

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

J.H., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
San Diego, CA, Employer**

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**Docket No. 12-1089
Issued: November 26, 2012**

Appearances:

John Eiler Goodwin, Esq., for the appellant

No Appearance, for the Director

Oral Argument September 19, 2012

ORDER REVERSING CASE

Before:

RICHARD J. DASCHBACH, Chief Judge

COLLEEN DUFFY KIKO, Judge

JAMES A. HAYNES, Alternate Judge

On April 23, 2012 appellant, through her representative, filed an application for review of a December 1, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) denying modification of a December 13, 2007 loss of wage-earning capacity (LWEC) decision. The appeal was docketed as No. 12-1089.¹

Appellant was employed as a part-time letter carrier on June 25, 2007 when she filed an occupational disease claim alleging a right upper extremity condition. OWCP accepted her claim for bilateral shoulder impingement syndrome, bilateral carpal tunnel syndrome and bilateral shoulder tendinitis and placed her on the periodic rolls. After an unsuccessful attempt to obtain employment for appellant through the vocational rehabilitation process, OWCP proposed to reduce her compensation on the grounds that she was no longer totally disabled and had the capacity to earn wages based on the full-time constructed position of information clerk, at the rate of \$385.00 per week. In a formal LWEC decision dated December 13, 2007, OWCP finalized its proposed reduction of benefits.

¹ This case has previously been before the Board. By decision dated March 2, 2010, the Board set aside OWCP's May 28, 2009 decision and remanded the case for consideration of appellant's request to modify the December 13, 2007 LWEC decision. Docket No. 09-2202 (issued March 2, 2010). In a December 29, 2010 order, the Board remanded the case for proper issuance of a May 20, 2010 decision denying modification of the December 13, 2007 LWEC decision. Docket No. 1877 (issued December 29, 2010).

By decision dated May 4, 2011, OWCP denied modification of the December 13, 2007 LWEC decision. In a December 1, 2011 decision, an OWCP hearing representative affirmed the May 4, 2011 decision and found that appellant had failed to show that there had been a material change in the nature and extent of the injury-related condition, that she had been vocationally rehabilitated or that the original determination was erroneous.

The Board having duly considered the matter concludes that the December 13, 2007 LWEC decision was erroneous.

Once OWCP has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction of benefits.² Under section 8115(a), wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent his or her wage-earning capacity or if the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, his or her usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect wage-earning capacity in his or her disabled condition.³

In this case, OWCP based its determination on the full-time constructed position of information clerk, which it found to be medically and vocationally suitable to represent appellant's wage-earning capacity, although she was working only part time at the time of injury. The hearing representative agreed that appellant's wage-earning capacity should be based on her present ability to work full time, in spite of the fact that appellant worked part time on the date of injury. This application, however, produces an inequitable result.⁴ Section 8115(a) of FECA provides that, if a claimant's actual earnings do not fairly and reasonably represent wage-earning capacity, then it should be determined with regard to specific criteria, including his usual employment. Appellant's usual employment, namely, her employment on the date of injury, was part time, not full time.⁵ Thus, OWCP based its wage-earning capacity decision on an incorrect, inflated salary.⁶

The Board finds that the December 13, 2007 LWEC determination was, in fact, erroneous. Therefore, the Board will reverse the hearing representative's December 1, 2011 decision.

² *David W. Green*, 43 ECAB 883 (1992).

³ *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

⁴ *See R.C.*, Docket No. 06-1293 (issued February 12, 2007).

⁵ 5 U.S.C. § 8115(a); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment -- Determining Wage Earning Capacity*, Chapter 2.814.8 (December 1993).

⁶ Given the Board's ruling, it is not necessary to discuss other arguments raised by counsel on appeal.

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 1, 2011 is reversed.

Issued: November 26, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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