



overpayment in the amount of \$1,115.12 during the period September 22 through October 4, 2003 and that she was without fault in accepting the overpayment. However, the Board reversed the issues of waiver and recovery of overpayment.<sup>2</sup> The facts relevant to the present appeal are hereinafter set forth.

On December 27, 2000 appellant, then a 48-year-old flat sorter keyer/distribution clerk, sustained an injury to her back and lower extremities while casing mail. OWCP accepted her claim for aggravation of degenerative disc disease and paid appropriate benefits.<sup>3</sup> Appellant was eventually retained on the periodic rolls.

In a March 11, 2003 report, Dr. John T. Williams, a Board-certified orthopedic surgeon and impartial medical specialist, opined that appellant had permanent residuals of her work-related condition but was capable of working. In an April 11, 2003 work capacity evaluation, he stated that appellant was capable of working eight hours a day with restrictions. Dr. Williams opined that she could sit, walk and stand for two-hour durations, could push, pull and lift with restrictions for four to six hours total, but should not twist, operate a commercial motor vehicle or climb. Breaks should be given for 15 minutes every 2 hours. Based on Dr. William's March 11, 2003 report, OWCP amended the accepted condition to degenerative disc disease.

On September 22, 2003 appellant started working full time with the employing establishment in a modified job assignment as a full-time mail processor. The position required preparing ripped and torn mail for two hours sitting; face letters for two hours sitting and standing; label machines for two hours standing; clean out machines for two hours standing; performing quality checks at the machines for two hours standing; recording racer mail for one hour standing; working relief for one hour; and filling out routine slips and placards for one hour sitting and standing. By decision dated August 3, 2004, OWCP reduced appellant's compensation to zero based on its findings that her actual earnings as a modified mail processing clerk effective September 22, 2003 fairly and reasonably represented her wage-earning capacity. It determined that her actual earnings met or exceeded her wages at the time of her injury.

Appellant worked in her modified-duty position until November 10, 2010, when the employing establishment withdrew her limited-duty assignment as part of the National Reassessment Process. On November 19, 2010 she started working a part-time modified position with the employing establishment.

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<sup>2</sup> Docket No. 05-11 (issued May 10, 2005).

<sup>3</sup> The record reflects that, although appellant originally filed a recurrence claim of her April 7, 1998 work injury, claim File No. xxxxxx535, OWCP treated the recurrence claim as a claim for a new traumatic injury occurring on December 27, 2000 under claim File No. xxxxxx317.

Appellant filed claims for compensation for wage loss for the periods November 6, 2010 and onward, when the employing establishment had no work due to the National Reassessment Process.<sup>4</sup> In a December 8, 2010 letter, OWCP advised her of the evidence required to modify a loss of wage-earning capacity determination. It noted that the employing establishment withdrew appellant's limited-duty assignment on November 10, 2010 as part of its National Reassessment Process. OWCP provided appellant 30 days to submit rationalized medical evidence showing that she sustained a change in her injury-related condition, that she had been retrained or vocationally rehabilitated or that the original loss of wage-earning capacity (LWEC) rating was in error.

In response, OWCP received several letters from counsel challenging the August 3, 2004 wage-earning capacity determination. In a December 10, 2010 letter, counsel argued that as appellant only performed modified duties of the mail processing clerk position, she did not perform regular employment. He also argued that the modified position was a job created for her.

Medical documentation of record indicates appellant was being treated for her accepted condition as well as several other conditions, which are not accepted as part of this claim. The record reflects that on August 28, 2008 she was diagnosed with a disc herniation at L4-5 and L5-S1, a L3-4 disc bulge and a torn right meniscus.

By decision dated January 11, 2011, OWCP denied appellant's claim for compensation benefits effective November 10, 2010. It found she had failed to meet her burden of proof to modify the August 3, 2004 LWEC determination.

On January 11, 2011 appellant, through counsel, requested a telephonic hearing with a representative of OWCP. The telephonic hearing was held April 6, 2011. At the hearing, appellant and counsel argued that the modified position she occupied since September 22, 2003 was a temporary, make shift, odd lot position tailored to fit her needs and did not constitute a valid position upon which to render a wage-earning capacity determination. She described the duties she performed and the manner in which she had her hours adjusted.

After the hearing, OWCP received medical reports from Dr. George Rodriguez, a Board-certified physiatrist, and an associate, Dr. Daisy Rodriguez, an internist, dated October 19, November 18 and December 16, 2010 and February 10, 2011 which indicated that appellant has restrictions and several copies of disability slips and slips for physical therapy. In a May 2, 2011 letter, counsel reiterated his arguments that appellant's modified position which the employing establishment withdrew was makeshift in nature and therefore cannot fairly represent her wage-earning capacity.

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<sup>4</sup> Appellant also filed a recurrence claim for wage loss effective November 10, 2010 alleging that her existing modified-duty assignment, which was eight hours a day/five days a week, was uniquely crafted for her and was withdrawn by management under the National Reassessment Process. She further indicated that she was given a new modified-duty assignment for four hours a day/five days a week. In a January 3, 2011 letter, OWCP advised appellant that she did not experience a true recurrence as she did not lose any time from work.

By decision dated June 2, 2011, OWCP's hearing representative affirmed the January 11, 2011 decision.

On appeal, counsel reiterated his contention that her modified-duty position was makeshift and thus it cannot form the basis of an LWEC determination.

### **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.<sup>5</sup> Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.<sup>6</sup>

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

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.<sup>9</sup> OWCP procedures provide 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.<sup>10</sup>

### **ANALYSIS**

OWCP accepted that appellant sustained employment-related aggravation of lumbar degenerative disc disease. Following a period of total disability upon which appellant was placed on the periodic rolls, she returned to work as a modified mail processor with the employing establishment. By decision dated August 3, 2004, OWCP determined that she had no LWEC as her actual earnings as a modified mail processor fairly and reasonably represented her wage-earning capacity.

