PRECEDENT**

A wage-earning capacity determination is a finding that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn

wages.<sup>2</sup> Actual wages earned are generally the best measure of wage-earning capacity.<sup>3</sup> In the absence of evidence showing that actual earnings do not fairly and reasonably represent the injured employee's wage-earning capacity, such earnings must be accepted as representative of the individual's wage-earning capacity.<sup>4</sup> A determination regarding whether actual earnings fairly and reasonably represent wage-earning capacity should be made only after an employee has worked in a given position for more than 60 days.<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>

### ANALYSIS

The Board finds that the August 23, 2005 wage-earning capacity determination was erroneous.

Appellant underwent right carpal tunnel release surgery on January 18, 2005 and remained off work. In a March 24, 2005 report, Dr. Jablon authorized her to return to full-time limited duty beginning April 4, 2005 with restrictions of no repetitive motions, no lifting or carrying over 10 pounds, no climbing, kneeling and pushing or pulling a cart and keyboarding for three hours. Appellant was also instructed to take a 5-minute break after 20 minutes of continuous typing. On March 31, 2005 she accepted a job offer as a modified letter carrier effective April 4, 2005. On July 8, 2005 the employing establishment offered appellant a permanent rehabilitation job assignment as a rehabilitation carrier effective July 23, 2005. On August 31, 2005 OWCP issued its LWEC determination on August 31, 2005 finding that appellant's employment as a modified letter carrier, which was effective April 4, 2005, fairly and reasonably represented her wage-earning capacity.

The Board finds that the LWEC determination was erroneous because it was based on the April 4, 2005 modified letter carrier position, even though appellant accepted a position as a rehabilitation carrier in July 2005. The rehabilitation carrier position was different than the position accepted in March 2005 and was appellant's position at the time OWCP issued its August 31, 2005 LWEC determination. Although appellant's duties were similar, the July 2005 rehabilitation carrier position included additional duties such as filing postal forms and

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<sup>2</sup> 5 U.S.C. § 8115(a); see *Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

<sup>3</sup> *Hayden C. Ross*, 55 ECAB 455, 460 (2004).

<sup>4</sup> *Id.*

<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (October 2009).

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

<sup>7</sup> *Tamra McCauley*, 51 ECAB 375, 377 (2000).

paperwork, assisting customers at caller windows, inputting and retrieving data on the computer, collecting keys from carriers, removing expired change of address cards and reviewing carrier edit sheets. Unless circumstances dictate the issuance of a retroactive LWEC determination,<sup>8</sup> OWCP cannot issue an LWEC determination based on a position the employee did not hold when the LWEC issued.<sup>9</sup> As noted, when determining wage-earning capacity, OWCP must not only consider actual earnings but must also evaluate the suitability of the work currently being performed.<sup>10</sup> In this case, OWCP's August 31, 2005 LWEC determination focused only on appellant's April 2005 position as a modified letter carrier effective April 4, 2005 and not on her current job duties in the July 2005 rehabilitation carrier position. Even if the August 31, 2005 LWEC determination had been based on appellant's then-current rehabilitation carrier duties, the determination would be erroneous because appellant had not performed those duties for 60 days before OWCP issued its August 31, 2005 LWEC decision.<sup>11</sup>

Because appellant was not in the modified letter carrier position at the time OWCP issued an LWEC based upon that position, the LWEC is erroneous. Because she had not occupied the rehabilitation carrier position for 60 days before OWCP issued the LWEC, the LWEC is inapplicable to that position. Accordingly, appellant has established a basis for modifying the LWEC determination.

### **CONCLUSION**

Appellant established a basis for modifying OWCP's August 31, 2005 wage-earning capacity determination.

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<sup>8</sup> See *Juan A. DeJesus*, 54 ECAB 721, 722-23 (2003).

<sup>9</sup> *C.H.*, Docket No. 11-1711 (issued February 15, 2012).

<sup>10</sup> See *supra* notes 7 and 8.

<sup>11</sup> *Supra* note 6.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 23, 2011 decision of the Office of Workers' Compensation Programs is reversed.

Issued: March 14, 2013  
Washington, DC

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

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

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