

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

B.W., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Detroit, MI, Employer**

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**Docket No. 13-1598
Issued: September 22, 2014**

Appearances:
Steve Burt, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge

JURISDICTION

On June 27, 2013 appellant, through her representative, filed a timely appeal from a March 12, 2013 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 appellant met her burden of proof to establish modification of OWCP's December 11, 1997 loss of wage-earning capacity determination.

FACTUAL HISTORY

In March 1997, OWCP accepted that appellant, then a 41-year-old letter carrier, sustained bilateral aggravation of osteoarthritis of her knees due to the performance of her work duties

¹ 5 U.S.C. §§ 8101-8193.

over time.² Appellant stopped work on December 28, 1995 in order to undergo left knee arthroscopy with medial meniscus debridement on December 29, 1995 and she returned to limited-duty work for the employing establishment on January 10, 1996.

In a May 5, 1997 report, Dr. William Higginbotham, an attending Board-certified orthopedic surgeon, indicated that appellant had degenerative changes of her knees which were worse in her left knee (including changes in the patellofemoral and medial joints). He recommended that appellant alternate between sitting and standing during the workday and that she not climb ladders, stand for prolonged periods, walk for long distances or walk on unprotected heights.

On May 28, 1997 Dr. William Fitz, an attending Board-certified physical medicine and rehabilitation physician, stated that appellant could return to work with restrictions, including lifting, carrying, pushing and pulling no more than 15 pounds.

On June 28, 1997 the employing establishment offered appellant a full-time position bearing the title "modified carrier."³ Appellant accepted the position on July 10, 1997 and began working in it on August 2, 1997. The modified carrier position allowed appellant to alternate between sitting and standing at will while sorting mail into carrier cases and inputting data on a keyboard for the delivery support information system and other programs.⁴ The physical requirements of the position included alternating between sitting and standing and appellant was not required to stoop, climb ladders, stand for prolonged periods, walk long distances or walk on unprotected heights.

In a December 11, 1997 decision, OWCP determined that appellant's actual wages as a modified carrier fairly and reasonably represented her wage-earning capacity. It found that she had no loss of wage-earning capacity and stated, "Since you returned as a modified carrier with retained wages, your wages match the current salary of your date-of-injury job as a carrier."⁵ OWCP indicated that appellant was vocationally and medically suited for the modified carrier position.

In June 19, 2001 and October 10, 2002 duty status reports (CA-17 forms), Dr. Diane Culik, an attending Board-certified family practitioner, indicated that appellant could work for eight hours per day with restrictions including lifting up to 20 pounds, walking for up to two hours per day and standing for up to one hour per day. Appellant could sit for eight hours daily but she could not kneel, bend or stoop. In an April 26, 2005 duty status report, Dr. Culik indicated that appellant could work for eight hours per day with restrictions including lifting up

² Appellant filed an occupational disease claim in January 1997 indicating that she first became aware of her claimed condition and its relationship to work factors on September 5, 1995 when she noticed that her left knee became inflamed while performing her work duties. Her letter carrier position required her to case and sort mail for two to three hours per day and to deliver mail for five hours per day.

³ The hours of the position were 8:00 a.m. to 4:40 p.m., five days per week.

⁴ The mail sorting task did not require using more than one hand at a time.

⁵ Appellant's pay rate when her disability began was \$702.90 per week and the current pay rate for the job she held when injured was \$708.90.

to 20 pounds, walking for up to four hours per day and standing for up to one hour per day. Appellant could not engage in kneeling, bending or stooping.

On March 17, 2007 appellant began working in a full-time position which involved casing mail, inputting data and working on undeliverable mail. The position required lifting up to 20 pounds, walking for up to four hours per day, standing for up to one hour at a time, occasional bending and reaching above the shoulder, and infrequent climbing.

In a June 21, 2007 duty status form report, Dr. Culik indicated that appellant could work for eight hours per day with restrictions including lifting up to 20 pounds, walking for up to two hours at a time and standing for up to two hours at a time. Appellant could occasionally bend and reach above the shoulder and could climb on rare occasions. In a duty status report dated June 23, 2009, Dr. Culik listed appellant's restrictions as walking for up to two hours at a time and standing for up to two hours at a time. Appellant could occasionally bend and reach above the shoulder and could climb on rare occasions.⁶ On January 27, 2010 Dr. Culik found that appellant could work for eight hours per day, with restrictions of lifting up to 20 pounds, walking for up to 4½ hours per day and standing for up to 4½ hours per day. Appellant could bend, stoop, twist, push and pull for up to three hours per day and could occasionally engage in climbing.

