

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

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**J.P., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Glen Ellyn, IL, Employer**

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**Docket No. 12-341  
Issued: July 10, 2012**

*Appearances:*

*Alan J. Shapiro, Esq., for the appellant  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On December 5, 2011 appellant, through her representative, filed a timely appeal from the October 24, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP), which denied modification of its wage-earning capacity determination. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (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 appellant met his burden to show that modification of OWCP's June 17, 2009 wage-earning capacity determination is warranted.

**FACTUAL HISTORY**

On February 24, 2003 appellant, a 23-year-old letter carrier, filed an occupational disease claim alleging that the bump on her right wrist was the result of her federal employment. OWCP

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

accepted her claim for right wrist ganglion cyst, bilateral carpal tunnel syndrome, and injury to an auxiliary blood vessel.

On June 17, 2009 OWCP determined that appellant's actual earnings as a modified carrier, effective April 6, 2009, fairly and reasonably represented her wage-earning capacity. As she was earning as much as her date-of-injury position currently paid, OWCP found that she was no longer entitled to compensation for wage loss.

Appellant's position required two hours of mounted delivery, two hours of casing mail and four hours of duty as a lobby director. On November 2, 2010 Dr. John J. Fernandez, the attending Board-certified orthopedic surgeon, restricted appellant to no more than one hour of casing mail.

Appellant filed a claim alleging a recurrence of disability beginning November 16, 2010.

In an April 12, 2011 decision, OWCP denied appellant's recurrence claim. OWCP found that the factual and medical evidence did not establish that the claimed recurrence resulted from the accepted work injury.

During a hearing, appellant testified that she stopped work because the employing establishment had no work for her within her physical restrictions, at least that was her understanding. She explained that Dr. Fernandez increased her restrictions because her limited duty required too much repetitive motion with casing and constantly reaching into a saddlebag to pull out heavy mail, which increased her symptoms. Appellant's representative argued that her job was created specifically for her and was not a job available in the general community. He also argued that her job caused her condition to become worse.

In an October 24, 2011 decision, an OWCP hearing representative affirmed. The hearing representative found that the evidence was insufficient to warrant modification of the established wage-earning capacity determination. He found that the medical evidence cited no objective findings of a worsening of the injury-related condition and failed to establish a change in the nature and extent of the injury-related condition. He also found that appellant's position was a modified version of the job she held when injured and included substantial functions of her usual occupation, including casing and delivering mail. The hearing representative concluded that the position was not makeshift.

### **LEGAL PRECEDENT**

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of her duty.<sup>2</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>3</sup>

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<sup>2</sup> 5 U.S.C. § 8102(a).

<sup>3</sup> 20 C.F.R. § 10.5(f).

Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.<sup>4</sup> Actual earnings in the open labor market generally more accurately represent an employee's wage-earning capacity and constitute a more reliable gauge than a secondary method such as an opinion of a vocational rehabilitation adviser.<sup>5</sup> As earnings in the open labor market are generally the best measure of wage-earning capacity, they must be accepted as such in the absence of evidence showing they do not fairly and reasonably represent wage-earning capacity.<sup>6</sup>

While wages actually earned are generally the best measure of an injured worker's capacity for employment, such wages may not be based on make-shift or sheltered employment.<sup>7</sup>

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.<sup>8</sup>

A formal decision on wage-earning capacity 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 OWCP will need to evaluate the request according to the customary criteria for modifying a formal wage-earning capacity determination.<sup>9</sup>

### ANALYSIS

OWCP issued a formal wage-earning capacity determination on June 17, 2009. When appellant claimed a recurrence of disability beginning November 16, 2010, she did not claim a closed or temporary period of disability, such as for a scheduled surgery and postoperative recovery. She claimed disability for an open-ended or indefinite period. In such cases, the proper analysis is to evaluate the claim according to the customary criteria for modifying a formal wage-earning capacity determination, with appellant bearing the burden of proof.<sup>10</sup>

Appellant testified that limited duty had caused her condition to become worse, but the medical record does not substantiate this. Dr. Fernandez, the attending surgeon, increased her

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<sup>4</sup> *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

<sup>5</sup> *Billie S. Miller*, 15 ECAB 168 (1963).

<sup>6</sup> *Lee R. Sires*, 23 ECAB 12 (1971); see 5 U.S.C. § 8115(a).

<sup>7</sup> *A.J.*, Docket No. 10-619 (issued June 29, 2010); *Connie L. Potratz-Watson*, 56 ECAB 316 (2005).

<sup>8</sup> *Daniel J. Boesen*, 38 ECAB 556 (1987).

<sup>9</sup> *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sharon C. Clement*, 55 ECAB 552 (2004).

<sup>10</sup> *Katherine T. Kreger*, 55 ECAB 633 (2004) (where the claimant submitted evidence of an increased partial disability that prevented her from working her limited-duty position, the Board found that OWCP should have considered the issue of modification of the wage-earning capacity determination rather than recurrence of disability).

work restriction on November 2, 2011, but he did not discuss why. He did not explain whether appellant's injury-related condition had worsened or how. He offered no new physical findings that could be compared to previous findings. Although an increased restriction might possibly reflect a worsening of appellant's wrists, the Board finds that an increased medical restriction alone is insufficient to establish a material change in the nature or extent of the injury-related condition. This is a medical issue and the medical evidence is insufficient to discharge appellant's burden to show that modification of the June 17, 2009 wage-earning capacity determination is warranted.

The evidence is also insufficient to establish that the original determination was, in fact, erroneous. Appellant's representative argued at the hearing that OWCP based its determination on a job created specifically for appellant but it is not enough to argue that the duties were designed to meet her particular needs. That is the essence of all limited duty. For the position to be medically suitable, it must, by definition, meet the restrictions imposed by the physician and medical suitability is a necessary component of wage-earning capacity.

The larger issue is whether appellant's earnings in her medically suitable limited-duty assignment fairly and reasonably represented her wage-earning capacity in the open labor market. Appellant's representative indicated that the job was not available in the general community, but he offered no proof.<sup>11</sup> The Board finds that his bare assertion is insufficient to discharge appellant's burden to show that modification of the June 17, 2009 wage-earning capacity determination is warranted.

As appellant has not met the customary criteria for modifying a formal wage-earning capacity determination, the Board will affirm OWCP's October 24, 2011 decision.

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 has not met her burden to show that modification of OWCP's June 17, 2009 wage-earning capacity determination is warranted.

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<sup>11</sup> See *Elden H. Tietze*, 2 ECAB 38 (1948) (the employee did not offer any evidence to show that he did not have the general capacity in the open labor market or otherwise, to earn the sum of money he was receiving or that he was in any way favored in his employment because of his injury). *Id.* at 42.

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 24, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 10, 2012  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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