

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

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**I.M., Appellant**

**and**

**DEPARTMENT OF THE AIR FORCE, AIR  
MOBILITY COMMAND, CHARLESTON AIR  
FORCE BASE, SC, Employer**

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**Docket No. 12-943  
Issued: September 13, 2012**

*Appearances:*  
*Bradley R. Marshall, Esq.,* for the appellant  
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

**ORDER REVERSING CASE**

Before:  
RICHARD J. DASCHBACH, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
PATRICIA HOWARD FITZGERALD, Judge

On March 21, 2012 appellant timely filed an application for review from the October 5, 2011 decision of the Office of Workers' Compensation Programs (OWCP) denying his request for modification of an OWCP wage-earning capacity determination dated February 7, 2005. The Board assigned Docket No. 12-943.

OWCP accepted that on July 24, 2001 appellant, then a 46-year-old fabric worker, sustained a work-related herniated disc at L5-S1. At the time of his July 24, 2001 work injury, he was working on a full-time basis for the employing establishment.<sup>1</sup> On August 16, 2004 appellant returned to a light-duty position for the employing establishment and he began working six hours per day for a total of 30 hours per week.<sup>2</sup> In a February 7, 2005 decision, OWCP reduced his compensation based on its determination that his actual earnings in this position fairly and reasonably represented his wage-earning capacity. Appellant stopped work on March 23, 2010 and requested modification of OWCP's February 7, 2005 wage-earning capacity

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<sup>1</sup> Appellant worked in this job for 40 hours per week.

<sup>2</sup> Appellant initially returned to work for four hours per day, five days per week, but he later increased his work hours to six hours per day, five days per week.

determination. In an October 5, 2011 decision, OWCP denied appellant's request for modification of its February 7, 2005 wage-earning capacity determination.

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.<sup>3</sup> 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.<sup>4</sup> Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.<sup>5</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>6</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>7</sup>

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.<sup>8</sup>

OWCP found that appellant's actual earnings in part-time reemployment as modified fabric worker for 30 hours per week fairly and reasonably represented his wage-earning capacity. Appellant was a full-time worker at the time of his July 24, 2001 work injury as he was working 40 hours per week. 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-earning capacity based on a part-time position.<sup>9</sup> The Board will reverse OWCP's October 5, 2011 decision.

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<sup>3</sup> See *Katherine T. Kreger*, 55 ECAB 633 (2004); 5 U.S.C. § 8115 (regarding determination of wage-earning capacity).

<sup>4</sup> See 5 U.S.C. § 8115.

<sup>5</sup> See *id.* at § 8115(a); *Loni J. Cleveland*, 52 ECAB 171 (2000).

<sup>6</sup> *Sharon C. Clement*, 55 ECAB 552 (2004).

<sup>7</sup> *T.M.*, Docket No. 08-975 (issued February 6, 2009); *Tamra McCauley*, 51 ECAB 375, 377 (2000).

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (October 2009).

<sup>9</sup> *O.V.*, Docket No. 11-98 (issued September 30, 2011); *S.M.*, Docket No. 10-2382 (issued September 28, 2011).

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 5, 2011 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 13, 2012  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board