

February 25, 2010. Appellant requested modification of OWCP's July 1, 1997 wage-earning capacity determination. In a June 24, 2010 decision, OWCP denied appellant's request for modification of its May 31, 2005 wage-earning capacity determination which was previously set aside. Appellant requested an oral hearing. By decision dated January 21, 2011, the hearing representative affirmed OWCP's finding regarding the modification of the May 31, 2005 wage-earning capacity determination, but modified that decision finding that appellant was entitled to compensation from January 25 to March 29, 2010 for three hours a day.

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. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.¹ Section 8115(a) of FECA 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.² Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.³

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.⁴ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁵

OWCP's procedure manual provides that the factors to be considered in determining whether the claimant's work fairly and reasonably represented his wage-earning capacity include the kind of appointment and the tour of duty. The manual states that reemployment may not be considered suitable when the actual earning job is part time, unless the claimant was a part-time worker at the time of injury.⁶

OWCP found that appellant's actual earnings in part-time reemployment for 20 hours per week represented her wage-earning capacity. Appellant was a full-time worker at the time of her work injury. As the above-noted procedure makes clear, the Director of OWCP has determined that when the tour of duty is not at least equivalent to that of the job held at the time of injury, OWCP will not consider the reemployment suitable for a wage-earning capacity determination. The Board finds, therefore, that OWCP abused its discretion in determining appellant's wage-

¹ See *Katherine T. Kreger*, 55 ECAB 633 (2004); 5 U.S.C. § 8115 (regarding determination of wage-earning capacity).

² See 5 U.S.C. § 8115.

³ See 5 U.S.C. § 8115(a); *Loni J. Cleveland*, 52 ECAB 171 (2000).

⁴ *Sharon C. Clement*, 55 ECAB 552 (2004).

⁵ *T.M.*, Docket No. 08-975 (issued February 6, 2009); *Tamra McCauley*, 51 ECAB 375, 377 (2000).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (October 2009); see also, *O.V.*, Docket No. 11-98 (issued September 30, 2011).

earning capacity based on a part-time position.⁷ The Board will reverse OWCP's January 21, 2011 decision.

ORDER

IT IS HEREBY ORDERED THAT the January 21, 2011 decision of the Office of Workers' Compensation Programs is reversed.

Issued: January 12, 2012
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

⁷ *O.V.*, *supra* note 6; *see also S.M.*, Docket No. 10-2382 (issued September 28, 2011).