Under the National Reassessment Process (NRP), the employing establishment offered appellant a modified city carrier position on April 29, 2010, a position which reduced her work hours from 8.0 to 5.5 hours per day for five days per week. The position involved delivering mail for part of the day and required her to lift up to 20 pounds, walk for up to 4½ hours per day, stand for up to 4½ hours per day, and bend, stoop, twist, push and pull for up to three hours per day. Appellant accepted the position "with protest" on May 13, 2010.⁷

On June 25, 2010 appellant filed a claim (Form CA-2a) alleging that she sustained a recurrence of disability on June 5, 2010 due to her accepted work injury. She indicated that her bilateral knee pain lessened when she worked in a modified position that did not require carrying mail but that the pain never completely went away. Appellant noted that on June 5, 2010 she was reassigned to the Monroe Post Office and that she had to stop work early that day after experiencing increased knee pain while attempting to deliver her mail route.⁸

Appellant submitted a June 23, 2010 duty status report in which Dr. Culik found that she could work for eight hours per day, with restrictions of lifting up to 20 pounds, walking for up to

⁶ In a September 30, 2009 duty status report, Dr. Culik indicated that appellant could walk for one and a half hours at a time.

⁷ On August 13, 2009 the employing establishment offered appellant a modified job for one and a half hours per day under NRP. Appellant rejected the offered position and it does not appear that she worked in the position.

⁸ On December 27, 2010 appellant filed a Form CA-2a containing a similar claim that she sustained a recurrence of disability on June 5, 2010 due to her accepted work injury. In this form, she indicated that she last worked on June 23, 2010 and that the employing establishment told her that it did not have work within her work restrictions. In a December 1, 2010 letter, appellant described the work duties she was performing in mid-2010, including engaging in repetitive lifting and twisting while casing mail.

one hour per day and standing for up to two hours per day. Appellant could bend, stoop and twist for up to one hour per day, push and pull for up to one half hour per day and occasionally engage in climbing. On July 15 and September 8, 2010 Dr. Culik provided similar work restrictions. On December 1, 2010 she indicated that appellant could engage in pushing and pulling for up to eight hours per day.

In a report dated December 3, 2010, Dr. Culik indicated that appellant had been on work restrictions due to severe osteoarthritis in her knees, especially in the left knee, noting that this condition was related to chronic wear and tear from standing at work and injuries related to work duty. She discussed appellant's work duties between June and September 2010 and stated:

"I definitely feel [appellant] has pushed herself to continue working to the best of her ability despite prolonged wear and tear and overuse of her knees and chronic pain and continuing her recommended medical management, and cooperating with the surgical and physical therapy recommendations of her orthopedic surgeon. She has reached the point that she can no longer medically continue with the required duties of her job position."

In a February 1, 2011 duty status report, Dr. Culik stated that appellant could work for eight hours per day, with restrictions of lifting up to 20 pounds, walking for up to one hour per day and standing for up to two hours per day. Appellant could bend, stoop, twist, push and pull for up to one hour per day and could occasionally engage in climbing.

In a March 28, 2011 letter, OWCP advised appellant that it considered her recurrence of disability claim to be a request for modification of its December 11, 1997 wage-earning capacity determination. It informed appellant of the criteria for modifying a wage-earning capacity determination including showing that the original rating was in error, that her injury-related medical condition had worsened such that she could not work in the rated position or that she had been retrained or otherwise vocationally rehabilitated. In another March 28, 2011 letter, OWCP asked the employing establishment to provide various documents, including copies of position descriptions of jobs held by appellant. The employing establishment submitted copies of position descriptions of jobs held by appellant, including the modified carrier position on which the December 11, 1997 wage-earning capacity determination was based.

In an April 15, 2011 letter, appellant alleged that OWCP's December 11, 1997 wage-earning capacity determination was made in error because it was based on the modified carrier position which did not fairly represent her "previous letter carrier duties." She argued that much of the work of the modified carrier position she began performing in 1997 was "make-work" and "not core letter carrier work to begin with." Appellant felt that the modified carrier position was "nothing more than a collection of make-work duties and was never a valid, funded or titled position." She claimed that, if she left the modified carrier position, it would not represent the type of position that could be bid upon by her coworkers.

