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

M.M., Appellant	)	
and	)	Docket No. 12-335 Issued: June 26, 2012
U.S. POSTAL SERVICE, NORTH BAY GENERAL MAIL FACILITY, Petaluma, CA, Employer	) ) )	188ueu. June 20, 2012
Appearances: Appellant, pro se Office of Solicitor, for the Director		Case Submitted on the Record

## ORDER REVERSING CASE

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

On December 5, 2011 appellant filed a timely appeal from the November 7, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP), which denied modification of its May 31, 1995 wage-earning capacity determination.<sup>1</sup>

The determination found that reemployment at the employing establishment effective April 30, 1995 with wages of \$564.90 per week fairly and reasonably represented appellant's wage-earning capacity. Appellant argued that this determination was, in fact, erroneous because it was based on a part-time position, and she was a full-time employee at the time of injury.

In its November 7, 2011 decision, OWCP rejected this argument. It found that the position was nonetheless consistent with her restriction of working six hours a day. Appellant worked in the position for more than 60 days, and the only reason she was off work was due to the National Reassessment Process. OWCP found that the wage-earning capacity determination

<sup>&</sup>lt;sup>1</sup> On August 4, 1990 appellant, a 33-year-old full-time postal clerk, sustained a traumatic injury in the performance of duty when she threw a #2 sack into a tub. OWCP accepted her claim for lumbosacral strain and herniated disc with S1 radiculitis on the left. She eventually returned to limited duty six hours a day and received compensation for the other two.

was therefore properly based on appellant's actual earnings and ability to perform part-time work.

The Board has duly considered the matter and finds that OWCP's November 7, 2011 decision must be reversed. In O.V.,<sup>2</sup> the Board found that OWCP abused its discretion when it determined that the claimant's actual earnings in part-time reemployment fairly and reasonably represented his capacity to earn wages in the open labor market. The Board explained that OWCP procedures prohibited a wage-earning capacity determination based on part-time reemployment unless the claimant was a part-time worker at the time of injury.

Procedures that were in effect when OWCP issued its May 31, 1995 wage-earning capacity determination also prohibited a determination based on part-time reemployment where the employee formerly held a full-time position.<sup>3</sup> The Board's holding in *O.V.*, therefore, applies.

The Board finds that appellant has met one of the criteria for obtaining modification of OWCP's May 31, 1995 wage-earning capacity determination. Appellant has shown that the determination was, in fact, erroneous.<sup>4</sup> Accordingly,

<sup>2</sup> Docket No. 11-98 (issued September 30, 2011).

<sup>&</sup>lt;sup>3</sup> See FECA Circular No. 95-7 (issued February 12, 1995): "The FECA Procedure Manual notes in Chapter 2.814.7(a) that a job actually held may be considered to fairly and reasonably represent the claimant's loss of wage-earning capacity with certain exceptions. One of these exceptions is where the employee who formerly held a full-time position obtains part-time work."

<sup>&</sup>lt;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. *Sue A. Sedgwick*, 45 ECAB 211 (1993).

**IT IS HEREBY ORDERED THAT** the November 7, 2011 decision of the Office of Workers' Compensation Programs is reversed.

Issued: June 26, 2012 Washington, DC

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

> Colleen Duffy Kiko, Judge Employees' Compensation Appeals Board

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