

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

C.C., Appellant)	
)	
and)	Docket No. 11-523
)	Issued: September 23, 2011
U.S. POSTAL SERVICE, AIRPORT MAIL)	
FACILITY, San Francisco, CA, Employer)	

Appearances:
Bob Williamson, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 28, 2010 appellant, through her representative, filed a timely appeal from a July 13, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) denying modification of its wage-earning capacity determination. 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.

ISSUES

The issues are: (1) whether appellant has established modification of the May 9, 1991 wage-earning determination; and (2) whether OWCP paid her compensation for the loss of wage-earning capacity at the proper rate.

FACTUAL HISTORY

On December 10, 1988 appellant, then a 30-year-old expeditor, filed a claim alleging that on that date she injured her hand and hip in the performance of duty. OWCP accepted the claim

¹ 5 U.S.C. § 8101 *et seq.*

for contusions of the sacrum and coccyx and strains of the left shoulder, left wrist and lumbar spine.

Appellant returned to work for four hours a day on January 9, 1991. On June 5, 1991 the employing establishment offered her a modified position as a data conversion clerk consistent with the January 24, 1991 restrictions by her attending physician. The position was for four hours per day and required no lifting over 10 pounds, bending or standing. The duties included sorting and typing Express Mail labels. The job offer provided, "Variations from the above duties may occur as directed by your supervisor and will be in accordance with your doctor's limitations."

By decision dated May 9, 1991, OWCP reduced appellant's compensation benefits based on its finding that her actual earnings as a part-time clerk effective January 9, 1991 fairly and reasonably represented her wage-earning capacity.

On September 24, 2009 the employing establishment informed appellant that it was unable to provide her with work pursuant to the National Reassessment Process (NRP). Appellant filed a claim for compensation (Form CA-7) beginning September 25, 2009.

By letter dated October 5, 2009, OWCP advised appellant of the criteria for modification of an established wage-earning capacity determination. It requested that she submit evidence supporting her request for modification.

In a letter dated October 9, 2009, appellant related that she had worked over 22 years as a foreign section clerk.² The employing establishment moved her to a modified position as a foreign short paid clerk on September 28, 2008 working four hours per day. On September 24, 2009 it withdrew her job as there was no work available.³ In another letter dated September 16, 2009, appellant noted that her supervisor told her to claim wage loss with OWCP for eight hours per day after her position was withdrawn.

By letter dated November 9, 2009, appellant's representative asserted that the employing establishment did not provide her with a permanent position after her work injury but instead placed her in a makeshift assignment that it later withdrew. He maintained that the loss of wage-earning capacity was thus issued in error. The representative further argued that appellant returned to work at a lower level than her date-of-injury position but OWCP did not address the change in pay rate.

By decision dated January 13, 2010, OWCP denied appellant's claim for compensation for total disability beginning September 25, 2009. It found that she had not established that the wage-earning capacity determination should be modified.

² In a duty status report dated October 8, 2009, Dr. Kenneth I. Light, a Board-certified orthopedic surgeon, diagnosed a herniated disc and found that appellant could work four hours per day with restrictions of no lifting over 20 pounds, pushing and pulling up to 5 pounds, lifting, sitting and reaching above the shoulder up to 4 hours per day and standing and walking 15 minutes per day. In a narrative report of the same date, Dr. Light found that her condition was "stable and stationary" and that she could work part time with the listed limitations.

³ Appellant accepted a part-time limited-duty position as a mail process on September 26, 2008.

On January 19, 2010 appellant requested an oral hearing. At the hearing, held on April 28, 2010, her representative argued that her limited-duty assignment was not a bid position with duties available in the open market.⁴

In a letter received May 10, 2010, appellant noted that she originally returned to work full time in 1988 after her injury but was unable to fully recover. When she was sent home due to the NRP, the employing establishment told her to claim wage loss for total disability. Appellant maintained that when she returned to work after her injury she was assigned to a lower level makeshift position.

