

FACTUAL HISTORY

In early 1991 the Office accepted that appellant, then a 28-year-old letter sorting machine operator, sustained bilateral carpal tunnel syndrome due to the repetitive duties of her job.¹ Appellant underwent a left carpal tunnel release on July 8, 1994 and a right carpal tunnel release on August 19, 1994. Both surgical procedures were authorized by the Office. In October 1994 appellant returned to work for the employing establishment in a light-duty position as a modified distribution clerk. In a December 8, 1994 decision, the Office reduced appellant's compensation effective October 1, 1994 based on its determination that her actual wages as a modified distribution clerk fairly and reasonably represented her wage-earning capacity. In late 1998 appellant started working in another modified clerk position for the employing establishment. In a September 17, 1999 decision, the Office adjusted appellant's compensation effective September 12, 1999 based on its determination that her wages in this modified clerk position fairly and reasonably represented her wage-earning capacity.

On November 6, 1999 appellant began working for the employing establishment in a light-duty position as a modified transportation clerk.² The position involved checking mail for quality control purposes. The physical requirements of the position did not require lifting more than 10 pounds, prolonged fine motor movements of the arms, prolonged reaching or reaching above the shoulders.

On April 24, 2000 Dr. Ward indicated that appellant's arm condition had not changed. On March 20, 2001 he indicated that appellant continued to complain of bilateral wrist pain.

In a September 28, 2001 decision, the Office adjusted appellant's compensation effective December 3, 2000 based on its determination that her wages as a modified transportation clerk fairly and reasonably represented her wage-earning capacity.

On December 5, 2002 Dr. Ward stated that appellant continued to report extremity pain from her carpal tunnel syndrome but could continue in her light-duty work. On August 10, 2005, September 12, 2006 and March 5, 2007 Dr. Ward indicated that appellant's condition was stable and noted that she could continue to perform her light-duty position for six hours per day.

Appellant's modified transportation clerk job was withdrawn by the employing establishment effective January 12, 2008. She filed a claim alleging that on January 12, 2008 she sustained a recurrence of disability due to her accepted employment condition and bilateral carpal tunnel syndrome. She also requested modification of the Office's September 28, 2001 wage-earning capacity determination.

¹ Appellant worked less than 40 hours per week at the time she sustained her employment injury.

² The position involved working six hours per day for five days per week. In an August 30, 1999 report, Dr. Thomas N. Ward, an attending Board-certified neurosurgeon, indicated that appellant continued to report pain and numbness in her hands, especially on the left. He provided no indication that appellant could not continue performing light-duty work. On December 2, 1999 Dr. Ward stated that appellant reported that "she feels pretty well."

In a January 14, 2008 letter, Denise Wilson, a manager for safety and health at the employing establishment, indicated that the modified transportation clerk position was tailored to appellant's work restrictions and was not "a proper position on which to base [a loss of wage-earning capacity]."

In a February 15, 2008 decision, the Office found that appellant did not meet her burden of proof to establish that she sustained a recurrence of total disability on January 12, 2008 due to her accepted employment injury because she did not submit sufficient medical evidence to establish a recurrence. It also found that she did not meet her burden of proof to modify the Office's determination of her wage-earning capacity because she did not show that the original determination was improper, that she had a material change in her employment-related condition or that she was vocationally rehabilitated.

In a March 19, 2008 letter, John T. Godlewski, Jr., the manager of human resources for the employing establishment, stated:

"The [p]ostal [s]ervice prior to the implementation of the [n]ational [r]eassessment [p]rocess, would create these type of make work modified [p]ositions in an effort to accommodate employees who had sustained an injury while in a work status. The withdrawal of this October 25, 1999 position is a result of the [n]ational [r]eassessment [p]rocess currently being undertaken nationwide within the [p]ostal [s]ervice. This process is neither a downsizing nor a reduction-in-force. If necessary work for one employee cannot be identified within their medical limitations, their current modified position is withdrawn and the employee is advised they can submit a claim for compensation for this injury from [the Office]. This is the situation in your specific claim.

"It is the position of [p]ostal management that the action taken as a result of the [n]ational [r]eassessment [p]rocess meets the definition of a valid recurrence claim in accordance with [Office] procedures and highly recommends that you contact [the Office] directly seeking their reconsideration of their determination to not accept your claim for compensation."

In a June 6, 2008 decision, the Office hearing representative affirmed the Office's February 15, 2008 decision.

LEGAL PRECEDENT -- ISSUE 1

When an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that she can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that she cannot perform such light duty. As part of this burden the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.³ Office procedure provides that a recurrence of disability can

³ *Cynthia M. Judd*, 42 ECAB 246, 250 (1990); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

be caused by withdrawal of a light-duty assignment made specifically to accommodate an employee if the withdrawal is not due to misconduct or nonperformance of job duties.⁴

ANALYSIS -- ISSUE 1

Appellant claimed that she sustained a recurrence of total disability when her modified transportation clerk position was withdrawn effective January 12, 2008. In a March 19, 2008 letter, Mr. Godlewski, Jr., the manager of human resources for the employing establishment, acknowledged that appellant's position was withdrawn as part of a wider restructuring of the modified-duty positions at the employing establishment. He noted, "It is the position of [p]ostal management that the action taken as a result of the [n]ational [r]eassessment [p]rocess meets the definition of a valid recurrence claim in accordance with [Office] procedures and highly recommends that you contact [the Office] directly seeking their reconsideration of their determination to not accept your claim for compensation." There is no indication that the modified transportation clerk position was withdrawn due to misconduct or nonperformance of job duties. Therefore, the Board finds appellant has established that she sustained an employment-related recurrence of total disability when her modified work was withdrawn by her employer effective January 12, 2008.⁵

