

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

M.S., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Santa Clarita, CA, Employer**

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**Docket No. 11-158
Issued: December 22, 2011**

Appearances:
Ron Watson, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 27, 2010 appellant, through his representative, filed a timely appeal from a May 5, 2010 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 has established that a modification of an October 11, 1994 wage-earning capacity determination was warranted.

FACTUAL HISTORY

Appellant filed a traumatic injury claim (Form CA-1) for an injury on June 8, 1991 when he was reaching for a mailbox and felt pain in his shoulder. On September 6, 1991 he underwent rotator cuff repair surgery and he also underwent a right shoulder decompression surgery on

¹ 5 U.S.C. § 8101 *et seq.*

October 23, 1992. OWCP accepted the claim for right shoulder sprain and rotator cuff syndrome.

On September 25, 1993 the employing establishment offered appellant a full-time position as a modified letter carrier, with wages of \$32,296.00 per year. The written description of the position indicated that it required one to two hours of casing mail, depending on the route, daily pick up of express and special delivery mail, delivery of all express mail that could not be delivered by regular carriers, updating case labels as needed, and, if time permitted, case on other routes with delayed or curtailed mail.

An attending physician, Dr. Alan Weinberger, was provided with a copy of the job description. On September 30, 1993 he indicated that he agreed with the offered position. Appellant checked a box that he accepted the position on September 29, 1993 and he returned to work in the modified position.

By decision dated October 11, 1994, OWCP found that the actual earnings fairly and reasonably represented appellant's wage-earning capacity. It found that the actual earnings met or exceeded the date-of-injury wages and reduced his compensation to zero pursuant to 5 U.S.C. § 8115.

In a letter dated September 4, 2009, appellant argued that the original wage-earning capacity determination was in error. He asserted the offered position was odd-lot, sheltered and not a *bona fide* position. Appellant submitted claims for compensation (Form CA-7) commencing July 17, 2009.

By decision dated September 21, 2009, OWCP found the evidence was not sufficient to warrant modification of the wage-earning capacity determination. Appellant requested an oral hearing, which was held on December 30, 2009. In a decision dated May 5, 2010, the hearing representative affirmed the September 21, 2009 OWCP decision.

LEGAL PRECEDENT

Under section 8115(a) of FECA, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity.² 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.³

OWCP procedures state that, after a claimant has been working for 60 days, OWCP will make a determination as to whether actual earnings fairly and reasonably represent wage-earning capacity.⁴ To determine whether actual earnings fairly and reasonably represent wage-earning

² 5 U.S.C. § 8115(a).

³ *Dennis E. Maddy*, 47 ECAB 259 (1995).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1995).

capacity, OWCP considers factors such as whether the position is temporary, seasonal or part time. Further, a makeshift or odd-lot position designed for a claimant's particular needs will not be suitable.⁵

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.⁶ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁷

ANALYSIS

In the present case, appellant argues that the October 11, 1994 wage-earning capacity determination should be modified because there was error in the original determination. He specifically argues that the position offered was inappropriate as it was a makeshift or odd-lot position.

The Board reviewed the issue of a makeshift position in the case of *A.J.*⁸ In that case, the Board found several factors that supported a finding the offered position was makeshift in nature. These factors included: (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 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.

In reviewing these factors, the Board finds the present case distinguishable. The offered position in this case had an official title and formal job description. The limitations were not overly strict, as the job outlined a number of duties and included only a limitation, but not preclusion, of casing mail. The job had meaningful tasks that appellant was required to perform and did perform. Thus, it was the type of position that is generally available in the community at large. In addition, there was no indication the position was temporary. Appellant had performed the position from September 1993.

The Board accordingly finds that the evidence of record does not establish the modified letter carrier position offered was a makeshift or odd-lot position. In addition, the attending physician reviewed the offered position and indicated that appellant could perform the position. Appellant had been performing the position for more than 60 days, and as noted above, actual

⁵ See *Phillip S. Deering*, 47 ECAB 692 (1996).

⁶ *Sue A. Sedgwick*, 45 ECAB 211 (1993).

⁷ *Id.*

⁸ Docket No. 10-619 (issued June 29, 2010). In a memorandum submitted to the hearing representative, appellant cited cases where the Board had found a job to be makeshift based on the facts presented, such as *Janice E. Geiger*, (Docket No. 00-821, issued August 17, 2001) and *Elizabeth E. Campbell*, 37 ECAB 224 (1985). *A.J.* is a recent case that discussed in some detail the factual circumstances that would support a finding that a position was makeshift in nature.

earnings are generally the best measure of wage-earning capacity. There was no probative evidence that the October 11, 1994 wage-earning capacity determination was erroneous.

It is also noted that there was no evidence presented, nor did appellant argue, that there was a material change in the nature and extent of the employment-related condition as of July 17, 2009 or thereafter. The Board finds that appellant did not meet the requirements for modifying a wage-earning capacity determination in this case.

CONCLUSION

The Board finds that appellant did not establish that a modification of the October 11, 1994 wage-earning capacity determination was warranted.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 5, 2010 is affirmed.

Issued: December 22, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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