

FACTUAL HISTORY

On May 11, 1999 appellant, then a 47-year-old letter carrier, filed an occupational disease claim alleging that she sustained injuries to her right elbow and shoulder due to factors of her federal employment. OWCP accepted her claim for tendinitis of the right elbow and shoulder.²

Appellant was treated by Dr. Mary deFigard, a Board-certified family practitioner. In a December 18, 2001 duty status report, Dr. deFigard provided work restrictions that precluded lifting more than five pounds, pushing for longer than 30 minutes and reaching above the shoulder with the right arm for more than 15 minutes. Appellant was also restricted from any climbing, kneeling, twisting or driving.

On January 11, 2002 appellant accepted a limited-duty job offer as a modified carrier working eight hours a day on “Schedule E” at her then current salary. The job offer provided that appellant would perform the following general duties:

“ON AN AS NEEDED BASIS...;

“EXPRESS MAIL DELIVERY -- up to 1 hr per day

“ANSWERING PHONES...

“DATA ENTRY

“FAA reports

“AMS...

“LOBBY SWEEP...

“... maintain records

“PERSONNEL -- hiring ..., ... interviews, maintain ...

“SAFETY OFFICER/INVESTIGATOR

“MAINTAIN ROUTE BOOKS -- maps, 1564a’s, flow charts, etc.).”

Physical restrictions of the position included: intermittent lifting up to five pounds; no pushing or pulling; intermittent walking less than one hour a day; no stooping or bending; simple grasping less than three hours per day; no reaching above the shoulder; no fine manipulation; and driving less than one hour per day.

² Appellant’s June 25, 1995 occupational disease claim (File No. xxxxxx496) was accepted for bilateral carpal tunnel syndrome. The claims were consolidated, with File No. xxxxxx450 serving as the master file.

By decision dated May 24, 2002, OWCP reduced appellant's compensation based on its finding that her actual earnings as a modified carrier fairly and reasonably represented her wage-earning capacity.

By letter dated November 19, 2009, the employing establishment notified appellant that pursuant to a review under the National Reassessment Program (NRP), it was unable to identify enough available necessary tasks within her medical restrictions in order for her to complete a full day of work. Accordingly, appellant's January 11, 2002 modified carrier position was being withdrawn. She was offered a position as a modified city carrier working two hours per day, five days a week. Appellant accepted the position under protest.

Appellant filed claims for compensation beginning November 14, 2009. On December 1, 2009 OWCP informed her that, in order to receive disability compensation, she was required to establish that modification of the 2002 wage-earning capacity decision was warranted. Therefore, appellant must show either that her accepted condition had worsened or that the original decision was issued in error.

In a letter dated December 21, 2009, appellant contended that the original LWEC was in error and therefore should be modified. She stated that the job on which the decision was based was temporary, as evidenced by the fact that it was subsequently converted to a part-time position.

On January 19, 2010 Dr. deFigard stated that appellant continued to experience symptoms related to her accepted condition. She indicated, however, that it was the withdrawal of her light-duty position by the employing establishment that caused her work cessation.

By decision dated March 22, 2010, OWCP denied modification of the May 24, 2002 LWEC decision. The claims examiner found that the fact that the employing establishment made an administrative decision to limit the number of hours of work being made available to appellant did not establish that the original job offer was for a temporary or part-time position, or that the decision was in error. He further found that the fact that appellant was provided with and performed full-time work for a number of years negated her argument that the 2002 job offer was based on temporary or part-time work.

On April 19, 2010 appellant requested a review of the written record. She contended that the original LWEC decision was in error because the position on which it was based was created especially for her and was "odd lot."

Appellant submitted a letter dated February 10, 2010 from Postmaster Laura Garcia, who stated: "The modified duty position that the claimant held was *not* a permanent position, but was a temporary position as it was subject to revision based on operational requirements." (Emphasis in the original.)

By decision dated July 7, 2010, an OWCP hearing representative affirmed the March 22, 2010 decision denying modification of the original LWEC decision.

On June 23, 2011 appellant requested reconsideration. In support of her request, she submitted a number of postal regulations and personnel documents. Appellant's representative argued that the original LWEC was erroneous because the position was makeshift in nature.

In an August 12, 2011 decision, OWCP denied modification of its prior decisions, finding that the original 2002 LWEC determination was not erroneous.

On appeal, appellant's representative does not contend that appellant's condition worsened such that she could no longer perform the duties of her position, but rather that the position on which the May 24, 2002 LWEC decision was based was makeshift because the employing establishment would not hire anyone with appellant's restrictions. He also argued that OWCP incorrectly identified the issue as "whether the original job offer was in error," rather than whether the original LWEC determination was erroneous. On March 29, 2012 the representative submitted a supplemental brief. On April 4, 2012 he submitted a postargument pleading addressing factors as noted by Professor Arthur Larson under sections 81.01(4) to 81.07.

