

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

P.C., Appellant

and

**DEPARTMENT OF COMMERCE, BUREAU
OF THE CENSUS, Petaluma, CA, Employer**

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**Docket No. 13-939
Issued: August 27, 2013**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 11, 2013 appellant filed a timely appeal from the January 31 and February 5, 2013 merit decisions 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.

ISSUES

The issues are: (1) whether OWCP properly reduced appellant's compensation based on its determination that her actual wages as part-time temporary field representative fairly and reasonably represented her wage-earning capacity; and (2) whether appellant established that modification of the loss of wage-earning capacity (LWEC) determination was warranted.

On appeal, appellant contends that she is entitled to compensation from November 13 through December 24, 2011 due to residuals and disability related to her accepted employment-

¹ 5 U.S.C. § 8101 *et seq.*

related injuries. Further, the employing establishment no longer had any work available within her restrictions.

FACTUAL HISTORY

OWCP accepted that on May 27, 2010 appellant, then a 38-year-old part-time temporary census enumerator, sustained a sprain and complex regional pain disorder of the left ankle when she twisted her left ankle while going down steps at a mobile home.² She stopped work on May 28, 2010.

In a June 20, 2011 medical report, Dr. Mark E. Schakel, II, an attending Board-certified orthopedic surgeon, released appellant to return to modified-duty work. He provided restrictions that included standing and walking 10 to 15 minutes continually up to 2 hours during an 8-hour timeframe, lifting, pushing and pulling up to 10 pounds and no squatting, kneeling and climbing.

On June 23, 2011 the employing establishment offered appellant a field representative position effective July 18, 2011. The position was a temporary appointment, not to exceed 90 days with the possibility of an extension. The position had an intermittent variable part-time schedule. The duties involved interviewing respondents to collect data required for current and one-time surveys and special censuses. The physical requirements included the ability to read the information presented on survey or census forms and a computer screen and to clearly hear the respondent's replies to the questions. Depending on the area of the assignment driving, walking and climbing stairs to interview survey respondents would be required. Occasional lifting of boxes containing survey or census materials may also be required. Additional physical requirements included intermittent to continuous sitting up to 3.5 hours, intermittent walking and standing up to 15 minutes and lifting and carrying less than 30 minutes, seldom pushing and pulling less than 30 minutes, intermittent and occasional reaching and repetitive movements less than 1 hour and seldom bending and turning less than 30 minutes a day. There was no stooping, squatting, kneeling and climbing. The position was essentially sedentary in nature and performed entirely at home with minimal physical demands in the performance of typical administrative functions. A telephone headset could be used to minimize reaching and grasping. The position required no more than 4 intermittent hours of work a day, 15 to 20 hours a week.

By letters dated August 15 and November 9, 2011, the employing establishment advised OWCP that appellant accepted the part-time field representative position effective August 17, 2011.

On December 1, 2011 and January 2, 2012 appellant filed claims (Form CA-7) for compensation for leave without pay (LWOP) from November 13 through December 10, 2011.³ On the CA-7 forms the employing establishment stated that appellant returned to work as a field

² Appellant was treated by Dr. Jonathan King on May 27, 2010. Dr. King noted that x-rays of her left knee and ankle were negative.

³ On November 9, 2011 appellant filed a Form CA-7 for LWOP compensation from October 30 through November 12, 2011. In a Form CA-7a dated November 18, 2011, she noted that not enough work was available to accommodate her work restrictions and physical disability due to the accepted employment injury. On December 20, 2011 OWCP paid appellant disability compensation for the claimed period.

representative which was similar to her date-of-injury position. Appellant received greater pay in her new job than in her date-of-injury job. The employing establishment stated that her temporary contract had been fulfilled and was terminated on January 28, 2012.

In a November 21, 2011 memorandum, appellant stated that her last day of work was on November 11, 2011 because no work was available to accommodate her restrictions which included standing no more than 20 minutes and walking up to 2 hours a day. The only available work required standing 40 to 60 minutes while holding a laptop computer and interviewing a respondent in person. Appellant contended that she continued to suffer from residuals and disability due to her accepted employment injuries.

