

<sup>1</sup> Appellant's regular work schedule was 8:00 a.m. to 4:30 p.m., Monday through Friday.

earnings in this position fairly and reasonably represented his wage-earning capacity. Appellant stopped work on March 27, 2007 and requested modification of OWCP's February 7, 2002 wage-earning capacity determination. In October 28, 2009 and June 8, 2010 decisions, OWCP denied appellant's request for modification of its February 7, 2002 wage-earning capacity determination.

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.<sup>2</sup> Section 8115(a) of the Federal Employees' Compensation Act provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity.<sup>3</sup> Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.<sup>4</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>5</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>6</sup>

OWCP's procedure manual provides that the factors to be considered in determining whether the claimant's work fairly and reasonably represented his wage-earning capacity include the kind of appointment and the tour of duty. The manual states that reemployment may not be considered suitable when the actual earning job is part time, unless the claimant was a part-time worker at the time of injury.<sup>7</sup>

OWCP found that appellant's actual earnings in part-time reemployment for 10 hours per week fairly and reasonably represented his wage-earning capacity. Appellant was a full-time worker at the time of his January 30, 1998 work injury. As the above-noted procedure makes clear, the Director of OWCP has determined that when the tour of duty is not at least equivalent to that of the job held at the time of injury, OWCP will not consider the reemployment suitable for a wage-earning capacity determination. The Board finds, therefore, that OWCP abused its

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<sup>2</sup> See *Katherine T. Kreger*, 55 ECAB 633 (2004); 5 U.S.C. § 8115 (regarding determination of wage-earning capacity).

<sup>3</sup> See 5 U.S.C. § 8115.

<sup>4</sup> See 5 U.S.C. § 8115(a); *Loni J. Cleveland*, 52 ECAB 171 (2000).

<sup>5</sup> *Sharon C. Clement*, 55 ECAB 552 (2004).

<sup>6</sup> *T.M.*, Docket No. 08-975 (issued February 6, 2009); *Tamra McCauley*, 51 ECAB 375, 377 (2000).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (October 2009).

discretion in determining appellant's wage-earning capacity based on a part-time position.<sup>8</sup> The Board will reverse OWCP's June 8, 2010 decision.

**IT IS HEREBY ORDERED THAT** the June 8, 2010 decision of the Office of Workers' Compensation Programs is reversed.

Issued: October 26, 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

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<sup>8</sup> *O.V.*, Docket No. 11-98 (issued September 30, 2011); *S.M.*, Docket No. 10-2382 (issued September 28, 2011).