

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

_____)	
V.H., Appellant)	
)	
and)	
)	Docket No. 13-2076
)	Issued: March 5, 2014
DEPARTMENT OF VETERANS AFFAIRS,)	
VETERANS HEALTH ADMINISTRATION,)	
East Orange, NJ, Employer)	
_____)	

Appearances:
James D. Muirhead, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 11, 2013 appellant, through her representative, filed a timely appeal from a June 28, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). 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.

ISSUE

The issue is whether OWCP properly denied modification of the July 15, 2010 wage-earning capacity determination.

On appeal, appellant asserts that her current employment is a makeshift or odd-lot position.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On September 28, 2007 appellant, then a 45-year-old food service worker, injured her left shoulder due to a fall onto a wet floor. She filed a traumatic injury claim (Form CA-1) on December 28, 2007. OWCP accepted her claim for compensation on February 5, 2008 for a left rotator cuff tear. In a decision dated January 21, 2010, it granted appellant a schedule award for five percent impairment of the right upper extremity.

In a work capacity evaluation (OWCP-5c) dated December 2, 2009, Dr. Andrew M. Hutter, a Board-certified orthopedic surgeon, found that appellant could return to full-time work on light duty. He indicated that she had work restrictions of standing and walking for no more than five hours per day, lifting of no more than 10 pounds and kneeling no more than one hour per day.

The employing establishment offered appellant a permanent light-duty position on May 7, 2010 as a food service worker, noting work restrictions of ability to stand and walk for five hours, ability to lift, pull and push up to 10 pounds, ability to kneel for one hour, and no reaching above the left shoulder. The duties of the position included working on sections of the tray line, described as “starter, vegetable, meat/entrée, bread, margarine, jelly, etc.,” and cleaning in the dish room, described as “sort out silvers, bags silvers, mat trays,” and “wipes down refrigerators and conveyor belts on tray line.” Appellant accepted this offer on May 10, 2010.

By decision dated July 15, 2010, OWCP determined that appellant’s actual earnings since May 10, 2010 represented her wage-earning capacity. It found that she had no loss of wage-earning capacity, as her earnings were equal to or exceeded her earnings on the date of injury.

On August 18, 2010 appellant, through her representative, requested reconsideration of the July 15, 2010 decision. Appellant’s representative argued that there was no reason to set a loss of wage-earning capacity except to allow OWCP and the employing establishment to avoid paying her if they abolished her limited-duty position.

By decision dated November 17, 2010, OWCP denied appellant’s request for reconsideration. It found that appellant had not submitted any relevant or pertinent new evidence, showed that OWCP erroneously applied or interpreted a point of law, or presented a legal or factual argument not previously considered.

On November 23, 2010 appellant, through her representative, again requested reconsideration of the July 15, 2010 decision. Appellant’s representative argued that the decision was erroneous because it was based on an odd-lot or makeshift job. He stated that appellant’s position was not permanent and that no one else had a job like hers. Appellant’s representative noted that she assisted in making salads, performing hospitality services and doing paperwork. He argued that the position had been specially arranged due to her medical restrictions, and that it was not a regular job, but a limited-duty job designed for her. Appellant noted that the appeal was not about the creation of her job, but rather attributing a loss of wage-earning capacity determination based on the job, because appellant anticipated that the employing establishment would eventually eliminate the position.

By letter dated April 9, 2013, appellant's representative requested a response from OWCP regarding the reconsideration request of November 23, 2010, as OWCP had not yet replied.

On April 18, 2013 OWCP advised the employing establishment that appellant had filed a timely request for reconsideration, enclosed a copy of the application and requested that it submit comments within 20 days.

By letter dated April 30, 2013, the employing establishment responded. It stated that the allegation that appellant's position was not permanent was incorrect, because it was a full-time, regular, permanent position, with clearly defined and limited duties in line with appellant's medical restrictions. The employing establishment noted that the position would not be deemed "no longer necessary" and that it was not odd-lot or makeshift. It described her position as a permanent limited-duty Food Service Worker WG-7408, Grade 3, Step 5.

