

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

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<b>J.M., Appellant</b>	)	
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<b>and</b>	)	<b>Docket No. 09-2355</b>
	)	<b>Issued: July 7, 2010</b>
<b>U.S. POSTAL SERVICE, POST OFFICE, Pearland, TX, Employer</b>	)	
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*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On September 16, 2009 appellant filed a timely appeal from the Office of Workers' Compensation Programs merit decision dated October 16, 2008. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>1</sup>

**ISSUE**

The issue is whether the Office properly denied modification of an August 22, 2008 wage-earning capacity determination.

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<sup>1</sup> The Board notes that the record contains a March 17, 2009 Office decision denying merit review of the claim. For decisions issued on and after November 19, 2008, a claimant has 180 days to file an appeal. 20 C.F.R. § 501.3(e). The 180-day period expired on September 14, 2009 and therefore appellant's September 16, 2009 appeal was untimely with respect to the March 17, 2009 Office decision.

## **FACTUAL HISTORY**

On December 5, 2005 appellant, then a 45-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging she sustained injuries in a motor vehicle accident on December 3, 2005 while in the performance of duty. The Office accepted the claim for neck, lumbar, left shoulder and upper arm sprains. Appellant returned to a part-time light-duty job in January 2006 and stopped working in April 2007.

In a form report<sup>2</sup> dated September 5, 2007, Dr. Kushwaha advised appellant could work 8 hours with a 20-pound lifting restriction and limitation on the duration of certain activities. The Office referred her for vocational rehabilitation services. As part of the rehabilitation plan, the rehabilitation counselor completed a CA-66 job classification form for the position of dispatcher (*Dictionary of Occupational Titles*, No. 249.167-014) on February 1, 2008. The position was described as sedentary with maximum 10-pound lifting. The physical demands of the position included "frequent" reaching. The counselor reported the position was reasonably available in appellant's area with weekly wages of \$650.00. A January 29, 2008 labor market survey by the rehabilitation counselor reported wages for a dispatcher of \$12.00 to \$16.00 per hour.

On April 23, 2008 Dr. Kushwaha reported that appellant was limited to working four hours per day with a 20-pound lifting restriction. By form report dated June 11, 2008, he indicated that appellant could work eight hours per day with a 15-pound lifting restriction. Dr. Kushwaha noted that appellant was limited to four hours of reaching and overhead reaching. In a brief June 11, 2008 narrative report, he stated that appellant could work as a postal clerk.

By letter dated July 21, 2008, the Office advised appellant that it proposed to reduce her compensation to zero because she had the capacity to earn wages of \$650.00 per week as a dispatcher. It found that appellant's current pay rate for the date-of-injury position was \$575.36 per week and, therefore, she had no loss in wage-earning capacity. As to the medical evidence, the Office found Dr. Kushwaha's June 11, 2008 work restrictions were accepted as the best representation of appellant's work capability.

In a form report dated August 14, 2008, Dr. Kushwaha indicated that appellant was scheduled for a functional capacity evaluation (FCE).

In an August 22, 2008 decision, the Office determined that appellant was capable of earning \$650.00 per week in the selected position of dispatcher. It reduced her wage-loss compensation to zero effective August 31, 2008.

By letter dated September 3, 2008, appellant requested reconsideration, advising that due to the pain and discomfort from her work injuries, her physician recommended a work-hardening program. She submitted an August 26, 2008 functional capacity evaluation from a physical therapist. In a report dated September 3, 2008, Dr. Kushwaha stated that the FCE showed appellant could not work medium to heavy physical demand, but was functioning at light to sedentary capacity.

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<sup>2</sup> The form reports submitted by Dr. Vivek Kushwaha, the attending orthopedic surgeon, are state workers compensation forms.

In a decision dated October 16, 2008, the Office denied modification of the wage-earning capacity determination.

### **LEGAL PRECEDENT**

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.<sup>3</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>4</sup>

### **ANALYSIS**

The Office issued an August 22, 2008 decision finding that, pursuant to 5 U.S.C. § 8115, appellant's wage-earning capacity was represented by the selected position of dispatcher. Appellant has argued on appeal that she continues to have an employment-related condition and the Office did not follow her physician's decisions.

As noted, a modification of a wage-earning capacity determination is warranted if the original determination was erroneous. It is well established that the selected position must be medically suitable. The Office acknowledged that Dr. Kushwaha's June 11, 2008 report was the best representation of appellant's work restrictions; but it failed to properly assess the work restrictions and the requirements of the selected position. Dr. Kushwaha clearly indicated that "reaching" was limited to four hours per day. The selected position, as described in the Form CA-66, required "frequent" reaching. The CA-66 form states that "frequent" means an activity existing from 1/3 to 2/3 of the time. Therefore the reaching requirement in the selected position, as described in the form presented to the Office, exceeded the limitation provided by Dr. Kushwaha. Under Office procedures, if the medical evidence is not "clear and unequivocal" on the issue of medical suitability, the claims examiner "will seek medical advice from the DMA [district medical adviser], treating physician, or second opinion specialist as appropriate."<sup>5</sup> The Office failed to follow its procedures in this case. The Board finds the August 22, 2008 wage-earning capacity determination was erroneous as the position is not established as conforming to appellant's restrictions.

The Board further notes that the wage-earning capacity calculations were based on earnings in the selected position of \$650.00 per week, or \$16.25 per hour for a 40-hour week, as reported in a February 1, 2008 CA-66. In the July 21, 2008 preliminary determination, the Office described the wages as "entry pay level" for the selected position, but the rehabilitation

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<sup>3</sup> *Sue A. Sedgwick*, 45 ECAB 211 (1993).

<sup>4</sup> *Id.*

<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(d) (December 1995). *See also Francisco Bermudez*, 51 ECAB 506 (2000).

counselor's January 29, 2008 labor market survey stated that the wages for a dispatcher position in appellant's area ranged from \$12.00 to \$16.00 per hour. The rehabilitation counselor did not provide sufficient explanation for the reported wages of \$650.00 per week, given the information provided in the labor market survey. The evidence of record does not support a finding that the \$650.00 weekly wages represented an entry level pay for a dispatcher. The Office should have requested clarification from the rehabilitation counselor regarding appellant's wages in the position.

For the above reasons, the Board finds the August 22, 2008 wage-earning capacity was erroneous.

**CONCLUSION**

The Board finds that appellant established the August 22, 2008 wage-earning capacity determination was erroneous and should be modified.

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 16, 2008 decision of the Office of Workers' Compensation Programs be reversed.

Issued: July 7, 2010  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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