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.³ Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.⁴

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.⁵ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁶

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.⁷ OWCP's 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

³ See 5 U.S.C. § 8115 (determination of wage-earning capacity).

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

⁵ *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Tamra McCauley*, 51 ECAB 375 (2000).

⁶ *Id.*

⁷ *Id.*

been issued, the decision will remain in place, unless one of the three accepted reasons for modification applies.⁸

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.⁹ Section 8115(a) of FECA provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his or her actual earnings if they fairly and reasonably represent his or her wage-earning capacity.¹⁰ Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.¹¹

OWCP's procedure manual provides that factors to be considered in determining whether the claimant's work fairly and reasonably represents her wage-earning capacity include the kind of appointment, that is, whether the position is temporary, seasonal or permanent and the tour of duty, that is, whether it is part time or full time.¹² The 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 work is not considered suitable. For example, the reemployment may not be considered suitable when the job is temporary where the claimant's previously job was permanent.¹³

ANALYSIS

In its August 12, 2011 decision, OWCP denied modification of the May 24, 2002 LWEC decision, which found that the light-duty carrier position accepted by appellant fairly and reasonably represented her wage-earning capacity. The Board finds, however, that the May 24, 2002 LWEC decision was erroneous because it was based on a temporary position. Therefore, OWCP's August 12, 2011 decision must be reversed.

On January 11, 2002 appellant accepted a limited-duty job offer as a modified carrier working eight hours a day. The job consisted of performing express mail delivery, answering telephones, data entry, lobby sweep, preparing reports, maintaining records and performing personnel functions on an "as needed" basis.¹⁴ The offer did not specify whether the position was temporary or permanent. On February 10, 2010, however, Postmaster Garcia confirmed that

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.7(a)(5) (October 2005).

⁹ *Katherine T. Kreger*, 55 ECAB 633 (2004).

¹⁰ See 5 U.S.C. § 8115 (determination of wage-earning capacity).

¹¹ *Id.* at § 8115(a); *Loni J. Cleveland*, 52 ECAB 171 (2000).

¹² *Id.*

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7a (October 2009).

¹⁴ The Board notes that appellant does not contend that the physical requirements of the position exceeded the restrictions provided by her physician.

the modified position was not a permanent position, but rather was a temporary position, subject to revision based on operational requirements. Appellant's contention that the modified position was temporary in nature is further supported by the fact that it was withdrawn when the employing establishment was unable to identify enough available necessary tasks within her medical restrictions for her to complete a full day of work. When operational requirements changed, the need for appellant's temporary position evaporated.

Once a wage-earning capacity is in place, it can only be modified if appellant can show that her condition has materially worsened or if there is sufficient evidence to find that the original determination was in error.¹⁵ OWCP based its 2002 wage-earning capacity determination on the position of modified carrier. The evidence establishes, however, that the offered position was not permanent. When determining whether earnings in alternative employment fairly and reasonably represent the employee's wage-earning capacity, OWCP may not consider the work suitable when the job is temporary and the employee's previous job was permanent.¹⁶ It does not appear that appellant's date-of-injury position was temporary and there is no evidence that the January 11, 2002 limited-duty assignment was classified as a permanent position. Consequently, she has established that the May 24, 2002 LWEC should be modified.

On appeal, appellant's representative argued that the position on which the May 24, 2002 LWEC decision was based was makeshift and designed to meet appellant's particular needs. Given its finding that the modified position was temporary and therefore unsuitable, the Board finds that it is unnecessary to make a determination as to whether the position was makeshift in nature. Appellant's representative also argued that OWCP incorrectly identified the issue as "whether the original job offer was in error," rather than whether the original LWEC determination was erroneous. Given the Board's finding that the original LWEC determination was erroneous, counsel's argument is moot.¹⁷

CONCLUSION

The Board finds that appellant has established that OWCP's May 24, 2002 wage-earning capacity determination should be modified.

¹⁵ See *supra* note 5 and accompanying text.

¹⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (July 1997); see also *R.J.*, Docket No. 10-2114 (issued June 15, 2011).

¹⁷ The representative contends that OWCP does not provide sufficient guidance to its personnel regarding whether a position is makeshift. The Board does not exercise jurisdiction over general issues relating to OWCP personnel policies.

ORDER

IT IS HEREBY ORDERED THAT the August 12, 2011 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 3, 2012
Washington, DC

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

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

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