

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

S.J., Appellant

and

**DEPARTMENT OF LABOR, OFFICE OF
WORKERS COMPENSATION PROGRAMS,
Dallas, TX, Employer**

)
)
)
)
)
)
)
)
)

**Docket No. 11-1639
Issued: March 15, 2012**

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 6, 2011 appellant, through her attorney, filed a timely appeal from a May 16, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established a modification of her February 5, 2007 wage-earning capacity determination was warranted.

FACTUAL HISTORY

The case has been before the Board on prior appeals. The Board reversed an October 21, 2003 OWCP decision terminating appellant's compensation on the grounds that she refused an

¹ 5 U.S.C. § 8101 *et seq.*

offer of suitable work.² By decision dated January 17, 2007, the Board found that OWCP had not properly calculated her compensation for the period August 31, 2004 to April 1, 2005 and commencing July 12, 2005.³ The Board noted that, pursuant to OWCP's regulations, it must determine the current pay rate for the date-of-injury job and OWCP had failed to make adequate findings in this regard. In response, OWCP issued a February 2, 2007 decision that found the date of injury was July 31, 1997 and the current pay rate for the date-of-injury position was \$861.48 per week.

By decision dated October 11, 2007, the Board affirmed OWCP's February 2, 2007 decision.⁴ In addition, the Board affirmed a November 17, 2006 OWCP decision, denying modification of a June 7, 2006 wage-earning capacity determination based on appellant's actual earnings since April 3, 2006. On February 5, 2007 OWCP modified its June 7, 2006 wage-earning capacity determination to reflect pay rate calculations in accord with the February 2, 2007 decision. As in the June 7, 2006 decision, it found that appellant had actual earnings of \$733.15 commencing April 3, 2006. With respect to computation of compensation, the pay rate for compensation purposes was \$980.54, based on a recurrence of disability on December 12, 2000. The current pay rate for the date-of-injury job was \$861.48, resulting in a loss of wage-earning capacity of 15 percent of the weekly pay rate.

By decision dated December 8, 2008, the Board affirmed OWCP decisions dated January 14 and March 17, 2008, finding that appellant did not establish that modification of the February 5, 2007 wage-earning capacity determination was warranted.⁵ The history of the case is contained in the Board's prior decisions and is incorporated herein by reference.

On March 18, 2010 OWCP received a March 10, 2010 report from a physician's assistant that provided results on examination.⁶ There is also a letter dated March 10, 2010, from Dr. Callewart to the employing establishment stating that appellant's work restrictions were permanent. On September 17, 2010 appellant submitted a claim for compensation (Form CA-7) commencing April 2, 2006. By decision dated October 27, 2010, OWCP denied modification of the February 5, 2007 wage-earning capacity determination.

By letter dated November 3, 2010, appellant requested a telephonic hearing before an OWCP hearing representative. She submitted a desk audit summary dated July 7, 2010. The summary stated that appellant was currently a Contact Representative and requested desk audit because her work duties were different from those in her position description. It was noted that, as of October 1, 2009, she was moved from a front desk location and no longer had contact with

² Docket No. 04-341 (issued November 12, 2004).

³ Docket No. 06-129 (issued January 17, 2007).

⁴ Docket Nos. 07-1493 and 07-938 (issued October 11, 2007).

⁵ Docket No. 08-1975 (issued December 8, 2008).

⁶ The physician's assistant stated "case discussed" with Dr. Craig Callewart, an orthopedic surgeon, but the report does not contain Dr. Callewart's signature.

claimants or representatives. The desk audit concluded that the position should be reclassified under OPM classification standards.

In a November 4, 2010 statement, appellant argued that the desk audit showed that the employing establishment had submitted erroneous information regarding her position as a front desk representative. She asserted that there was no such position as a front desk receptionist. Appellant submitted an SF-50 indicating that her position effective April 2, 2006 was entitled a contact representative. On December 21, 2010 she resubmitted an October 17, 2007 report from Dr. Callewart, which the Board had reviewed in its December 8, 2008 decision.

A telephonic hearing was held on March 14, 2011. Appellant indicated that she had worked at the front desk, but did not perform the duties of a contact representative. By decision dated May 16, 2011, the hearing representative denied modification of the wage-earning capacity determination.

LEGAL PRECEDENT

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

ANALYSIS

In the present case, appellant seeks modification of a February 5, 2007 wage-earning capacity determination based on her actual earnings from April 2, 2006 as a front desk receptionist. It is her burden of proof to show that a modification is warranted. Appellant does not appear to argue that there was a material change in the nature and extent in the employment-related condition. She resubmitted an October 17, 2007 report from Dr. Callewart that previously had been reviewed by the Board and found insufficient to warrant a modification. The March 10, 2010 report from a physician's assistant is not considered probative medical evidence as a physician's assistant is not a physician under FECA.⁹ Dr. Callewart's March 10, 2010 letter does not show a change in the employment-related condition. In addition, appellant does not argue that she has been retrained or vocationally rehabilitated.

The remaining standard for modification of wage-earning capacity determination is establishing that the original determination was erroneous. Appellant has submitted a July 7, 2010 desk audit of her current position and argues that the wage-earning capacity determination was erroneous. She asserts that her job title was a contact representative and she never worked at

⁷ *Sue A. Sedgwick*, 45 ECAB 211 (1993).

⁸ *Id.*

⁹ *George H. Clark*, 56 ECAB 162 (2004). A report countersigned by a physician would constitute medical evidence from a physician, but there was no signature from Dr. Callewart. See *Lyle Dayberry*, 48 ECAB 369 (1998).

that position, that the job she worked at was not properly classified and was specially tailored to her needs.

The Board notes that the December 22, 2005 job offer indicated the “organizational title” was contact representative and the “position title” was front desk receptionist. The job offer had a clear description of front desk duties that would be involved. The statements in the desk audit, as well as appellant’s own statements at the March 24, 2010 hearing, indicate that she did work at the front desk through October 2009. According to the desk audit her duties did change in October 2009 and the July 7, 2010 desk audit found that the current job duties were not properly classified. But this does not establish error in the February 5, 2007 wage-earning capacity determination. The front desk position offered to appellant had an official title and job description, it required the performance of meaningful tasks and there was no evidence it was a temporary job. The evidence does not support that the job was a makeshift job or otherwise inappropriate for a wage-earning capacity determination.¹⁰

Based on the evidence of record, the Board finds that appellant did not establish that the original wage-earning capacity determination was erroneous. Appellant did not show a material change in the nature and extent of an employment-related condition or show the original determination was erroneous. It is her burden of proof to establish that a modification of the wage-earning capacity determination was warranted and she did not meet her burden in this case. Appellant may request modification of the wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that a modification of the wage-earning capacity determination was warranted.

¹⁰ A makeshift or odd lot position is a job specifically designed for a claimant’s particular needs and is not appropriate for a wage-earning capacity determination. *M.S.*, Docket No. 11-158 (issued December 22, 2011). Among the factors considered in determining that a position is makeshift include, *e.g.*, whether the position did not have an official title or formal position description; whether there were such strict physical limitations indicating the claimant would not be able to secure a position in the community at large with such limited duties; whether the claimant did not perform any meaningful tasks in the position; and whether the job appeared to be temporary in nature. *See A.J.*, Docket No. 10-619 (issued June 29, 2010).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 16, 2011 is affirmed.

Issued: March 15, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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