

damage to her right hand due to the constant pushing, pulling and lifting required by her job. OWCP accepted that she sustained bilateral carpal tunnel syndrome, right articular cartilage disorder, right wrist sprain and left ulnar nerve lesion. On August 27, 2003 appellant underwent right wrist arthroscopy surgery and, on July 19, 2006, she underwent left wrist arthroscopy surgery. Both procedures were authorized by OWCP.

Appellant had intermittent periods of disability after her right wrist surgery. On November 6, 2006 Dr. Robert S. Ferretti, a Board-certified orthopedic surgeon serving as an OWCP referral physician, found that she continued to have residuals of her work injuries but that she was able to work up to six hours a day with limited duties. On January 5, 2007 Dr. Jerald R. Gerst, an attending Board-certified internist, provided work restrictions. He found that appellant would be able to work up to six hours a day in three to six months and would be able to work eight hours a day in approximately one year.

In February 2007 appellant was referred to an OWCP-sponsored vocational rehabilitation program, but the program was interrupted in June 2007 due to several outstanding medical issues. On June 19, 2007 Dr. Gerst provided new work restrictions which limited appellant to working for five hours a day, five days a week. In August 2007 appellant was again referred to a vocational rehabilitation program. She was provided with at least three 30-day extensions in addition to the initial 90 days of placement services.

In an October 13, 2008 report, Dr. Gerst determined that appellant was restricted from lifting more than 25 pounds and that she should avoid very repetitive gripping or very forceful sustained gripping. He noted that she was able to work eight hours a day.

On November 19, 2008 OWCP was advised that appellant's former employer was willing and able to offer her light-duty work within her work restrictions. Appellant accepted and returned to work on November 22, 2008 as a modified mail handler on a full-time basis with the employer in Richmond, CA. The light-duty job required lifting up to 25 pounds but did not require forceful or sustained gripping.²

In a March 4, 2009 report, Dr. Gerst stated that appellant had reached maximum medical improvement and that her work restrictions were permanent. These restrictions included lifting no more than 25 pounds and avoiding repetitive or very forceful sustained gripping. Dr. Gerst noted that appellant was able to work eight hours a day within these restrictions.

In an August 6, 2009 decision, OWCP adjusted appellant's compensation based on its determination that the light-duty mail handler position fairly and reasonably represented her wage-earning capacity. It indicated that the rating decision was based on the fact that she worked for more than 60 days in a modified position as a mail handler with the employer and her treating physician stated that her work restrictions were permanent and not likely to change. Because appellant's wages as a modified mail handler were less than her date-of-injury earnings, she received compensation to supplement her wage loss.

² Appellant's set work schedule was 6:00 a.m. to 2:30 p.m., Saturday through Wednesday.

Following appellant's formal rating decision, the employing establishment initiated the National Reassessment Process. The District Assessment Team was unable to identify any available necessary tasks within appellant's medical restrictions and sent her home on November 17, 2009.

Appellant filed a Form CA-7 for claimed total disability beginning November 17, 2009 and continuing because her employer sent her home due to no work being available. In a November 23, 2009 letter, OWCP advised her that, 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. The burden of proof is on the party attempting to show a modification of the wage-earning capacity award.

To assist in developing appellant's claim for compensation, OWCP sent a letter to Dr. Gerst on November 23, 2009 requesting his medical opinion on appellant's work restrictions based on objective findings. It asked him to discuss whether there had been a material change in the nature and extent of appellant's condition. Dr. Gerst was provided a description of the modified mail handler position and was provided 30 days to submit a response.

In a December 9, 2009 report, Dr. Gerst stated that since appellant returned to work she had experienced a progressive increase in bilateral upper extremity pain, stiffness and weakness. He wrote that the character of her pain remained the same. Appellant reported that the pain in her right arm was located at the base of the thumb and on her left arm it was located along the ulnar aspect of her left forearm and left hand. Dr. Gerst performed range of motion testing and noted limitations upon flexion, extension, ulnar deviation and radial deviation. He provided a rating impairment examination under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001). Dr. Gerst opined that appellant's work restrictions limited her to lifting 15 pounds on an occasional basis with frequent lifting of 5 to 8 pounds. Appellant was to avoid repetitive forceful and/or sustained gripping with both hands. Dr. Gerst wrote, "I think that she can, at present, work only a [five]-hour day." He also wrote that appellant's condition materially worsened such that she was no longer able to perform the job duties of the modified mail handler position.

In a January 22, 2010 telephone call, the employer advised OWCP that the duties of the modified mail handler position appellant performed until November 2009 allowed her to increase or decrease the amount of weight required to drag and sort mail.