By decision dated July 10, 2010, OWCP's hearing representative affirmed the January 13, 2010 decision. She found that appellant had not established modification of the wage-earning capacity determination. The hearing representative also found that there was no evidence that OWCP paid her at an inaccurate pay rate as she returned to work as a Level 5 worker and was a Level 5 worker on the date of injury.

On appeal appellant, through her representative, argues that she worked at a higher rate of pay at the time of her work injury than the rate of pay used in her wage-earning capacity determination. He also asserts that she returned to a nonfunded position.

LEGAL PRECEDENT -- ISSUE 1

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.⁵ Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.⁶

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.⁷ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁸

When a formal loss of wage-earning capacity determination is in place and light duty is withdrawn, the proper standard of review is not whether appellant sustained a recurrence of disability, but whether OWCP should modify its decision according to the established criteria for modifying a formal loss of wage-earning capacity determination.⁹ OWCP procedures provide

⁴ In a December 30, 2009 report, Dr. Light found that she could return to part-time employment with reduced restrictions. On March 31, 2010 he related that appellant could work with restrictions.

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

⁶ *Sharon C. Clement*, 55 ECAB 552 (2004).

⁷ *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Tamra McCauley*, 51 ECAB 375, 377 (2000).

⁸ *Id.*

⁹ *Id.*

that when the employing establishment has withdrawn a light-duty assignment, which accommodated the claimant's work restrictions and a formal wage-earning capacity decision has been issued, the decision will remain in place, unless one of the three accepted reasons for modification applies.¹⁰

Section 8115(a) of FECA¹¹ 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.¹² 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.¹³ The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision,¹⁴ 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.¹⁵ OWCP 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.¹⁶

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

“a. *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;

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.7(a)(5) (October 2005).

¹¹ 5 U.S.C. § 8101 *et seq.*

¹² *Id.* at § 8115(a); *Loni J. Cleveland*, 52 ECAB 171 (2000).

¹³ *Lottie M. Williams*, 56 ECAB 302 (2005).

¹⁴ *Albert C. Shadrick*, 5 ECAB 376 (1953).

¹⁵ 20 C.F.R. § 10.403(c).

¹⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (October 2009).

- (2) *The job is seasonal* in an area where year-round employment is available.
- (3) *The job is temporary* where the claimant's previously job was permanent."¹⁷

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained contusions of the sacrum and coccyx and strains of the lumbar spine, left shoulder and left wrist due to a December 10, 1988 employment injury. She returned to part-time work on January 9, 1991. The employing establishment offered appellant a position for four hours per day that required no lifting over 10 pounds, standing or bending. Based on this position, OWCP reduced her compensation effective January 9, 1991 after finding that her actual earnings as a part-time clerk fairly and reasonably represented her wage-earning capacity. Appellant filed a claim for compensation beginning September 25, 2009 due to the withdrawal of her limited-duty assignment as part of the NRP.

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.¹⁸ Appellant did not contend that she experienced a material change in the nature and extent of her injury-related condition. Instead she argued that her actual earnings in the position upon which the original loss of wage-earning capacity was based did not fairly and reasonably represent her wage-earning capacity as the position was makeshift in nature.

On appeal appellant argues that the position offered by the employing establishment was makeshift in nature. The Board finds, however, that OWCP improperly reduced her compensation based on different grounds.

At the time of her injury appellant worked full-time as an expeditor. OWCP, however, based its wage-earning capacity determination 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.¹⁹ 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.²⁰ OWCP did not address this issue in its wage-earning capacity decision. It determined that the part-time position of modified clerk fairly and reasonably represented his wage-earning capacity without clearly explaining why the actual earnings were based on a part-time position when appellant was not a part-time employee at the time of injury. The Board thus finds that the

¹⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7a (October 2009).

¹⁸ *See supra* note 6.

¹⁹ *See supra* note 16.

²⁰ *Connie L. Potratz-Watson*, 56 ECAB 316 (2005).

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 May 9, 1991 wage-earning capacity determination warrants modification.²¹

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the July 13, 2010 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 23, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

²¹ In view of the Board's finding regarding the wage-earning capacity determination, the issue of whether OWCP utilized the proper pay rate in its wage-earning capacity decision is moot.