

and her lower back at work. OWCP accepted her claim for lumbar muscle spasm with no lost time. It expanded the claim to include lumbar disc syndrome and a herniated disc at L5-S1.²

On September 8, 1999 appellant accepted a limited-duty assignment as a modified distribution clerk. The employing establishment informed her that the assignment was based upon the limitations prescribed by her treating physician. The job was tailored to appellant's physical restrictions and allowed her to work for five hours per day, manually sorting letter-sized pieces of mail. It was noted that she would not have to do any lifting, climbing, kneeling, twisting, stooping, pushing, pulling or reaching above the shoulders. Additionally, it was noted that a straight-back chair was required. Furthermore, appellant was advised that the assignment was prepared to accommodate her medical restrictions and that it was subject to adjustment in accordance with her medical and physical progression. The stated offer indicated that the effective date was August 25, 1999.

By decision dated October 20, 1999, OWCP issued a formal loss of 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 modified position of distribution clerk, \$38,650.00 per annum, fairly and reasonably represented her wage-earning capacity.

On November 2, 2011 appellant filed a claim for a recurrence of disability on October 30, 2011. She indicated that she worked in the limited-duty position until October 30, 2011, when the position was withdrawn. By decision dated February 17, 2012, OWCP denied modification of its wage-earning capacity decision. On March 25, 2012 appellant requested a hearing, which was held on May 30, 2012.

By decision dated July 16, 2012, OWCP's hearing representative affirmed the prior decision. She found that appellant's position was not a makeshift or odd-lot position.

By letter dated October 30, 2012, appellant's representative requested reconsideration. He argued the original loss of wage-earning capacity decision was erroneous as appellant was not working in the position for 60 days prior to the issuance of the loss of wage-earning capacity decision.

By decision dated February 7, 2013, OWCP denied modification of its prior decision.

LEGAL PRECEDENT

OWCP's procedure manual provides that, if a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss.³ The procedure manual further indicates that,

² On January 20, 1998 the Board reversed an August 3, 1995 OWCP decision that terminated appellant's compensation. Docket No. 96-334 (issued January 20, 1998).

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11 (October 2009).

under these circumstances, the claims examiner will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity decision.⁴

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.⁵ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁶

OWCP's procedure manual provides that factors to be considered in determining whether the claimant's work fairly and reasonably represents her wage-earning capacity include the kind of appointment, that is, whether the position is temporary, seasonal or permanent and the tour of duty, that is, whether it is part time or full time.⁷ Its procedures provide that a determination regarding whether actual earnings fairly and reasonably represent wage-earning capacity should be made after an employee has been working in a given position for more than 60 days.⁸

ANALYSIS

OWCP denied modification of the October 20, 1999 loss of wage-earning capacity determination. It found that the modified distribution clerk position that was the subject of the original loss of wage-earning capacity fairly and reasonably represented appellant's wage-earning capacity. 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. Appellant's representative does not contend that modification of the October 20, 1999 loss of wage-earning capacity determination was warranted due to a material change in the nature and extent of the injury-related condition, nor does the evidence establish that she has been retrained or otherwise vocationally rehabilitated. He contends, rather, that the original determination was, in fact, erroneous.

The Board finds that the wage-earning capacity determination was erroneous when issued.

Appellant had originally been employed in a full-time position as a distribution clerk. On September 28, 1991 she experienced pain in her back while working and she became disabled due to her accepted conditions which included lumbar muscle spasm, lumbar disc syndrome and

⁴ *Id.*

⁵ *Tamra McCauley*, 51 ECAB 375, 377 (2000).

⁶ *Id.*

⁷ Federal (FECA) Procedure Manual, *supra* note 3 at Chapter 2.814.7(a) (October 2009). *T.M.*, Docket No. 08-975 (issued February 6, 2009); *Tamra McCauley*, *supra* note 5.

⁸ *Id.* at Chapter 2.814.7(c)(1).

a herniated disc at L5-S1. On September 8, 1999 appellant accepted a part-time limited-duty assignment as a modified distribution clerk, which was the basis of the October 20, 1999 loss of wage-earning capacity. The position was effective August 25, 1999. The Board finds that the October 20, 1999 wage-earning capacity determination was in error. OWCP failed to follow its procedures in determining that appellant had worked in the position for at least 60 days. The record establishes that on September 8, 1999 she accepted the modified distribution clerk position, which became effective on August 25, 1999. The evidence supports that appellant did not work in the position offered by the employing establishment for more than 60 days prior to the October 20, 1999 wage-earning capacity determination. The Board, therefore, finds that OWCP failed to follow its established procedures as it did not show that appellant performed the modified distribution clerk position consistently for 60 days.⁹ Furthermore, the record indicates that appellant was a full-time employee when injured but her wage-earning capacity determination was based on a part-time job. OWCP did not explain how this comported with its procedures.¹⁰ Thus, it failed to meet its burden of proof. Accordingly, the Board finds that the October 20, 1999 position did not fairly and reasonably represent appellant's wage-earning capacity.

CONCLUSION

The Board finds that appellant has established that modification of the October 20, 1999 wage-earning capacity decision is warranted.

⁹ See *Amalia Stys*, Docket No. 96-521 (issued June 9, 1998) (where the Board found that, as the claimant was terminated after 56 days of employment, she did not have 60 days of actual wages from which OWCP could derive a fair and reasonable representation of her wage-earning capacity).

¹⁰ See Federal (FECA) Procedure Manual, *supra* note 3; *J.H.*, Docket No. 13-78 (issued April 1, 2013).

ORDER

IT IS HEREBY ORDERED THAT the February 7, 2013 Office of Workers' Compensation Programs' decision is reversed.

Issued: January 23, 2014
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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