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

<sup>6</sup> *Sharon C. Clement*, 55 ECAB 552 (2004); *Loni J. Cleveland*, 52 ECAB 171 (2000).

<sup>7</sup> *Harley Sims, Jr.*, 56 ECAB 320 (2006); *Sharon C. Clement*, *supra* note 6.

<sup>8</sup> *Tamra McCauley*, 51 ECAB 375, 377 (2000); *T.M.*, Docket No. 08-975 (issued February 6, 2009).

<sup>9</sup> *Id.*

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

On November 10, 2010 the employing establishment indicated that appellant's modified position was no longer available as part of a National Reassessment Process after determining that it did not have work available for her position. Appellant was subsequently given part-time modified work. She filed claims requesting compensation for wage loss beginning November 10, 2010. Appellant requested modification of the August 3, 2004 wage-earning capacity decision, contending on appeal and before OWCP that the position was make-shift or otherwise inappropriate for a wage-earning capacity determination.

Appellant did not submit any evidence to show that OWCP's original wage-earning capacity decision was erroneous. OWCP based its LWEC determination on her actual earnings that a modified mail processor beginning September 22, 2003 fairly and reasonably represented her wage-earning capacity. Its determination was consistent with section 8115(a) of FECA which provides that the wage-earning capacity of an employee is determined by appellant's actual earnings if her actual earnings fairly and reasonably represent her wage-earning capacity.<sup>11</sup> OWCP properly noted that she had received actual earnings as a modified rural carrier for more than 60 days at the time of its LWEC determination. The position was not a temporary or part-time position.<sup>12</sup> In fact, appellant worked in such modified position for almost seven years before the employing establishment withdrew it as part of the National Reassessment Process. While she claimed that the modified position was an odd-lot or make-shift position designed for her particular needs, the Board finds that she has not established this assertion. Appellant did not submit sufficient evidence to show that the modified position was not reasonably available on the open labor market or could not have been performed by another employee. There is no evidence establishing that the duties assigned to her were merely to keep her employed or that the duties and/or the position was created especially for her to fill until such time as it could be determined whether she could physically return to another position or alternative status.<sup>13</sup> While counsel asserted both before OWCP and appeal that the position was make-shift or temporary, he appears to base his argument simply on the fact that it was a modified position. There is no evidence to show that appellant was not working eight hours a day or that the position consisted of make-shift work designed for her particular needs.<sup>14</sup> While counsel contends that she did not perform all the duties set forth on the modified position and that her assignment was subject to revision based on operations requirements, these facts do not constitute evidence that the position was make-shift work.<sup>15</sup> Accordingly, there is no evidence

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<sup>11</sup> *A.P.*, 58 ECAB 198 (2006); *David L. Scott*, 55 ECAB 330 (2004).

<sup>12</sup> See *James D. Champlain*, 44 ECAB 438, 440-41 (1993); Federal (FECA) Procedural Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7a(1) (July 1997). In *Jeffrey T. Hunter*, 52 ECAB 503 (2001), the Board found that duties of regular employment are covered by a specific job classification and such duties would have been performed by another employee if the employee did not perform them. The test is not whether the tasks that the employee performs would have been done by someone else, but instead whether she occupied a regular position that would have been performed by another employee.

<sup>13</sup> *J.K.*, Docket No. 11-159 (August 19, 2011).

<sup>14</sup> *J.C.*, 58 ECAB 700 (2007); *N.C.*, Docket No. 11-378 (September 9, 2011).

<sup>15</sup> *Id.*

that the position was make-shift, temporary, seasonal or otherwise inappropriate for a wage-earning capacity determination.<sup>16</sup>

Appellant contended that she now has a LWEC as she is no longer working full time as a modified mail processor. As a formal wage-earning capacity was in effect at the time that the employing establishment took away her position, she must show a basis for modification of that decision to be entitled to wage-loss compensation on or after November 10, 2010.<sup>17</sup>

The Board finds that appellant has not met any of the requirements for modification of OWCP's August 3, 2004 wage-earning capacity determination. Appellant did not allege that she was retrained or otherwise vocationally rehabilitated and, as discussed, there is no evidence that the original wage-earning capacity determination was erroneous. Furthermore, the evidence does not establish a material change in her employment-related condition. The contemporaneous medical evidence from both Dr. Rodriguez's found that appellant can work with restrictions. Compensation for LWEC is based upon loss of the capacity to earn and not on actual wages lost.<sup>18</sup> Absent a showing that the wage-earning capacity should be modified, appellant has no disability under FECA and is not entitled to compensation for wage loss based on the withdrawal of her limited-duty position.<sup>19</sup> Accordingly, OWCP properly denied her claim for wage-loss compensation as she had not established modification of the established wage-earning capacity determination and properly denied modification of its August 3, 2004 wage-earning capacity decision.

### **CONCLUSION**

The Board finds that appellant has not established OWCP's wage-earning capacity determination should be modified.

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<sup>16</sup> *D.S.*, 58 ECAB 392 (2007); *Selden H. Swartz*, 55 ECAB 272 (2004).

<sup>17</sup> *See D.S.*, *id.*

<sup>18</sup> *Marie A. Gonzales*, 55 ECAB 395 (2004); *Roy Matthew Lyon*, 27 ECAB 186 (1975).

<sup>19</sup> *S.L.*, Docket No. 10-1478 (issued February 10, 2011); *K.R.*, Docket No. 09-415 (issued February 24, 2010).

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' decision dated June 2, 2011 is affirmed.

Issued: February 7, 2012  
Washington, DC

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

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

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