On May 6, 2013 appellant's representative responded to the employing establishment's letter dated April 30, 2013. He noted that the author of the letter was the workers' compensation program manager at the employing establishment and not in a position to state that appellant's job was regular, full time and permanent. Appellant's representative again argued that a loss of wage-earning capacity determination was not necessary in this case, and that the only reason it was sought was to abolish appellant's job in the future and reduce the employing establishment's exposure.

By decision dated June 28, 2013, OWCP denied modification of the July 15, 2010 decision regarding her loss of wage-earning capacity. It noted that appellant had worked in the limited-duty position for almost three years and that she continued to work in that position. OWCP found that the limited-duty food service worker position was not makeshift or odd-lot, because it was a classified position, the duties and physical requirements were indicated, and she was performing specific duties that correlated with the position of a food service worker.

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 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.²

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

² *Dennis E. Maddy*, 47 ECAB 259, 262 (1995).

rehabilitated or the original determination was, in fact, erroneous.³ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁴

OWCP's procedure manual provides guidelines for determining wage-earning 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 generally not appropriate for a wage-earning capacity determination.⁵

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.⁶ 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.⁷

ANALYSIS

Appellant's claim was accepted for a left rotator cuff tear. She began work in a modified food service worker position on May 10, 2010 and continued to work for more than 60 days. The issue is whether the July 15, 2010 wage-earning determination was erroneous as the position worked was not suitable for a wage-earning capacity determination. Appellant's representative argued that the position was odd-lot or makeshift, and that the employing establishment only sought a loss of wage-earning capacity determination so that it could avoid future liability when they eliminated her position.

In reviewing the relevant factors regarding a makeshift position, the Board finds no evidence to establish that the modified food service worker position was makeshift. The job had an official title and a detailed job description. The physical restrictions were not overly strict, as appellant was limited to no more than five hours of standing and walking; no more than 10 pounds of lifting, pulling, and pushing; no more than one hour of kneeling; and no reaching above the left shoulder, but performed activities associated with that of a food service worker position. The job involved meaningful tasks, such as working on sections of the tray line to make meals and cleaning in the dish room. Thus, the food service worker position in this case

³ See *Sharon C. Clement*, 55 ECAB 552 (2004).

⁴ See *T.M.*, Docket No. 08-975 (issued February 6, 2009).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4 (June 2013).

⁶ See *A.J.*, Docket No. 10-619 (issued June 29, 2010).

⁷ *Id.*

had a detailed job description, was performed without overly strict physical restrictions, and involved meaningful tasks correlated to that of a food service worker.

With respect to whether the position was temporary, no evidence was presented to indicate that the position was in fact temporary. The written job offer and job description contained no indications that the position was temporary. Appellant's representative merely asserted that the employing establishment would, at some future time, eliminate her position. Appellant had worked as a modified food service worker for three years at the time of OWCP's June 28, 2013 decision denying modification of the wage-earning capacity determination. Thus, there is no probative evidence establishing that the position was temporary in nature.

OWCP procedures state that a light-duty position that fairly and reasonably represents an employee's ability to earn wages may form the basis of a loss of wage-earning capacity determination if that light-duty position is a classified position to which the injured employee has been formally reassigned.⁸ The position must conform to the established physical limitations of the injured employee, the employer must have a written position description outlining the duties and physical requirements, and the position must correlate to the type of appointment held by the injured employee at the time of injury.⁹ Appellant's modified food service worker position is a classified position and she has been formally reassigned. The physical restrictions of this position conform to the limitations described by Dr. Hutter in his December 2, 2009 work capacity evaluation. As noted above, there is a written position description outlining the duties of this position and physical requirements. Finally, appellant worked in an unmodified food service worker position at the time of injury.

The Board finds that, based on the evidence of record, the modified food service worker job performed as of May 10, 2010 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 her earnings as of the date of injury, noting that she had earned \$807.90 per week in her job before the injury and earned \$807.90 in the permanent modified food service worker position after her injury. 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 denied modification of appellant's wage-earning capacity determination.

⁸ *Supra* note 5 at Chapter 2.815.5(c) (June 2013).

⁹ *Id.*

ORDER

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

Issued: March 5, 2014
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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