In a January 22, 2010 letter, OWCP advised appellant that Dr. Gerst's December 9, 2009 report did not justify modification of its wage-earning capacity determination because he did not discuss why she was unable to perform her modified duties. Appellant was provided 30 days to submit additional evidence and argument.

In a February 8, 2010 letter, appellant discussed the specific duties of her modified position. She stated that she would set up the work area by getting all equipment needed to do the job and that she had to push a hamper over to a machine, place the machine on lifts and then turn the machine on. Appellant noted that she did not recall being required to pull unwheeled

carts because there were tug drivers that towed the mail away. She indicated that she did not drag plastic or glass hampers across the floor but that she did dump loose mail onto a belt with the assistance of a machine. Appellant asserted that she was required to lift tubs onto the belt and cut or pull away the tape that kept them closed. She stated that she performed these duties for eight hours a day, five days a week.

In a December 22, 2009 letter, counsel argued that appellant was given a job that does not exist. He asserted that her job was not classified and could not be bid on. Counsel stated that the law was very clear that a make-work job was not a real job and that therefore, if the job was withdrawn, the claimant would receive compensation. He asserted that OWCP should pay appellant for total disability and suggested that its wage-earning capacity determination should be modified.

In a May 13, 2010 decision, OWCP denied appellant's claim for modification of its August 6, 2009 wage-earning capacity determination noting that she had not shown there was a material change in the nature and extent of the injury-related condition, that she had been retrained or otherwise vocationally rehabilitated or that the original determination was, in fact, erroneous.

Appellant disagreed with the decision and requested an oral hearing before an OWCP hearing representative. At the hearing held on August 10, 2010, she was not present but was represented by counsel who presented argument asserting that the employing establishment withdrew the light-duty job. Counsel further claimed that the position was not a permanent job offer and the original rating was erroneous.

Appellant submitted treatment notes from Dr. Gerst, dated between July 2009 and June 2010. The medical records received indicate that she continued to suffer injury-related residuals.

In a December 16, 2010 decision, OWCP's hearing representative affirmed its May 13, 2010 decision.

LEGAL PRECEDENT

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. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.³ OWCP's procedure manual provides that, "[i]f 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. 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."⁴

³ *Katherine T. Kreger*, 55 ECAB 633 (2004).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

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.⁵ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁶

In addition, Chapter 2.814.11 of the procedure manual contains provisions regarding the modification of a formal loss of wage-earning capacity. The relevant part provides that a formal loss of wage-earning capacity will be modified when: (1) the original rating was in error; (2) the claimant's medical condition has changed; or (3) the claimant has been vocationally rehabilitated. OWCP procedures further provide that the party seeking modification of a formal loss of wage-earning capacity decision has the burden to prove that one of these criteria has been met. If OWCP is seeking modification, it must establish that the original rating was in error, that the injury-related condition has improved or that the claimant has been vocationally rehabilitated.⁷

Section 8115(a) of FECA provides that the "wage-earning capacity of an employee is determined by her actual earnings if her actual earnings fairly and reasonably represent her wage-earning capacity."⁸ The Board has stated, "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."⁹ Wage-earning capacity may not be based on an odd-lot or make-shift position designed for an employee's particular needs or a position that is seasonal in an area where year-round employment is available.¹⁰ OWCP procedures direct that a wage-earning capacity determination based on actual wages be made following 60 days of employment.¹¹

⁵ *Stanley B. Plotkin*, 51 ECAB 700 (2000).

⁶ *Id.*

⁷ *See supra* note 4 at Chapter 2.814.11 (June 1996).

⁸ 5 U.S.C. § 8115(a).

⁹ *Floyd A. Gervais*, 40 ECAB 1045, 1048 (1989); *Clyde Price*, 32 ECAB 1932, 1934 (1981). Disability is defined in the implementing federal regulations as "the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury." 20 C.F.R. § 10.5(f). Once it is determined that the actual wages of a given position represent a employee's wage-earning capacity, OWCP applies the principles enunciated in *Albert C. Shadrick*, 5 ECAB 376 (1953), in order to calculate the adjustment in the employee's compensation.

¹⁰ *See James D. Champlain*, 44 ECAB 438, 440-41 (1993); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.814.7a(1) (July 1997). In *Jeffery T. Hunter*, 52 ECAB 503 (2001), the Board found that the duties of "regular" employment are covered by a specific job classification and such duties would have been performed by another employee if the employee did not perform them. The test is not whether the tasks that the employee performs would have been done by someone else, but instead whether she occupied a regular position that would have been performed by another employee. *Id.* In determining whether a given job is makeshift, the Board has looked to such factors as whether the job has detailed work duties and a set schedule. *See A.J.*, Docket No. 10-619 (issued June 29, 2010).

¹¹ *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7c (December 1993).

