

FACTUAL HISTORY

OWCP accepted that on June 18, 1986 appellant, then a 28-year-old rigger, sustained a cervical dorsal strain/sprain and herniated lumbar disc due to lifting and emptying trash cans. At the time, he was working 40 hours per week at the employing establishment.² Appellant last worked on January 25, 1989. On March 12, 2004 he underwent an authorized discectomy at L4-5 and L5-S1 with anterior interbody fusion.

In an April 15, 2005 letter, appellant reported to OWCP that on April 11, 2005 he began working for 20 hours a week as an activities director for Kampgrounds of America in Niagara Falls, NY. In a June 28, 2006 letter, an official from Kampgrounds of America stated that on April 11, 2005 appellant began employment “doing activities” at the Niagara Falls Kampgrounds of America.³ The official advised that appellant was scheduled to work 20 hours a week and made \$6.75 per hour.

In a December 18, 2006 decision, OWCP adjusted appellant’s compensation effective April 11, 2005 based on its determination that his actual wages as an activities director represented his wage-earning capacity.⁴

Appellant stopped working on November 20, 2008. He advised OWCP in a December 10, 2008 letter that his injury-related condition had worsened and that he could no longer work as an activities director. OWCP requested that he submit evidence in support of the request to establish that modification of the loss in wage-earning capacity was warranted.

In a November 24, 2008 report, Dr. David F. Grider, an attending Board-certified orthopedic surgeon, noted that appellant had chronic myositis, thoracic outlet syndrome, bicipital tendinitis bilaterally, bulging discs at C3 and C4 and chronic lumbosacral strain. He stated, “It is my opinion that this patient is no longer able to work in his present capacity. The patient cannot do the lifting that is required, work the hours that are required and cannot function in his present position.” Appellant also submitted reports of Dr. Marcus Malone, an attending orthopedic surgeon, and Dr. Igor Khromov, an attending Board-certified physical medicine and rehabilitation physician, which detailed his neck and back symptoms.

In an October 1, 2009 decision, OWCP denied appellant’s request for modification of its December 18, 2006 wage-earning capacity determination. It found that he had not established that the original determination was erroneous or that he sustained a material worsening of his injury-related condition such that he could no longer work as an activities director.

² Appellant worked eight hours a day, Monday through Friday.

³ The official stated that the duties of the job included “riding in a golf cart to talk with the guests in the park and make sure that they are having a nice time” and giving “the guests ideas of where to go and what to see in the area, helping guests learn how to do tie dye t-shirts, games, ice cream socials, etc.”

⁴ OWCP indicated that appellant’s actual wages were \$135.00 per week.

In an October 21, 2009 report, Dr. Michael Drelles, an attending osteopath, diagnosed myalgia, myositis, cervalgia and lumbago. In a December 2, 2010 report, Dr. Ruben Fernandez, an attending Board-certified anesthesiologist, diagnosed postlaminectomy syndrome of the lumbar region, degeneration of cervical intervertebral disc, muscle spasm, cervalgia, pain in thoracic spine and lumbago.

In a February 11, 2011 decision, OWCP denied appellant's request for modification of its December 18, 2006 wage-earning capacity determination.

Appellant submitted medical reports from attending physicians who diagnosed several conditions, including postlaminectomy syndrome of the lumbar region, degeneration of cervical intervertebral disc, muscle spasm, cervalgia, pain in thoracic spine and lumbago. He also submitted medical notes listing periods of disability after November 20, 2008.

In a February 27, 2012 decision, OWCP determined that appellant was not entitled to further review of the merits of his claim under section 8128 of FECA. It found that the additional evidence and arguments he provided were cumulative, repetitious, irrelevant or immaterial.

Appellant submitted a December 19, 2011 report from Dr. Daniel Battaglia, an attending Board-certified anesthesiologist, who discussed the management of appellant's multiple pain symptoms, primarily located in the cervical and lumbar regions.

In a January 16, 2013 decision,⁵ the Board set aside OWCP's February 27, 2012 decision denying appellant merit review. The Board noted that, as appellant had requested modification of the December 18, 2006 wage-earning capacity determination, the requirements for requesting reconsideration did not apply in this case and he was entitled to a merit review on the wage-earning capacity issue. The Board remanded the case to OWCP to issue a merit decision on this issue.

