



shoulder injury while processing mail. OWCP accepted the claim on January 10, 2012 for left trapezius and scapula sprains. On May 23, 2012 it accepted the claim for a herniated C4-5 disc. Appellant received compensation for intermittent disability commencing October 16, 2011. She stopped work as of January 26, 2012 and received compensation for temporary total disability.

In a work capacity evaluation (OWCP-5c) dated September 5, 2012, Dr. James Hill, a Board-certified orthopedic surgeon, found that appellant could return to full-time work. He indicated that she had a 25-pound lifting restriction and a restriction of 145 pounds of pushing and pulling.

The employing establishment offered appellant a full-time light-duty position as a modified mail processing clerk. The stated job duties in the written offer included processing of first class and standard mail, labeling and sorting mail. The physical requirements included a 25-pound lifting limitation. On September 20, 2012 appellant accepted the job offer and commenced work.

By decision dated December 11, 2012, OWCP found that appellant's actual earnings since September 20, 2012 represented her wage-earning capacity. It found that she had no loss of wage-earning capacity, as her earnings were equal to or exceeded the date-of-injury earnings.

Appellant requested a hearing before an OWCP hearing representative, which was held on March 14, 2013. At the hearing, counsel stated that there was no question she was working the position and it had restored her to her preinjury earning levels. He stated that while he "did not want to use the word make work because it is real work [appellant] is doing" he felt the job was a "special job" that made accommodations to appellant. Counsel stated that she did not get the position through the bid process, although it "was the type of job you can bid." Appellant also asserted that her facility would close in 2014 and her job would be eliminated.

By decision dated May 28, 2013, OWCP's hearing representative affirmed the December 11, 2012 OWCP decision. The hearing representative found OWCP had properly determined appellant's loss of wage-earning capacity.

### **LEGAL PRECEDENT**

Under 5 U.S.C. § 8115(a), wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. Generally, wages actually earned are the best measure of a wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.<sup>2</sup>

OWCP procedures state that after a claimant has been working for 60 days, OWCP will make a determination as to whether actual earnings fairly and reasonably represent wage-earning capacity.<sup>3</sup> OWCP's Procedure Manual provides guidelines for determining wage-earning

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<sup>2</sup> *Dennis E. Maddy*, 47 ECAB 259 (1995).

<sup>3</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (February 2013).

capacity based on actual earnings. A job that is part time (when the claimant was a full-time employee at the time of injury), seasonal in an area where year-round employment is available, or temporary (when the date-of-injury position was a permanent position) is not appropriate for a wage-earning capacity determination.<sup>4</sup>

In addition, it is well established that a position that is considered an odd-lot or makeshift position designed for a claimant's particular needs is not appropriate for a wage-earning capacity determination.<sup>5</sup> The Board has discussed several factors that may support a finding that the offered position was makeshift in nature. These factors include: (1) the position did not have an official title or formal position description; (2) there were strict limitations, such as five-pound lifting and no casing of mail, which indicated the claimant would not be able to secure a position in the community at large with such limited duties; (3) the claimant did not perform any meaningful tasks in the position; and (4) the job appeared to be temporary in nature.<sup>6</sup>

The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision,<sup>7</sup> has been codified at 20 C.F.R. § 10.403. OWCP first calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the current pay rate for the date-of-injury position.<sup>8</sup>

### ANALYSIS

Appellant's claim was accepted for a left shoulder injury. She began work in the modified mail processing clerk position on September 20, 2012 and continued to work more than 60 days. The issue is whether there was a basis to find the position worked was not suitable for a wage-earning capacity determination. Counsel raised the issue of a possible makeshift position by arguing that it was a "special job" for appellant that was not secured through the bid process.

In reviewing the relevant factors regarding a makeshift position, the Board finds no evidence to establish the modified mail processing clerk position was makeshift. It has an official title and a detailed job description. The physical restrictions were not overly strict, as appellant was only limited to 25 pounds lifting but performed other activities. The job involved meaningful tasks, as counsel acknowledged at the hearing. It is not a question of whether the job was secured through the bid process, but whether the job duties and other evidence establish that the position was created specifically for appellant.<sup>9</sup> The mail processing clerk position in this case had meaningful tasks, a detailed job description without overly strict physical restrictions.

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<sup>4</sup> *Id.* at Chapter 2.814.7(a) (February 2013).

<sup>5</sup> *See A.J.*, Docket No. 10-619 (issued June 29, 2010).

<sup>6</sup> *Id.*

<sup>7</sup> 5 ECAB 376 (1953).

<sup>8</sup> 20 C.F.R. § 10.403(d).

<sup>9</sup> *See H.S.*, Docket No. 11-1791 (issued March 23, 2012) (appellant alleged the job could not be secured through the bid process, but the evidence established that the job was appropriate for a wage-earning capacity determination).

With respect to a temporary position, no evidence was presented that the job was temporary. The written job offer and job description gave no indication that the position was temporary. Appellant stated at the hearing that she believed the work facility was scheduled to close sometime in 2014, but the issue adjudicated below was for wage-earning capacity upon her return to full-time modified duty; not a possible recurrence of disability at some future date. There is no probative evidence establishing that the position was temporary in nature.<sup>10</sup>

The Board finds that, based on the evidence of record, the modified mail processing clerk job performed as of September 20, 2012 was appropriate for a wage-earning capacity determination. It was not part time, makeshift or temporary. OWCP found that appellant's earnings were equal to or greater than the date-of-injury earnings. Appellant acknowledged that the job restored her preinjury earnings. The Board finds that OWCP properly determined that appellant had no loss of wage-earning capacity based on her actual earnings. Appellant may request modification of the wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

### **CONCLUSION**

The Board finds that OWCP properly determined that appellant's wage-earning capacity was represented by his actual earnings commencing September 20, 2012.

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<sup>10</sup> Cf. *K.V.*, Docket No. 11-145 (issued July 22, 2011) (where the job offer indicated that it was not a permanent position).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated May 28, 2013 is affirmed.

Issued: January 6, 2014  
Washington, DC

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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

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