

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

C.A., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
San Francisco, CA, Employer)

**Docket No. 11-556
Issued: November 4, 2011**

Appearances:
Brian Stephens, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On January 4, 2010 appellant, through her representative, filed a timely appeal from the July 7, 2010 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 (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUE

The issue is whether appellant is entitled to a resumption of compensation for total wage loss from September 12, 2009 to February 14, 2010, notwithstanding an existing wage-earning capacity determination.

¹ 5 U.S.C. § 8101 *et seq.*

² Appellant does not appeal OWCP's hearing representative's December 15, 2010 decision affirming the denial of an additional schedule award. *See* 20 C.F.R. § 501.3. Thus, the Board will not address it on this appeal.

FACTUAL HISTORY

On July 26, 1990 appellant, then a 25-year-old mail handler, filed a claim for workers' compensation benefits alleging that she developed carpal tunnel syndrome as a result of continuous heavy lifting in the performance of duty. OWCP accepted her claim for bilateral carpal tunnel syndrome/wrist tendinitis, bilateral lateral epicondylitis, bilateral de Quervain's tenosynovitis, bilateral upper trapezius strain and cervicothoracic sprain.

In 2004 appellant accepted an offer to return to work as a modified mail handler. In a decision dated March 29, 2005, OWCP determined that her wages as a full-time modified mail handler fairly and reasonably represented her wage-earning capacity.

Appellant underwent right wrist surgery in 2008. OWCP paid compensation for temporary total disability from June 6 to August 2, 2008. Appellant returned full time to her modified position.

On September 12, 2009 the employer notified appellant that, following the guidelines established by the National Reassessment Process, a search was completed for necessary tasks meeting her medical restrictions in all crafts and on all tours within her facility and throughout the local commuting area within the district boundaries. Based on that search, the employer was unable to identify any available necessary tasks within her medical restrictions. Appellant stopped work that day and claimed compensation for total disability, as no work was available within her restrictions.

In a decision dated November 13, 2009, OWCP denied appellant's claim for compensation beginning September 12, 2009. It found that she did not meet one of the three criteria for modifying the March 29, 2005 wage-earning capacity determination.

The record indicates that appellant returned to work for the employing establishment. On April 12, 2010 appellant's attending physician noted: "Patient reports that her employer has now been able to accommodate her modified duties and she has been back to work for the past [two] months."

On July 7, 2010 OWCP's hearing representative affirmed the November 13, 2009 denial of appellant's claim for compensation. The hearing representative found that the reason appellant stopped work was insufficient to warrant modification of her established wage-earning capacity.

On appeal, appellant argues that the employing establishment gave her a new position on February 14, 2010. She also argues that OWCP may accept a limited period of employment-related disability without modifying a loss of wage-earning capacity determination. Appellant requests a decision on her claim for temporary wage loss caused by the National Reassessment Process.

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of her duty.³ “Disability” means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.⁴

Wage-earning capacity is a measure of the employee’s ability to earn wages in the open labor market under normal employment conditions.⁵ Once the loss of wage-earning capacity 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. The burden of proof is on the party attempting to show modification of the award.⁶

Once OWCP issues a formal decision on wage-earning capacity, the rating should be left in place until the claimant requests resumption of compensation for total wage loss for more than a limited period of disability, in which instance it will need to evaluate the request according to the customary criteria for modifying a formal wage-earning capacity determination.⁷ When the period of disability for which the claimant seeks compensation is limited or closed, however, OWCP should adjudicate the claim as one of recurrence.⁸

ANALYSIS

On March 29, 2005 OWCP determined that appellant’s wages as a full-time modified mail handler fairly and reasonably represented her wage-earning capacity in the open labor market. When appellant stopped work for right wrist surgery in 2008, however, it paid compensation for temporary total disability for a limited period, from June 6 to August 2, 2008, and did so without disturbing its earlier determination of wage-earning capacity. The question

³ 5 U.S.C. § 8102(a).

⁴ 20 C.F.R. § 10.5(f).

⁵ *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

⁶ *Daniel J. Boesen*, 38 ECAB 556 (1987).

⁷ *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sharon C. Clement*, 55 ECAB 552 (2004).

⁸ *Id.*; see *L.G.*, Docket No. 10-1614 (issued May 12, 2011) (claimed a recurrence of disability on March 9, 2009 when the employing establishment withdrew her limited-duty assignment due to the National Reassessment Process, but she returned to work around August 14, 2009; therefore, the period of disability for which she sought compensation was limited or closed); *S.H.*, Docket No. 07-755 (issued November 9, 2007); *Sandra D. Pruitt*, 57 ECAB 126 (2005) (OWCP is not precluded from adjudicating a limited period of employment-related disability when a formal wage-earning capacity determination has been issued). In *Clement*, *supra* note 7, following a wage-earning capacity determination, OWCP accepted a recurrence claim and paid compensation for a period of temporary total disability when the claimant stopped work on the advice of her physician pending carpal tunnel surgery. The surgeon released her to limited duty about a year after surgery. *Cf. Elsie L. Price*, 54 ECAB 734 (2003) (acceptance of disability for an extended period -- five years -- was sufficient to establish that modification of the wage-earning capacity determination was warranted).

presented in this appeal is whether appellant should again receive compensation for temporary total disability notwithstanding the existing determination of wage-earning capacity.

The key is whether appellant requests a resumption of compensation for total wage loss for a closed or limited period. The record establishes that she stopped work on September 12, 2009 because work within her restrictions was no longer available. The record also suggests that appellant returned to work for the employing establishment on February 14, 2010. If this is the case, OWCP should adjudicate her claim for compensation as one of recurrence and not as a modification of the wage-earning capacity determination.

The only evidence supporting appellant's return to full-time limited duty is a reference to such by her attending physician in April 2010. OWCP should ask the employing establishment to confirm her return to work and the date of that return. If it receives confirmation, thus establishing a closed or limited period for which appellant claims compensation for total wage loss, OWCP shall adjudicate appellant's claim as one of recurrence. The Board will therefore set aside OWCP's July 7, 2010 decision and will remand the case for further development and an appropriate final decision on appellant's claim for compensation.

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the July 7, 2010 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Issued: November 4, 2011
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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