In a September 27, 2010 progress note, Dr. Brian K. Hunt, a Board-certified anesthesiologist, obtained a history of the May 27, 2010 employment injury and appellant's medical, family, social and employment background. He noted that her left ankle pain interfered with her activities of daily living. Dr. Hunt listed findings on physical and x-ray examination of the left ankle and diagnosed Type 1 complex regional pain syndrome of the lower limb, arthritis in the ankle and foot and a sprained ankle.

In medical reports dated November 16 and December 20, 2011, Dr. Schakel noted appellant's complaints of pain and impaired activities of daily living. He addressed her treatment plan. In a December 12, 2011 report, Dr. Schakel reviewed a history of appellant's medical, social and family background. He noted that she was not currently working. On physical examination, Dr. Schakel reported essentially normal findings with the exception of her slight walk on the left side, calf atrophy, and restricted range of motion in both knees and ankles. He reported essentially normal findings on neurological examination with the exception of dizziness. On psychological examination, Dr. Schakel found anxiety, depression and sleep disturbances. He advised that appellant had an industrial injury with a left ankle fracture and complex regional pain syndrome of the left lower extremity. Dr. Schakel concluded that she was capable of performing modified work with restrictions which included no kneeling, climbing, squatting, and no lifting, pushing and pulling more than 25 pounds on a rare to occasional basis.

In a January 6, 2012 letter, the employing establishment requested that OWCP make a determination based on appellant's actual earnings. It stated that she had successfully returned to work and demonstrated by actual earnings no further LWEC. Appellant remained employed as an intermittent employee although she currently had no assigned work. The employing establishment stated that, once no LWEC was demonstrated, a lack of work for a temporary intermittent nonstatus employee did not constitute a recurrence of disability under FECA. It noted that appellant was initially injured while working as a part-time temporary intermittent Decennial Census 2012 employee without career or career-condition status. She returned to work in an identical temporary part-time intermittent nonstatus position in August 2011. The employing establishment contended that appellant was not entitled to restoration rights if or when work became available since she had returned to work that was identical to her date-of-injury job and lasted more than 90 days. It concluded that after 60 days her actual earnings demonstrated zero LWEC.

By letter dated January 23, 2012, OWCP requested that the employing establishment clarify whether any work was available for appellant since she had a part-time temporary

position. It was also asked to provide whether work was available regardless of her medical condition and work restrictions.

In a January 30, 2012 letter, the employing establishment stated that field representatives, even those who conducted census surveys by telephone, worked on an intermittent and varied/flexible schedule with no set work hours or days as long as the survey was completed within the allotted time. It accommodated medical restrictions on a case-by-case basis. The employing establishment noted that the flexible work schedule allowed field representatives to attend medical appointments.

In a January 31, 2012 letter, the employing establishment stated that appellant was hired to work as a temporary intermittent field representative and was trained for the American Housing Survey (AHS). The survey ended in December 2011. The lack of work had nothing to do with appellant's physical limitations. The survey was completed and all assignments ceased for all AHS field representatives. Appellant's appointment ended on January 28, 2011 and she was no longer employed. The employing establishment concluded that no work was available regardless of her medical condition.

On February 2, 2012 appellant filed a Form CA-7 for wage-loss compensation from December 11 to 24, 2011.

In a February 20, 2012 letter, appellant stated that in November 2011 her supervisors offered her additional work as a regular field representative because they knew there was a limited amount of telephone work available to accommodate her work restrictions and physical disability that she would finish during the first or second week of November 2011. The position required standing 40 to 60 minutes and holding a laptop while conducting in-person interviews of respondents. Appellant could only stand up to 20 minutes at a time. After discussing a possible accommodation which involved making telephone appointments with respondents who could not provide her with a comfortable place to sit during an interview, appellant's supervisors did not allow her to accept the additional field representative work. Appellant contended that since the offered regular field representative work would continue until the end of December 2011 and her telephone work lasted through November 11, 2011, she was entitled to compensation through December 2011.

