

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

L.W., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Bellmawr, NJ, Employer**

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**Docket No. 12-1741
Issued: May 13, 2013**

Appearances:

*Jason S. Lomax, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On August 9, 2012 appellant, through her attorney, filed a timely appeal of a February 29, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (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 OWCP properly denied modification of appellant's loss of wage-earning capacity on August 9, 2011 based upon her actual part-time earnings.

FACTUAL HISTORY

On February 9, 2009 appellant, a 43-year-old mail handler, injured her right shoulder and right arm while culling mail from a culling belt. She filed a claim for benefits on February 13, 2009, which OWCP accepted for right shoulder and right arm sprain. On April 11, 2009 appellant

¹ 5 U.S.C. § 8101 *et seq.*

filed a Form CA-2a claim for benefits, alleging that she sustained a recurrence of disability causally related to her accepted conditions. OWCP accepted the claim on August 14, 2009.

In a report dated June 16, 2010, Dr. John M. Fenlin, Board-certified in orthopedic surgery, restricted appellant from lifting more than five pounds. Appellant returned to work in July 2010.

In a memorandum of telephone call dated October 5, 2010, OWCP verified that appellant had been working eight hours per day, but that work was currently only available at the employing establishment for five hours per day.

In a work capacity form report, dated March 30, 2011, Dr. Fenlin indicated that appellant could work for eight hours per day, with restrictions on overhead lifting and reaching above the shoulders.

In an e-mail dated April 14, 2011, the employing establishment advised OWCP that appellant was currently working in a five-hour limited-duty position, although it was conducting a search to determine if there was eight-hour work available within her restrictions.

On April 27, 2011 the employing establishment offered appellant a job for five hours a day as a modified mail handler. The position entailed repairing and rewrapping damaged or loose mail, was tailored to her physical restrictions and allowed her to work for five hours per day, with intermittent standing/walking for 30 minutes and no overhead lifting. Appellant accepted the job on May 4, 2011 as a modified mail handler for five hours per day.

By decision dated August 9, 2011, OWCP issued a formal wage-earning capacity decision. It found that appellant had worked more than 60 days in the modified position and that the actual wages she earned in the position of modified mail handler, \$699.98 per week, fairly and reasonably represented her wage-earning capacity. OWCP therefore reduced her compensation rate to \$253.31, which amounted to a monthly compensation rate of \$1,066.00.

On August 12, 2011 appellant requested an oral hearing, which was held on December 9, 2011. At the hearing, she testified that she actually returned to work in July 2010 at an eight-hour job, in the same modified mail handler position. Appellant further stated that her hours were reduced from eight to five hours per day in August 2010.

On September 26, 2011 appellant filed CA-7 forms for wage-loss compensation beginning April 2 to 8, 2011. OWCP paid compensation for three hours per day.

By decision dated February 29, 2012, an OWCP hearing representative affirmed the August 9, 2011 loss of wage-earning capacity decision. She stated that when an employee cannot return to the date-of-injury job because of a disability due to work-related injury or disease, but does return to alternative employment with an actual wage loss, OWCP must determine whether the earnings in the alternative employment fairly and reasonably represented the employee's wage-earning capacity. The hearing representative noted that, after returning to work on July 10, 2010, appellant returned to work for eight hours per day as a modified mail handler. Subsequently, on August 31, 2010, appellant's modified job was reduced to five hours per day pursuant to the National Reassessment Program. The hearing representative further noted that on May 4, 2011 appellant accepted a new modified mail handler position for five hours per day. She stated that throughout this period appellant continued to work five hours per

day and receive compensation for wage loss for three hours per day. Based on this set of facts which established that appellant continued to work the modified position, the hearing representative found that OWCP properly issued a loss of wage-earning capacity decision on August 9, 2011 based upon the claimant's actual earnings since May 4, 2011. She further found that appellant continued to be entitled to compensation for wage loss for three hours per day.

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.² 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, OWCP must determine whether the earnings in the alternative employment fairly and reasonably represent the employee's loss of wage-earning capacity.³

Section 8115(a) of FECA provides that in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his or her actual earnings if his or her actual earnings fairly and reasonably represent his or her wage-earning capacity.⁴ Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.⁵

OWCP's Procedure Manual provides that the factors to be considered in determining whether the claimant's work fairly and reasonably represented her wage-earning capacity include the kind of appointment and the tour of duty. The manual states that reemployment may not be considered suitable when the position is part time, unless the claimant was a part-time worker at the time of injury.⁶

ANALYSIS

On August 9, 2011 OWCP found that appellant's actual earnings of five hours a day, as a modified mail handler, fairly and reasonably represented her wage-earning capacity as of May 4, 2011. Appellant's attorney argues that, based upon her medical restrictions, appellant was actually capable of working eight hours per day and that the modified mail handler position artificially restricts her to working five hours per day, and was therefore erroneous.

The Board finds that the August 9, 2011 wage-earning capacity determination was erroneous when issued.

² 5 U.S.C. § 8102(a).

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (September 2011).

⁴ 5 U.S.C. § 8115.

⁵ See *Loni J. Cleveland*, 52 ECAB 171 (2000).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage Earning Capacity*, Chapter 2.814.7 (September 2011). See also *S.M.*, Docket No. 10-2382 (issued September 28, 2011); *E.F.*, Docket No. 11-2056 (issued May 14, 2012).

Appellant had been employed in a full-time position at the time of injury. The medical evidence of record also establishes that she was capable of performing full-time modified work as of August 2010. On May 4, 2011 appellant assumed part-time job duties, five hours a day, which were the basis of the August 9, 2011 loss of wage-earning capacity.⁷ OWCP's own procedures state that a part-time position may not be suitable as the basis of a loss of wage-earning capacity determination if appellant was a full-time employee at the time of injury. OWCP's August 9, 2011 determination that appellant's five-hour-a-day wages represented her wage-earning capacity was therefore erroneous.

The Board will set aside the February 29, 2012 decision.

CONCLUSION

The Board finds that the February 29, 2012 wage-earning capacity decision is reversed.

ORDER

IT IS HEREBY ORDERED THAT the February 29, 2012 decision of the Office of Workers' Compensation Programs is reversed.

Issued: May 13, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

⁷ A part-time tour of duty is defined by OWCP directive at Federal (FECA) Procedure Manual, Part 2 -- *Determining Pay Rates*, Chapter 2.900.3(a)(2) (March 2011) as between 16 and 32 hours a week.