

on or about April 16, 2008. On July 21, 2008 he underwent OWCP-approved right shoulder arthroscopic surgery and wage-loss compensation for temporary total disability. On September 22, 2009 appellant accepted a part-time (four hours a day) position as a modified sales/service associate, which was available effective October 3, 2009.² By decision dated February 9, 2010, OWCP determined that his actual earnings as a part-time, modified sales/service associate fairly and reasonably represented his wage-earning capacity. It adjusted appellant's wage-loss compensation based on his part-time earnings. When compared to his date-of-injury earnings, OWCP found that he had 50 percent loss of wage-earning capacity (LWEC).³ It subsequently modified the February 9, 2010 LWEC determination because it initially relied on incorrect pay rate information. However, the May 19, 2010 decision did not otherwise amend the prior determination that appellant's part-time, modified sales/service associate position fairly and reasonably represented his wage-earning capacity.

On September 17, 2010 appellant filed a notice of recurrence (Form CA-2a). Effective September 18, 2010, the employing establishment eliminated his part-time, limited-duty assignment pursuant to the National Reassessment Process. Appellant continued to receive wage-loss compensation every 28 days pursuant to the May 19, 2010 LWEC determination.

By decision dated November 2, 2010, OWCP denied appellant's claim for wage-loss compensation for total disability. It found that he had not established a basis for modifying the May 19, 2010 LWEC determination.⁴

On April 18, 2011 appellant's counsel requested reconsideration. By decision dated August 5, 2011, OWCP denied modification. It found that where a formal LWEC is in place and a light-duty assignment is subsequently withdrawn, the LWEC determination remains in effect unless a basis for modifying the LWEC determination is established. OWCP concluded that appellant had not established a basis for modifying the May 19, 2010 LWEC determination and denied his claim for total disability.

LEGAL PRECEDENT

A wage-earning capacity determination is a finding that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages.⁵ Compensation payments are based on the wage-earning capacity determination, and it remains undisturbed until properly modified.⁶ Modification of an LWEC determination is unwarranted 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

² Appellant had been working in a part-time, limited-duty capacity since December 15, 2008.

³ Appellant had been working full time prior to his accepted employment injury.

⁴ OWCP explained that modification was unwarranted unless there was a material change in the nature and extent of the injury-related condition, the employee had been retrained or otherwise vocationally rehabilitated or the original determination was erroneous.

⁵ 5 U.S.C. § 8115(a); see *Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

⁶ See *Katherine T. Kreger*, 55 ECAB 633, 635 (2004).

determination was erroneous.⁷ The burden of proof is on the party seeking modification of the wage-earning capacity determination.⁸

A recurrence of disability includes an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his work-related injury or illness is withdrawn -- except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force (RIF).⁹ Absent a formal wage-earning capacity determination and assuming the position was not withdrawn for cause or because of a RIF, the employee would be entitled to compensation based upon a showing of continuing injury-related disability for regular duty¹⁰ but when a formal wage-earning capacity determination is in place, the subsequent withdrawal of a light-duty assignment is not treated like a recurrence of disability.¹¹ Under these particular circumstances, OWCP shall review the claim for additional compensation as a request for modification of the wage-earning capacity determination and apply the above-noted criteria in determining whether modification is warranted.¹²

ANALYSIS

Due to residuals of his April 16, 2008 employment injury, appellant was unable to resume his previous full-time duties as a window clerk. On September 22, 2009 he accepted part time (four hours a day) work as a modified sales/service associate. OWCP issued a February 9, 2010 LWEC determination based on appellant's earnings as a part-time modified sales/service associate. On May 19, 2010 it modified the LWEC determination to reflect the appropriate pay rate, but did not otherwise alter its finding that appellant's part-time earnings as a modified sales/service associate fairly and reasonably represented his wage-earning capacity. The employing establishment withdrew appellant's part-time, limited-duty assignment effective September 18, 2010. Thereafter, appellant received wage-loss compensation from OWCP based on the May 19, 2010 LWEC determination (50 percent). He claimed additional compensation from OWCP for the four hours of daily wages he lost when his position was eliminated on September 18, 2010. OWCP denied appellant's claim for additional compensation because he purportedly failed to establish a basis for modifying the May 19, 2010 LWEC determination.

One of the grounds for modifying an LWEC determination is that the original determination was erroneous.¹³ The Board finds that the May 19, 2010 LWEC determination was erroneous because OWCP based its finding on a part-time position. Factors to be considered

⁷ *Tamra McCauley*, 51 ECAB 375, 377 (2000).

⁸ *Id.*

⁹ 20 C.F.R. § 10.5(x).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.7(a)(4) (October 2009).

¹¹ *Id.* at Chapter 2.1500.7(a)(5).

¹² *Id.*; *K.R.*, Docket No. 09-415 (issued February 24, 2010); *K.R.*, Docket No. 09-28 (issued September 16, 2009).

¹³ *Tamra McCauley*, *supra* note 7.

in determining if a position fairly and reasonably represents the injured employee's wage-earning capacity include: (1) whether the kind of appointment and tour of duty are at least equivalent to those of the date-of-injury job; (2) whether the job is part time (unless the claimant was a part-time worker at the time of injury) or sporadic in nature; (3) whether the job is seasonal in an area where year-round employment is available; and (4) whether the job is temporary where the claimant's previous job was permanent.¹⁴

The record established that, prior to his accepted injury, appellant worked full time. OWCP failed to follow the procedure manual when it erroneously relied on his part-time reemployment as a basis for finding that his actual earnings fairly and reasonably represented his wage-earning capacity. The procedure manual clearly states that 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.¹⁵ The Board finds that OWCP abused its discretion in determining that appellant's actual earnings in part-time reemployment fairly and reasonably represented his wage-earning capacity. Accordingly, the May 19, 2010 LWEC determination is reversed.¹⁶

The case will be remanded to OWCP to determine whether appellant is entitled to wage-loss compensation for total disability based on the employer's withdrawal of his limited-duty assignment effective September 18, 2010.

CONCLUSION

The Board finds that OWCP erroneously issued the May 19, 2010 loss of wage-earning capacity determination.

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (October 2009).

¹⁵ *Id.*

¹⁶ *See O.V.*, Docket No. 11-98 (issued September 30, 2011).

ORDER

IT IS HEREBY ORDERED THAT the August 5, 2011 decision of the Office of Workers' Compensation Programs is reversed.

Issued: May 14, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board