In a February 22, 2012 duty status report, Dr. Culik recommended work restrictions which were similar to those contained in her February 1, 2011 duty status report.

In a March 16, 2012 decision, OWCP found that appellant did not meet her burden of proof to modify its December 11, 1997 wage-earning capacity determination. It indicated that appellant had not shown that there was a material worsening of her injury-related condition such that she was unable to earn wages as a modified carrier position, *i.e.*, the position on which the December 11, 1997 determination was based.

In a decision dated May 30, 2012, an OWCP hearing representative set aside OWCP's March 16, 2012 decision on the grounds that OWCP had not adequately considered appellant's argument that the December 11, 1997 wage-earning capacity determination should be modified because the determination was erroneous at the time it was made. Appellant had argued that the determination was erroneous because it was based on wages earned in a makeshift or odd-lot position. The case was remanded to OWCP for consideration of this argument.

In an August 3, 2012 decision, OWCP denied appellant's request for modification of its December 11, 1997 wage-earning capacity determination. It found that appellant had not shown that the December 11, 1997 determination was erroneous or that her injury-related condition worsened such that she was unable to earn wages as a modified carrier. OWCP determined that the modified carrier position was not a makeshift or odd-lot position.

Appellant requested a hearing with an OWCP hearing representative. During the December 18, 2012 hearing, she testified that the 1997 job offer involved casing mail and entering data into a computer keyboard. Appellant stated that other duties were later assigned, including some express mail delivery and pickup, office supply clerk duties, Combined Federal Campaign responsibilities and food drive assistance. She indicated that she cased mail from one to three hours daily. Appellant continued with these activities until 2009 when her work hours were diminished due to NRP. She stated that she was unable to continue working in June 2009 and that a manager sent her home because no work was available within her work restrictions. Appellant's representative asserted that OWCP's December 11, 1997 wage-earning capacity determination should be modified because the original rating was in error. He argued that the 1997 job offer was devised to meet appellant's specific needs, that it had no formal job title or position number, and that it could not have been found in the local job market. Appellant's representative discussed FECA Bulletin No. 09-05 and argued that the wage-earning capacity determination was not based on a *bona fide* job offer, *i.e.*, a classified position with a formal position description. He also asserted that the evidence showed a change in the injury-related condition such that appellant's medical status actually improved prior to being offered a new job in April 2010. For these reasons, OWCP should have modified its December 11, 1997 wage-earning capacity determination.⁹

In a March 12, 2013 decision, an OWCP hearing representative affirmed OWCP's August 3, 2012 decision. He found that appellant had not shown that the December 11, 1997 determination was erroneous or that her injury-related condition worsened such that she was unable to earn wages as a modified carrier.

⁹ Appellant's representative submitted a copy of a Merit Systems Protection Board case which he believed supported his argument that the modified carrier position represented makeshift of odd-lot work.

LEGAL PRECEDENT

Under 5 U.S.C. § 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. Generally, wages actually earned are the best measure of wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.¹⁰ A determination regarding whether actual earnings fairly and reasonably represents one's wage-earning capacity should be made only after an employee has worked in a given position for more than 60 days.¹¹

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.¹² The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.¹³

OWCP procedure manual provides guidelines for determining wage-earning capacity based on actual earnings. A job that is part-time (when the claimant was a full-time employee at the time of injury), seasonal in an area where year-round employment is available, or temporary (when the date-of-injury position was a permanent position) is generally not appropriate for a wage-earning capacity determination.¹⁴

In addition, it is well established that a position that is considered an odd-lot or makeshift position designed for a claimant's particular needs is not appropriate for a wage-earning capacity determination.¹⁵ The Board has discussed several factors that may support a finding that the offered position was makeshift in nature. These factors include: (1) the position did not have an official title or formal position description; (2) there were strict limitations, such as five-pound lifting and no casing of mail, which indicated that the claimant would not be able to secure a position in the community at large with such limited duties; (3) the claimant did not perform any meaningful tasks in the position; and (4) the job appeared to be temporary in nature.¹⁶

FECA Bulletin No. 09-05 outlines OWCP procedures when limited-duty positions are withdrawn pursuant to NRP. If a formal wage-earning capacity decision has been issued, OWCP

¹⁰ *Dennis E. Maddy*, 47 ECAB 259, 262 (1995).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (October 2009).

¹² *See Sharon C. Clement*, 55 ECAB 552 (2004).

