

stopped work on August 25, 2000. OWCP accepted the claim for lumbar strain, intervertebral disc disorder and psychogenic pain and paid him compensation for total disability.

In a work restriction evaluation dated April 25, 2007, Dr. Steven C. Levin, a Board-certified anesthesiologist, found that appellant could work four hours per day with restrictions sitting for one to two hours a day, walking under one hour, standing one hour, reaching one hour, using the wrists and elbows repetitively one to two hours, pushing and pulling 10 pounds one hour and no reaching above the shoulder, twisting, bending, stooping, driving, lifting, squatting, kneeling or climbing.

On May 5, 2007 the employing establishment offered appellant a position as a modified carrier working four hours per day. The duties of the position included retrieving customer held mail from a carrier case, computer data entry, casing mail without reaching over the shoulder and answering the telephones. The physical requirements of the position were consistent with those found by Dr. Levin in the April 25, 2007 work restriction evaluation. Appellant accepted the position and returned to work on July 14, 2007.

By decision dated September 28, 2007, OWCP reduced appellant's compensation based on its finding that his actual earnings working 20 hours a week as a modified carrier fairly and reasonably represented his wage-earning capacity.

On November 5, 2009 appellant filed a recurrence of disability claim beginning that date due to his August 24, 2000 employment injury. He attributed his recurrence of disability to the employing establishment's withdrawal of his limited duty under the National Reassessment Program (NRP).

In a report dated November 4, 2009, Dr. Levin indicated that appellant believed that he could try to increase his work hours. He completed a duty status report indicating that he could work four to six hours a day with decreased work restrictions.

On November 10, 2009 appellant filed a claim for compensation beginning November 21, 2009. The employing establishment indicated that he was out of work due to the NRP.

By letter dated November 17, 2009, OWCP informed appellant of the criteria for modifying an established wage-earning capacity determination.

In a duty status report dated December 7, 2009, Dr. Levin again diagnosed low back pain and found that appellant could work four to six hours per day with less restrictions than in his modified position. On December 17, 2009 he noted that he had been "laid off work." Dr. Levin noted that appellant experienced increased spasm in cold weather and noted that he described difficulty casing mail, sitting over 20 to 30 minutes and standing over 20 minutes.

By decision dated January 26, 2010, OWCP found that appellant had not established that the established wage-earning capacity should be modified. On February 12, 2010 appellant requested an oral hearing. Following a preliminary review, in a decision dated March 30, 2010, OWCP's hearing representative reversed the September 28, 2007 wage-earning capacity determination. OWCP's hearing representative found that there was no evidence that the May 4,

2007 position was permanent and that appellant had not worked 60 days in the position at the time OWCP issued its wage-earning capacity decision as he missed 20 days due to illness.

In a decision dated April 12, 2010, OWCP's hearing representative vacated the March 30, 2010 decision and scheduled the case for an oral hearing. The hearing representative found that there was no evidence that appellant was working in a temporary position. OWCP's hearing representative further found that he worked over 60 days in the position and that his leave use was for personal reasons. The hearing representative determined that the evidence did not establish that the original wage-earning capacity was erroneous.

In a duty status report dated April 1, 2010, Dr. Levin advised that appellant could work four to eight hours per day with restrictions. The restrictions included sitting one to two hours a day and standing and walking one to six hours a day.²

At the telephone hearing, held on May 10, 2010, appellant related that he was a permanent employee at the time of his work injury. He contended that his modified position was not permanent as evidenced by its withdrawal. Appellant believed that the position was permanent when it was offered. The employing establishment informed him that it could be changed as his condition either improved or worsened. Appellant related that his medical condition was the same. He asked his physician to lessen his restrictions in an attempt to return to work but the employing establishment informed him that there was no work available. Appellant related that his duties in his modified position differed greatly from his date-of-injury job.

By decision dated July 27, 2010, OWCP's hearing representative affirmed the January 26, 2010 decision. She found that appellant had not established modification of the wage-earning capacity determination.

On appeal, appellant related that the employing establishment informed him when he stopped work due to the NRP that he should file a recurrence of disability claim. He related that his part-time modified clerk position entailed working three of the four hours per day outside his craft. Appellant noted that he was out of work 20 days due to his wife's injury prior to OWCP's wage-earning capacity determination. He asserted that the offered position was not permanent.

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.³ Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.⁴

² Dr. Levin also submitted progress reports from February to July 2010.

³ See 5 U.S.C. § 8115 (determination of wage-earning capacity).

⁴ *Sharon C. Clement*, 55 ECAB 552 (2004).

Section 8115(a) of FECA⁵ provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity.⁶ Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such a measure.⁷ The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision,⁸ has been codified at 20 C.F.R. § 10.403. OWCP calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the current pay rate for the date-of-injury job.⁹ 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.¹⁰

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

"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 are at least equivalent to those 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.

⁵ 5 U.S.C. §§ 8101-8193.

⁶ *Id.* at § 8115(a); *Loni J. Cleveland*, 52 ECAB 171 (2000).

⁷ *Lottie M. Williams*, 56 ECAB 302 (2005).

⁸ *Albert C. Shadrick*, 5 ECAB 376 (1953).

⁹ 20 C.F.R. § 10.403(c).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1993).

(3) The job is temporary where the claimant's previously job was permanent."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

ANALYSIS

OWCP accepted that appellant sustained lumbar strain, intervertebral disc disorder and psychogenic pain due to an August 24, 2000 motor vehicle accident. Appellant returned to work as a modified carrier for four hours per day on July 14, 2007. By decision dated September 28, 2007, OWCP reduced his compensation based on its finding that his actual earnings as a modified carrier fairly and reasonably represented his wage-earning capacity.

On November 5, 2009 the employing establishment determined that it did not have work available for appellant effective November 19, 2009 under the NRP. Appellant filed a recurrence of disability claim beginning November 5, 2009 due to the withdrawal of his limited-duty assignment.

On appeal and before OWCP, appellant argued that the original wage-earning capacity determination was erroneous. The record indicated that his date-of-injury job as a letter carrier was a full-time job for at least 40 hours per week. OWCP, however, based appellant's actual earnings on a part-time position of 20 hours per week. 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.¹⁴ The Board has held that OWCP must address the issue and explain why a part-time position is suitable for a wage-earning capacity determination based on the specific circumstances of the case.¹⁵ OWCP did not address this issue, however, in its wage-earning capacity decision. It determined that the part-time position of modified carrier fairly and reasonably represented appellant's wage-earning capacity without clearly explaining why the actual earnings were based on a part-time position when he was not a part-time employee at the time of injury. The Board thus finds that the position does not fairly and reasonably represent his wage-earning capacity and, consequently, that the original wage-earning capacity determination was erroneous. Accordingly, appellant has established that the September 28, 2007 wage-earning capacity determination warrants modification.

¹¹ *Id.* at Chapter 2.804.7a (July 1997).

¹² *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Tamra McCauley*, 51 ECAB 375, 377 (2000).

¹³ *Id.*

¹⁴ *See supra* note 11.

¹⁵ *Connie L. Potratz-Watson*, 56 ECAB 316 (2005).

CONCLUSION

The Board finds that appellant has established modification of OWCP's wage-earning capacity determination.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated July 27 and April 12, 2010 are reversed.

Issued: August 22, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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