OWCP procedure provides that when the employing establishment has withdrawn a light-duty assignment, which accommodated the appellant's work restrictions and a formal wage-earning capacity decision has been issued, the decision will remain in place, unless one of the three accepted reasons for modification applies.¹²

ANALYSIS

OWCP accepted that appellant sustained bilateral carpal tunnel syndrome, right articular cartilage disorder, right wrist sprain and left ulnar nerve lesion due to her repetitive work duties. On August 27, 2003 appellant underwent right wrist arthroscopy surgery and, on July 19, 2006, she underwent left wrist arthroscopy surgery. Both procedures were authorized by OWCP.

In an August 6, 2009 decision, OWCP adjusted appellant's compensation based on its determination that her actual earnings as a modified mail handler beginning November 22, 2008 fairly and reasonably represented her wage-earning capacity. Appellant later claimed that this wage-earning capacity determination should be modified.

The Board finds that OWCP's August 6, 2009 determination was consistent with section 8115(a) of FECA which provides that the wage-earning capacity of an employee is determined by her actual earnings if her actual earnings fairly and reasonably represent her wage-earning capacity.¹³ OWCP properly noted that appellant had received actual earnings as a modified mail handler for more than 60 days in that she had been working in the position since November 22, 2008 when it issued its August 6, 2009 decision. There is no evidence that appellant's earnings in the modified mail handler position did not fairly and reasonably represent her wage-earning capacity.

Counsel asserted that the modified mail handler position on which appellant's wage-earning capacity was based was unclassified and constituted make-shift work. However, the job falls under the classification of "mail handler" and appellant was provided with a position description which included the physical requirements of the position. Appellant performed the duties of the position under a set schedule. The evidence does not support the argument that the mail handler position on which the rating decision was based was not classified and was make-shift in nature.¹⁴

The evidence does not show that appellant's actual earnings as a modified mail handler did not fairly and reasonably represent her wage-earning capacity and OWCP properly adjusted her compensation based on this wage-earning capacity determination.¹⁵ For these reasons,

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.7(a)(5) (October 2005).

¹³ *See supra* notes 8 and 9.

¹⁴ Counsel argued that the withdrawal of appellant's job in November 2007 warranted a modification of OWCP's wage-earning capacity determination, but the relevant precedent does not support that such a withdrawal would automatically trigger a need for such modification. *See supra* note 12.

¹⁵ OWCP properly applied the principles enunciated in *Albert C. Shadrick*, 5 ECAB 376 (1953), in order to calculate the adjustment in appellant's compensation.

appellant has not shown that OWCP's original determination with regards to her wage-earning capacity was erroneous.

Appellant alleged that there was a material change in the nature and extent of her employment-related condition. However, the evidence does not contain a rationalized medical opinion explaining why an employment-related condition prevented her from performing the mail handler position or otherwise establish that OWCP improperly determined her wage-earning capacity.¹⁶

In a December 9, 2009 report, Dr. Gerst, an attending Board-certified internist, provided new work restrictions and indicated that appellant could only work five hours a day. He opined that she could only lift 15 pounds on an occasional basis and 5 to 8 pounds on a frequent basis.¹⁷ However, Dr. Gerst did not clearly explain how objective findings on physical examination and diagnostic testing showed that appellant had a material change in her injury-related condition. The examination findings he reported were similar to those reported before the time that appellant claimed that modification of OWCP's wage-earning capacity was warranted. Dr. Gerst's report is of diminished probative value because he stated on March 4, 2009 that appellant's medical restrictions were permanent, but on December 9, 2009, about six months later, he provided new restrictions without adequately addressing the specific nature of any change in appellant's medical condition. He did not provide adequate medical rationale supporting a material change in appellant's injury-related condition.

The record also contains treatment notes from Dr. Gerst which were produced between July 2009 and June 2010. The medical records indicated that appellant continued to have injury-related residuals. However, the reports did not contain a rationalized medical opinion demonstrating that appellant's injury-related medical condition worsened such that she was precluded from performing the duties of the modified mail handler position.

Therefore, the medical evidence does not show that appellant experienced a material worsening of her injury-related condition which prevented her from being able to perform the duties of the modified mail handler position in which she was rated. In addition, appellant did not present evidence that she vocationally rehabilitated herself such that she now had a higher wage-earning capacity than was previously established. For these reasons, she did not show that OWCP's August 6, 2009 wage-earning capacity determination should be modified.

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 appellant did not meet her burden of proof to modify OWCP's August 6, 2009 wage-earning capacity determination.

¹⁶ See *Norman F. Bligh*, 41 ECAB 230, 237-38 (1989).

¹⁷ Dr. Gerst had previously indicated that appellant could lift up to 25 pounds and work eight hours a day.

ORDER

IT IS HEREBY ORDERED THAT the December 16, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 7, 2011
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board