¹³ *See T.M.*, Docket No. 08-975 (issued February 6, 2009).

¹⁴ Federal (FECA) Procedure Manual, *supra* note 11.

¹⁵ *See A.J.*, Docket No. 10-619 (issued June 29, 2010).

¹⁶ *Id.*

must develop the evidence to determine whether a modification of that decision is appropriate.¹⁷ When a loss of wage-earning capacity decision has been issued, FECA Bulletin No. 09-05 requires OWCP to develop the evidence to determine whether a modification of the decision is appropriate.¹⁸ To this end, FECA Bulletin No. 09-05 asks OWCP to confirm that the file contains documentary evidence supporting that the position was an actual *bona fide* position. It requires OWCP to review whether a current medical report supports work-related disability and establishes that the current need for limited duty or medical treatment is a result of injury-related residuals, and to further develop the evidence from both the claimant and the employing establishment if the case lacks current medical evidence.¹⁹

ANALYSIS

OWCP accepted that appellant sustained bilateral aggravation of the osteoarthritis of her knees due to the performance of her work duties over time. Appellant stopped work on December 28, 1995 in order to undergo left knee surgery on December 29, 1995 and she returned to limited-duty work for the employing establishment on January 10, 1996.

On June 28, 1997 the employing establishment offered appellant a full-time position bearing the title “modified carrier.” Appellant began working in the position on August 2, 1997. The modified carrier position allowed appellant to alternate between sitting and standing at will while sorting mail into carrier cases and inputting data on a keyboard for the delivery support information system and other programs. The physical requirements of the position included alternating between sitting and standing and appellant was not required to stoop, climb ladders, stand for prolonged periods, walk long distances or walk on unprotected heights. In a December 11, 1997 decision, OWCP determined that appellant’s actual wages as a modified carrier fairly and reasonably represented her wage-earning capacity. It indicated that appellant was vocationally and medically suited for the modified carrier position and found that she had no loss of wage-earning capacity. On April 29, 2010 OWCP offered appellant a modified position under NRP. The modified carrier position reduced appellant’s work hours.

Appellant stopped work in June 2010 and requested that OWCP modify its December 11, 1997 wage-earning capacity determination.²⁰ In several decisions, OWCP found that appellant had not met her burden of proof to modify the December 11, 1997 determination.

¹⁷ FECA Bulletin No. 09-05 (issued August 18, 2009).

¹⁸ *Id.*

¹⁹ *Id.* at §§ I.A.1-2.

²⁰ Appellant initially indicated that she was claiming a recurrence of work-related disability, but she later indicated that she was requesting modification of OWCP’s December 11, 1997 wage-earning capacity determination.

The Board finds that appellant did not meet her burden of proof to modify OWCP's December 11, 1997 wage-earning determination under any of the three criteria discussed above.²¹

Appellant and her representative alleged, both before OWCP and on appeal, that OWCP's original December 11, 1997 wage-earning capacity determination was, in fact, erroneous. It was argued that the position upon which the rating was based, *i.e.*, modified carrier, was makeshift or odd-lot in nature and therefore could not be used to justify the wage-earning capacity determination.

In the case of *A.J.*,²² the Board discussed several factors that may support a finding that an offered position was makeshift or odd-lot in nature. These factors include: (1) the position did not have an official title or formal position description; (2) there were strict limitations, such as five-pound lifting and no casing of mail, which indicated that the claimant would not be able to secure a position in the community at large with such limited duties; (3) the claimant did not perform any meaningful tasks in the position; and (4) the job appeared to be temporary in nature.²³

The Board finds that the facts of the present case are distinguishable from those of the case of *A.J.* and that the modified carrier position which served as the basis for OWCP's December 11, 1997 wage-earning capacity determination does not constitute a makeshift or odd-lot position. Although the position that appellant began performing on August 2, 1997 was not classified, it did have the title of modified carrier. The position description for the job listed specific work duties and physical requirements. The limitations of the position were not unduly strict as the job included the activities of sorting and casing mail and making entries on a keyboard. These are meaningful tasks which had been a substantial part of appellant's date-of-injury job as a letter carrier. The position was not temporary in nature as appellant performed it for a number of years. There was no evidence that the position was created specifically for appellant. Thus, the modified carrier position was not makeshift or odd-lot in nature because it had a detailed job description, was performed without overly strict physical restrictions and involved meaningful tasks correlated to that of a letter carrier.²⁴

The evidence further reveals that the modified carrier position was medically and vocationally suitable for appellant. Appellant testified that other duties were added to the modified carrier position. However, she did not establish that she was required to exceed her

²¹ See *supra* note 12.

