

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

W.C., Appellant)
and) Docket No. 11-92
U.S. POSTAL SERVICE, POST OFFICE,) Issued: September 13, 2011
Fergus Falls, MN, Employer)

)

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On October 7, 2010 appellant filed a timely appeal from the April 12, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP), which denied modification of its 2003 determination of his wage-earning capacity. Pursuant to the Federal Employees' Compensation Act (FECA)¹ 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 modification of OWCP's November 21, 2003 wage-earning capacity determination is warranted.

FACTUAL HISTORY

On February 22, 1990 appellant, then a 39-year-old full-time city carrier, sustained an injury in the performance of duty when he lifted a full sack from a relay box. OWCP accepted

¹ 5 U.S.C. § 8101 *et seq.*

his claim for low back strain and myofascial syndrome of the lumbar and cervical areas. On September 3, 1991 appellant returned to limited duty as a carrier/clerk for four hours a day. He received compensation for temporary partial disability on the periodic rolls.

Effective August 9, 2003, appellant accepted, under protest, a part-time rehabilitation assignment to work as a distribution clerk (modified). The employing establishment designed the assignment to accommodate his permanent physical limitations: "The Distribution Clerk (Modified) position has been tailored to meet your physical needs at this time...." Under the offer, appellant would be paid 20 work hours and 20 hours administrative leave per week. The employing establishment explained that the job provided the full and current salary for the job held on the date of injury and included any step increases appellant would have obtained had he not been injured.

In a decision dated November 2, 2003, OWCP found that this part-time assignment fairly and reasonably represented appellant's wage-earning capacity in the open labor market. It reduced his compensation for wage loss to zero on the grounds that his actual part-time wages exceeded the current wages of the full-time job he held at the time of injury.

Effective November 10, 2008, as a result of the National Reassessment Process, the employing establishment withdrew appellant's part-time rehabilitation assignment and advised that there was no work available within his medical restrictions. Appellant covered his absence with leave and when his leave was depleted, he claimed compensation for temporary total disability beginning December 5, 2009.

In a decision dated April 12, 2010, OWCP denied modification of its 2003 wage-earning capacity determination. It noted that the medical evidence demonstrated no change in appellant's condition or restriction for "quite a few years."² Instead, it appeared that he was claiming compensation because he exhausted his leave following the loss of his part-time rehabilitation job as part of the National Reassessment Process. OWCP found that this did not warrant modification of its earlier determination of wage-earning capacity.

On appeal, appellant argues that OWCP's 2003 wage-earning capacity determination was, in fact, erroneous, as it was makeshift or odd-lot. He also argues that his injury-related condition materially worsened since 2003.

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of his duty.³ "Disability" means the incapacity,

² On December 19, 2008 appellant informed his attending physician, Dr. Paul Lindquist, that his symptoms had been about the same over the last few months. Dr. Lindquist noted that there had been no change in his restrictions for quite a few years.

³ 5 U.S.C. § 8102(a).

because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.⁴

Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.⁵ The wage-earning capacity of an employee is determined by the employee's actual earnings if the employee's actual earnings fairly and reasonably represent his wage-earning capacity.⁶ While wages actually earned are generally the best measure of an injured worker's capacity for employment, such wages may not be based on makeshift or sheltered employment.⁷

To determine whether the claimant's work fairly and reasonably represents his wage-earning capacity, OWCP should consider whether the tour of duty is at least equivalent to that of the job held on date of injury. Unless it is, OWCP may not consider the work suitable. Thus, reemployment may not be considered suitable when the job is part time, unless the claimant was a part-time worker at the time of injury.⁸

Once the loss of wage-earning capacity 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. The burden of proof is on the party attempting to show modification of the award.⁹

ANALYSIS

In its November 2, 2003 determination, OWCP found that the part-time rehabilitation assignment appellant had performed since August 9, 2003 fairly and reasonably represented his wage-earning capacity in the open labor market under normal employment conditions. It offered no rationale to support this finding.

The rehabilitation modified assignment was part time. Appellant worked only 20 hours a week in that assignment. At the time of injury, however, he was a full-time worker. OWCP has administratively determined that part-time reemployment does not fairly and reasonably

⁴ 20 C.F.R. § 10.5(f).

⁵ *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

⁶ 5 U.S.C. § 8115(a).

⁷ A.J., Docket No. 10-619 (issued June 29, 2010); *Connie L. Potratz-Watson*, 56 ECAB 316 (2005).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.0814.7.a(1) (October 2009). The postal service recognizes several types of tours of duty, depending on the kind of work performed. Craft employees such as letter carriers and mail clerks are full-time regular employees and work 40 hours per week. Part-time regular employees have a fixed schedule but work less than 40 hours per week. *Id.*, *Determining Pay Rates*, Chapter 2.0900.3.b(2) (March 2011).

⁹ *Daniel J. Boesen*, 38 ECAB 556 (1987).

represent a claimant's wage-earning capacity in the open labor market unless the claimant was a part-time worker at the time of injury.¹⁰

The Board finds that November 2, 2003 wage-earning capacity determination was, in fact, erroneous. The Board will reverse OWCP's April 12, 2010 decision denying modification.

CONCLUSION

The Board finds that modification of OWCP's November 21, 2003 wage-earning capacity determination is warranted.

ORDER

IT IS HEREBY ORDERED THAT the April 12, 2010 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 13, 2011
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

¹⁰ Federal (FECA) Procedure Manual, *supra* note 8. *But see Kathleen A. Price*, Docket No. 04-336 (issued May 19, 2004) (allowing the use of part-time reemployment so long as OWCP adequately considers the circumstance "in accordance with its procedural requirements").