LEGAL PRECEDENT -- ISSUE 2

Once a loss of wage-earning capacity is determined, a modification of such a determination is not warranted unless there is a material change in the nature and extent of the employment-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was in fact erroneous.⁶ The burden of proof is on the party attempting to show the award should be modified.⁷

Section 8115(a) of the Federal Employees' Compensation Act provides that the "wage-earning capacity of an employee is determined by [her] actual earnings if [her] actual earnings fairly and reasonably represent [her] wage-earning capacity."⁸ The Board has stated, "Generally, wages actually earned are the best measure of a 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."⁹ However, wage-earning capacity may not

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3b(1)(c) (January 1995).

⁵ See *supra* note 4 and accompanying text.

⁶ *George W. Coleman*, 38 ECAB 782, 788 (1987); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

⁷ *Jack E. Rohrbaugh*, 38 ECAB 186, 190 (1986).

⁸ 5 U.S.C. § 8115(a).

⁹ *Floyd A. Gervais*, 40 ECAB 1045, 1048 (1989); *Clyde Price*, 32 ECAB 1932, 1934 (1981). Disability is defined in the implementing federal regulations as "the incapacity, because of an employment injury, to earn the wages the employee was receiving *at the time of injury*." (Emphasis added.) 20 C.F.R. § 10.5(f). Once it is determined that the actual wages of a given position represent an employee's wage-earning capacity, the Office applies the principles enunciated in *Albert C. Shadrick*, 5 ECAB 376 (1953), in order to calculate the adjustment in the employee's compensation.

be based on an odd-lot or make-shift position designed for an employee's particular needs or a position that is seasonal in an area where year-round employment is available.¹⁰ Wage-earning capacity may only be based on a temporary or part-time position if the position held by the employee at the time of injury was a temporary or part-time position.¹¹

Office procedures direct that a wage-earning capacity determination based on actual wages be made following 60 days of employment.¹² The procedures provide for a retroactive determination where an employee has worked for at least 60 days, the employment fairly and reasonably represents the claimant's wage-earning capacity, and work stoppage did not occur due to any change in the claimant's injury-related condition.¹³

ANALYSIS -- ISSUE 2

Appellant did not submit any evidence to show that the Office's original determination with regard to her wage-earning capacity was erroneous. In the present case, the Office based appellant's loss of wage-earning capacity on a determination that her actual earnings as a modified transportation clerk beginning November 6, 1999 represented her wage-earning capacity. This determination was consistent with section 8115(a) of the Act which provides that the wage-earning capacity of an employee is determined by her actual earnings if her actual earnings fairly and reasonably represent her wage-earning capacity.¹⁴ The Office properly noted that appellant had received actual earnings as a modified transportation clerk for more than 60 days in that she had been working in the position since November 6, 1999 when the Office issued its September 28, 2001 decision and there is no evidence that appellant's earnings in this position did not fairly and reasonably represent her wage-earning capacity. The modified transportation clerk position was not an odd-lot or make-shift position designed for appellant's particular needs and it was not seasonal in nature.¹⁵ Moreover, the position was not a temporary and, although it was a part-time position, appellant had been working part time at the time she was injured.¹⁶

The evidence does not show that appellant's actual earnings as a modified transportation clerk did not fairly and reasonably represent her wage-earning capacity and the Office properly adjusted her compensation based on this wage-earning capacity determination. For these

¹⁰ See *James D. Champlain*, 44 ECAB 438, 440-41 (1993); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7a(1) (July 1997).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7a(1), (3) (July 1997).

¹² See *id.* at Chapter 2.814.7c (December 1993).

¹³ *Id.* at Chapter 2.814.7e (December 1993).

¹⁴ See *supra* note 9 and accompanying text.

¹⁵ See *supra* note 10 and accompanying text. An employing establishment official suggested that the position was tailored to appellant's work restrictions but she did not provide sufficient detail in her statement to establish that the position was make-shift in nature.

¹⁶ See *supra* note 11 and accompanying text.

reasons, appellant has not shown that the Office's original determination with regard to her wage-earning capacity was erroneous.

Appellant suggested that there was a material change in the nature and extent of her employment-related condition. However, the record does not contain evidence of such a material change. Throughout the time she worked as a modified transportation clerk, Dr. Ward, an attending neurosurgeon, indicated that appellant's employment-related bilateral carpal tunnel condition remained stable and that she could continue to perform her light-duty work. Moreover, appellant has not been retrained or otherwise vocationally rehabilitated such that her work as a modified transportation clerk would not be representative of her wage-earning capacity. Therefore, appellant has not established that the Office's September 28, 2001 wage-earning capacity determination should be modified.

CONCLUSION

The Board finds that appellant met her burden of proof to establish that she sustained an employment-related recurrence of total disability on January 12, 2008. The Board further finds that appellant did not meet her burden of proof to modify the Office's September 28, 2001 wage-earning capacity determination.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' June 6 and February 15, 2008 decisions are reversed with respect to appellant's claim for recurrence of total disability effective January 12, 2008. The decisions are affirmed with respect to appellant's request for modification of the Office's September 28, 2001 wage-earning capacity determination.

Issued: February 11, 2009
Washington, DC

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

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

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