



## **FACTUAL HISTORY**

In the prior appeal<sup>2</sup> the Board, by an order dated July 28, 2011, reversed OWCP's April 12, 2010 decision to deny modification of its November 9, 2005 wage-earning capacity determination. The Board found that appellant had met his burden to show that the original determination was, in fact, erroneous. Appellant was a full-time regular letter carrier at the time of injury and OWCP based its wage-earning capacity determination on his subsequent part-time earnings. The Board found that OWCP procedures explicitly prohibited such a determination.<sup>3</sup>

On August 18, 2011 OWCP reviewed the same subject matter and found that the original determination was not, in fact, erroneous. It found that appellant's permanent rehabilitation position of modified letter carrier fairly and reasonably represented his wage-earning capacity at the time the original determination was made and formalized in the decision of November 9, 2005. OWCP found that the evidence of record did not otherwise provide support for modification of the wage-earning capacity determination.

Appellant's representative argues on appeal that OWCP reversed the Board's ruling.

## **LEGAL PRECEDENT**

The Board has jurisdiction to consider and decide appeals from final decisions of OWCP in any case arising under FECA. The Board may review all relevant questions of law, fact and exercises of discretion (or failure to exercise discretion) in such cases.<sup>4</sup> The decisions and orders of the Board are final as to the subject matter appealed, and such decisions and orders are not subject to review, except by the Board.<sup>5</sup> The Director of OWCP may file a petition for reconsideration of a decision or order issued by the Board within 30 days of the date of issuance.<sup>6</sup>

## **ANALYSIS**

This Board has final authority to determine questions of law and fact. Its determinations are binding upon OWCP and must, of necessity, be so accepted and acted upon by the Director. Otherwise, there could be no finality of decisions, the whole appeals procedure would be nullified and questions would remain moot. Such result would not only be contrary to the

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<sup>2</sup> *Order Reversing Case*, Docket No. 10-1611 (issued July 28, 2011). The facts of this case as set out in the Board's order are hereby incorporated by reference.

<sup>3</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7.a(1) (October 2009) (OWCP may not consider part-time reemployment suitable for a wage-earning capacity determination unless the claimant was a part-time worker at the time of injury).

<sup>4</sup> 20 C.F.R. § 501.2(c).

<sup>5</sup> *Id.* at § 501.6(d).

<sup>6</sup> *Id.* § 501.7(a).

regulations governing appeals but directly contrary to applicable provisions of Reorganization Plan No. 2 of 1946, which directed that the Board be established.<sup>7</sup>

In *Clinton K. Yingling, Jr.*,<sup>8</sup> the Board discussed at length the legislative history of the applicable statutory provisions, particularly those that provided for creation of the Board, effective July 16, 1946.<sup>9</sup> From this discussion the Board reached the following conclusion:

“The orderly quasi-judicial procedure of the Board is put in motion by appeal from the administrative determination of the Bureau [now OWCP], and the power to make final decision on the merits of the case thereafter reposes in the Board, according to applicable legislation, the legislative history behind that legislation, and the regulations and orders issued pursuant thereto.”<sup>10</sup>

These fundamental principles, regarding the authority of the Board to make a *de novo* review and make the final determination on questions of law and fact, have governed the Board without deviation from its inception to the present day.<sup>11</sup>

In its July 28, 2011 decision, the Board found that appellant had met his burden to show that the November 9, 2005 wage-earning capacity determination was, in fact, erroneous. If the Director did not agree, appellant had 30 days to file a petition for reconsideration. He did not. The Board’s decision and order is therefore final as to the subject matter appealed.<sup>12</sup> It is binding upon OWCP and must, of necessity, be so accepted and acted upon by the Director.<sup>13</sup>

OWCP’s August 18, 2011 decision reviewed the same subject matter. It reviewed the Board’s July 28, 2011 decision, took issue with the analysis and made findings that were inconsistent with that order. OWCP misread certain of the Board’s statements as an instruction to perfect the original wage-earning capacity determination. As a result, the decision was fatally flawed.

OWCP procedures explicitly prohibited the November 9, 2005 wage-earning capacity determination. The procedures prohibit any wage-earning capacity determination based on appellant’s part-time work as a modified letter carrier, including OWCP’s August 18, 2011

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<sup>7</sup> *Anthony Greco*, 3 ECAB 84, 85 (1949). See *Clara Anne Andresen*, 5 ECAB 42 (1952) which distinguishes between an OWCP decision issued under its administrative process and the review authority granted the Board under Reorganization Plan No. 2 of 1946, which provided for the Board’s creation and the regulations governing appeals promulgated pursuant thereto.

<sup>8</sup> 4 ECAB 529 (1952).

<sup>9</sup> Reorganization Plan No. 2 of 1946, 11 F. R. 7873, 60 Stat. 1096.

<sup>10</sup> *Supra* note 8 at 536.

<sup>11</sup> *Paul Raymond Kuyoth*, 27 ECAB 498 (1976).

<sup>12</sup> 20 C.F.R. § 501.6(d).

<sup>13</sup> See *id.*; see also *supra* note 8 at 536-37.

determination. There is only one circumstance in which OWCP may use part-time earnings as a measure of wage-earning capacity: if the claimant was a part-time worker at the time of injury.<sup>14</sup>

Further, the hearing representative relied on *Kathleen A. Price*<sup>15</sup> to affirm a determination based on part-time earnings. The Board overruled *Price* on prior appeal to the extent that it interpreted this particular language of OWCP's procedure as permissive.<sup>16</sup>

OWCP had no authority to rule otherwise following the Board's July 28, 2011 decision and order. The Board will therefore reverse OWCP's August 18, 2011 decision and remand the case for a proper final decision on appellant's October 13, 2009 recurrence claim consistent with the Board's previous direction.

### CONCLUSION

The Board finds that its July 28, 2011 decision and order was binding upon OWCP and must, of necessity, be so accepted and acted upon by the Director. OWCP had no authority to review the Board's decision to reach a different conclusion.

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<sup>14</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7.a(1) (October 2009).

<sup>15</sup> Docket No. 04-336 (issued May 19, 2004).

<sup>16</sup> *See also O.V.*, Docket No. 11-98 (issued September 30, 2011) (the Board found that OWCP abused its discretion when it determined that the claimant's actual earnings in part-time reemployment fairly and reasonably represented his capacity to earn wages in the open labor market. The Board explained that OWCP procedures prohibited a wage-earning capacity determination based on part-time reemployment unless the claimant was a part-time worker at the time of injury).

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 18, 2011 decision of the Office of Workers' Compensation Programs is reversed. The case is remanded for a proper final decision on appellant's October 13, 2009 recurrence claim.

Issued: August 9, 2012  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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