²² *Supra* note 15.

²³ See also *V.H.*, Docket No. 13-2076 (issued March 5, 2014).

²⁴ See *K.A.*, Docket No. 13-1652 (issued January 6, 2014) (position serving as basis for wage-earning capacity determination found to not be makeshift or odd-lot because it had a detailed job description, was performed without overly strict physical restrictions and involved meaningful tasks). Appellant's representative submitted a copy of a Merit Systems Protection Board case which he believed supported his argument that the modified carrier position represented makeshift of odd-lot work. However, he did not explain how the standards of another federal agency were applicable to the present case decided under FECA.

physical limitations or that her assignment was vocationally unsuitable.²⁵ Actual earnings are generally the best measure of wage-earning capacity and OWCP properly used appellant's actual wages in the modified carrier position to determine her wage-earning capacity.²⁶ There was no clear probative evidence that the December 11, 1997 wage-earning capacity finding was erroneous.

Appellant and her representative also argued that she experienced a worsening of her injury-related condition in June 2009 which prevented her from working in the modified carrier job from that time forward. The Board finds that the medical evidence does not contain probative medical evidence showing such a worsening of appellant's injury-related condition.²⁷

The Board notes that appellant's medical restrictions remained fairly consistent over an extended period of time. For example, in June 19, 2001 and October 10, 2002 duty status reports, Dr. Culik, an attending Board-certified family practitioner, indicated that appellant could work for eight hours per day with restrictions including lifting up to 20 pounds, walking for up to two hours per day and standing for up to one hour per day. These restrictions would not have prevented appellant from performing the modified carrier position as that position was primarily a sedentary position which allowed appellant to alternate at will between sitting and standing. Dr. Culik later gradually lessened appellant's work restrictions over time, a circumstance which suggests an improvement in her bilateral knee condition rather than a worsening. On January 27, 2010 she found that appellant could work for eight hours per day, with restrictions of lifting up to 20 pounds, walking for up to 4½ hours per day, and standing for up to 4½ hours per day. Appellant could bend, stoop, twist, push and pull for up to three hours per day and could occasionally engage in climbing.

While Dr. Culik did indicate in December 2010 that appellant could "no longer medically continue with the required duties of her job position" she did not provide a clear indication that she could not perform the duties of the modified carrier position which served as the basis for OWCP's December 11, 1997 wage-earning capacity determination. Moreover, although Dr. Culik suggested that appellant's accepted work injury from the mid-1990s contributed to her inability to work in 2010, she did not provide a clear opinion on this matter. She did not provide any significant discussion of appellant's accepted bilateral knee condition or provide a rationalized medical explanation of how it could have contributed to her capacity to work during any period after she began working as a modified carrier. Therefore, appellant did not show that a worsening of her injury-related condition prevented her from working as a modified carrier.

The Board further notes that, in denying appellant's request for modification of the December 11, 1997 wage-earning capacity evaluation, OWCP properly complied with the requirements of FECA Bulletin No. 09-05. OWCP confirmed that the file contained documentary evidence supporting that the modified carrier position was an actual *bona fide*

²⁵ See *H.S.*, Docket No. 11-1791 (issued March 23, 2012).

²⁶ OWCP complied with its procedures by making its December 11, 1997 wage-earning capacity determination after appellant worked in the modified carrier position for more than 60 days. See *supra* note 11.

²⁷ In addition, appellant has not alleged or otherwise shown that OWCP's December 11, 1997 determination should be modified because she had been retrained or otherwise vocationally rehabilitated. See *supra* note 12.

position and reviewed the record to determine whether a current medical report supported work-related disability with respect to the modified carrier position.²⁸ For the above-described reasons, appellant did not meet her burden of proof to establish that modification of OWCP's December 11, 1997 loss of wage-earning capacity determination is warranted.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that modification of OWCP's December 11, 1997 loss of wage-earning capacity determination is warranted.

ORDER

IT IS HEREBY ORDERED THAT the March 12, 2013 decision of the Office of Workers' Compensation Programs is affirmed.²⁹

Issued: September 22, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

²⁸ See *supra* notes 17 through 19.

²⁹ Richard J. Daschbach, Chief Judge, who participated in the preparation of the opinion, was no longer a member of the Board after May 16, 2014.