In a February 19, 2013 decision, OWCP found that appellant had not met his burden of proof to modify the December 18, 2006 wage-earning capacity determination. Appellant did not establish that the original wage-earning capacity decision was in error or submit probative medical evidence showing that he could no longer work as an activities director due to his accepted injury-related condition.

LEGAL PRECEDENT

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.⁶ OWCP's procedure manual provides that, "[i]f a formal loss of wage-earning capacity decision has been issued, the rating should be left in place

⁵ Docket No. 12-1774 (issued January 16, 2013).

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

unless the claimant requests resumption of compensation for total wage loss. In this instance the [claims examiner] will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity.”⁷

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.⁸ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁹

OWCP’s procedure manual provides guidelines for determining wage-earning capacity based on actual earnings:

“a. Factors considered. To determine whether the claimant’s work fairly and reasonably represents his or her WEC [wage-earning capacity], the CE [claims examiner] should consider whether the kind of appointment and tour of duty (see FECA PM 2.900.3) are at least equivalent to those of the job held on date of injury. Unless they are, the CE may not consider the work suitable.

“For instance, reemployment of a temporary or casual worker in another temporary or casual (USPS) position is proper, as long as it will last at least 90 days, and reemployment of a term or transitional (USPS) worker in another term or transitional position is likewise acceptable. However, the reemployment may not be considered suitable when:

- (1) The job is part-time (unless the claimant was a part-time worker at the time of injury) or sporadic in nature;
- (2) The job is seasonal in an area where year-round employment is available....
- (3) The job is temporary where the claimant’s previous job was permanent.”¹⁰

ANALYSIS

OWCP accepted that on June 18, 1986 appellant sustained a cervical dorsal strain/sprain and herniated lumbar disc due to lifting and emptying trash cans. On March 12, 2004 appellant

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

⁸ *Stanley B. Plotkin*, 51 ECAB 700 (2000).

⁹ *Id.*

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7a (July 1997).

underwent an OWCP-authorized discectomy at L4-5 and L5-S1 with anterior interbody fusion. In a December 18, 2006 decision, OWCP adjusted his compensation effective April 11, 2005 based on his ability to earn wages as an activities director. It based appellant's loss of wage-earning capacity on a determination that his actual earnings as an activities director beginning April 11, 2005 represented his wage-earning capacity. Appellant requested modification of OWCP's December 18, 2006 wage-earning capacity determination, but it denied his request for modification of this determination.

The record reflects that appellant's date-of-injury job as a rigger was a full-time position. The actual earnings in this case were based on a part-time job of activities director. Appellant worked 20 hours per week in this position. OWCP's procedure manual provides, in situations where an employee is working full time when injured and is reemployed in a part-time position, a formal wage-earning capacity determination is generally not appropriate. The Board has held that OWCP must address the issue and address why a part-time position is suitable for a wage-earning capacity determination based on the specific circumstances of the case.¹¹

OWCP did not address this issue in the 2005 wage-earning capacity decision. It made a finding that his actual earnings fairly and reasonably represented appellant's wage-earning capacity. OWCP did not address the part-time position or the fact that appellant was not a part-time employee when he sustained injury. The Board finds that OWCP failed to meet its burden of proof in determining appellant's wage-earning capacity effective April 11, 2005 based on his part-time work as an activities director for 20 hours per week.

OWCP has not shown that appellant's wages as an activities director fairly and reasonably represent his wage-earning capacity and it improperly adjusted his compensation based on this wage-earning capacity determination. Therefore, appellant has shown that OWCP's original determination with regard to his wage-earning capacity was erroneous and that modification of the determination is warranted on this basis.¹²

CONCLUSION

The Board finds that appellant met his burden of proof to modify OWCP's December 18, 2006 wage-earning capacity determination.

¹¹ *Connie L. Potratz-Watson*, 56 ECAB 316 (2005).

¹² *See supra* note 8.

ORDER

IT IS HEREBY ORDERED THAT the February 19, 2013 decision of the Office of Workers' Compensation Programs is reversed.

Issued: January 30, 2014
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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