



## **FACTUAL HISTORY**

On January 10, 1987 appellant, then a 34-year-old full-time mail handler, sustained an injury in the performance of duty when, following his shift, he felt pain in his shoulders and upper and lower back. OWCP accepted his claim for lumbosacral strain and permanent aggravation of degenerative disc disease. Appellant underwent surgery and received a schedule award for permanent impairment to his left lower extremity. OWCP paid compensation for periods of disability.

The employing establishment offered a part-time rehabilitation modified position, which appellant accepted. Appellant returned to work on July 18, 2009.

On September 16, 2009 OWCP issued a wage-earning capacity determination. It found that appellant's actual earnings in the part-time position fairly and reasonably represented his wage-earning capacity.

On April 13, 2010 OWCP's hearing representative affirmed the use of appellant's part-time employment in rating his wage-earning capacity. Citing the case of *Kathleen A. Price*,<sup>2</sup> the hearing representative explained that OWCP's procedure prohibiting a wage-earning capacity determination based on part-time reemployment is not applicable when the medical evidence clearly shows that the claimant is capable of only part-time work. OWCP's hearing representative therefore found that OWCP was not precluded from issuing a wage-earning capacity determination based on appellant's part-time reemployment. The hearing representative remanded the case, however, for a recalculation based on a correction of appellant's weekly pay rate and the addition of night differential pay.

On July 8, 2010 OWCP issued a merit decision on appellant's wage-earning capacity based on his part-time reemployment.

On appeal, appellant's representative argues that OWCP cannot determine wage-earning capacity from a temporary job offer, that it failed to use the recurrent pay rate and that it continues to miscalculate appellant's earnings.

## **LEGAL PRECEDENT**

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of his duty.<sup>3</sup> "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.<sup>4</sup>

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<sup>2</sup> Docket No. 04-336 (issued May 19, 2004).

<sup>3</sup> 5 U.S.C. § 8102(a).

<sup>4</sup> 20 C.F.R. § 10.5(f).

When disability is partial, FECA provides for a reduction in compensation to reflect a loss of wage-earning capacity.<sup>5</sup> Wage-earning capacity is a measure of the employee's ability to earn wages under normal employment conditions.<sup>6</sup> The wage-earning capacity of an employee is determined by actual earnings if the employee's actual earnings fairly and reasonably represent his wage-earning capacity.<sup>7</sup>

OWCP procedures offer further instruction:

*“Determining WEC Based on Actual Earnings.* When an employee cannot return to the date[-]of[-]injury job because of disability due to work-related injury or disease, but does return to alternative employment with an actual wage loss, the CE [claims examiner] must determine whether the earnings in the alternative employment fairly and reasonably represent the employee's WEC [wage-earning capacity]. Following is an outline of actions to be taken by the CE when a partially disabled claimant returns to alternative work:

a. *Factors Considered.* To determine whether the claimant's work fairly and reasonably represents his or her WEC, the CE should consider whether the kind of appointment and tour of duty (see *FECA PM 2-0900.3*) are at least equivalent to those of the job held on [the] date of injury. Unless they are, the CE may not consider the work suitable.

For instance, reemployment of a temporary or casual worker in another temporary or casual (USPS) position is proper, as long as it will last at least 90 days, and reemployment of a term or transitional (USPS) worker in another term or transitional position is likewise acceptable. However, the reemployment may not be considered suitable when:

(1) *The job is part-time* (unless the claimant was a part-time worker at the time of injury) or sporadic in nature;

(2) *The job is seasonal* in an area where year-round employment is available. If an employee obtains seasonal work voluntarily in an area where year-round work is generally performed, the CE should carefully determine whether such work is truly representative of the claimant's WEC; or

(3) *The job is temporary* where the claimant's previous job was permanent.

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<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.2 (December 1993).

<sup>6</sup> *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

<sup>7</sup> 5 U.S.C. § 8115(a).

The CE should *not* consider the factors set forth in 5 U.S.C. 8115; they should be addressed only when reaching a constructed WEC (see paragraph 8 below).<sup>8</sup>

### **ANALYSIS**

OWCP found that appellant's actual earnings in part-time reemployment fairly and reasonably represented his wage-earning capacity. Appellant was a full-time worker at the time of injury. As the above-quoted procedure makes clear, the Director 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 discretion in determining appellant's wage-earning capacity based on a part-time position. The Board will reverse OWCP's July 8, 2010 decision.

OWCP's hearing representative cited *Kathleen A. Price* for the proposition that OWCP's procedure prohibiting a wage-earning capacity determination based on part-time reemployment is not applicable when the medical evidence clearly shows that the claimant is capable of only part-time work. *Price* affirmed the use of part-time earnings on the grounds that OWCP "adequately considered this circumstance in accordance with its procedural requirements," but the procedure does not allow such consideration. It states that unless the tour of duty is at least equivalent to that of the job held on the date of injury, OWCP "may not consider the work suitable" for a determination of wage-earning capacity. The procedure then repeats the prohibition: "However, the reemployment may not be considered suitable when the job is part-time (unless the claimant was a part-time worker at the time of injury)." So to the extent that *Price* and other cases found that this procedure allows consideration of part-time reemployment when the tour of duty is not at least equivalent to that of the job held on the date of injury, those cases are overruled.

### **CONCLUSION**

The Board finds that OWCP abused its discretion when it found that appellant's actual earnings in part-time reemployment fairly and reasonably represented his capacity to earn wages in the open labor market.

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<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.0814.7 (October 2009).

**ORDER**

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

Issued: September 30, 2011  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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