By letter dated January 2, 2013, the employing establishment again contended that appellant was not entitled to compensation for the claimed period. It noted that she was hired to perform a telephone survey job in her home. No outside work was required. When all telephone survey work was completed, there was no work to offer appellant. At the time her initial appointment was set to expire, she expressed an interest in performing a limited number of outside field assignments. Appellant believed that her physician would release her to perform such work. Her temporary term of employment was extended. Appellant was never released to perform outside field assignments and her home telephone survey job ceased. The employing establishment concluded that her inability to be released to perform a new work assignment did not constitute disability under FECA for a nonstatus employee without retention rights.

In a January 31, 2013 decision, OWCP found that appellant's actual earnings as a temporary field representative effective August 17, 2011 fairly and reasonably represented her

wage-earning capacity. It noted that she had worked in the position for over 60 days. OWCP reduced appellant's compensation to zero as her actual earnings exceeded the current wages of her date-of-injury position.

By decision dated February 5, 2013, OWCP denied appellant's claim for compensation from November 13 through December 24, 2011, finding that she failed to establish a basis for modifying the January 31, 2013 LWEC determination. The employing establishment indicated that she was laid off because there was no work available and that all similarly situated employees were also laid off. OWCP found that there was no evidence that the LWEC determination which was retroactive to October 22, 2011 was made in error or that her accepted conditions had worsened. It stated that the medical evidence established gradual improvement of appellant's medical condition.

LEGAL PRECEDENT -- ISSUE 1

Section 8115(a) of FECA provides that the wage-earning capacity of an employee is determined by her actual earnings if her actual earnings fairly and reasonably represent her wage-earning capacity.⁴ Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.⁵ OWCP procedures provide that OWCP can make a retroactive wage-earning capacity determination if the claimant worked in the position for at least 60 days, the position fairly and reasonably represented his or her wage-earning capacity and the work stoppage did not occur because of any change in his or her other injury-related condition affecting the ability to work.⁶ However, wage-earning capacity may not be based on an odd-lot or make-shift position designed for an employee's particular needs or a position that is seasonal in an area where year-round employment is available.⁷ Reemployment of a temporary or casual worker in another temporary or casual position is proper, as long as it will last at least 90 days.⁸

The formula for determining LWEC based on actual earnings, developed in the *Albert C. Shadrick* decision,⁹ has been codified at 20 C.F.R. § 10.403. OWCP calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the current pay rate for the date-of-injury job.¹⁰

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

⁵ *Lottie M. Williams*, 56 ECAB 302 (2005).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity* Chapter 2.814.7.e(1) (October 2009).

⁷ See *James D. Champlain*, 44 ECAB 438, 440-41 (1993); Federal (FECA) Procedure Manual, *supra* note 5 at Chapter 2.814.7a(1) (July 1997).

⁸ Federal (FECA) Procedure Manual, *id.* at Chapter 2.814.7.a (October 2009).

⁹ 5 ECAB 376 (1953).

¹⁰ 20 C.F.R. § 10.403(c).

ANALYSIS -- ISSUE 1

OWCP accepted that on May 27, 2010 appellant, then a part-time temporary census enumerator, sustained a sprain and complex regional pain disorder of the left ankle while in the performance of duty. In determining appellant's wage-earning capacity, it properly found that she had received actual earnings as a part-time temporary field representative for more than 60 days in that she had been working in the position effective August 17, 2011 when OWCP issued its January 31, 2013 LWEC decision.¹¹ According to the evidence of record, the job offer was in accordance with the restrictions provided by Dr. Schakel, an attending physician.

OWCP also properly found that appellant's actual wages fairly and reasonably represented her wage-earning capacity.¹² The part-time temporary field representative position was not an odd-lot or make-shift position designed for appellant's particular needs or seasonal in nature.¹³ The position was a part-time temporary position not to exceed 90 days, but wage-earning capacity may be based on a part-time temporary position where, as in the present case, the position the employee held when injured was also part time and temporary in nature.¹⁴

The Board finds that as the evidence does not show that appellant's actual earnings as a part-time temporary field representative did not fairly and reasonably represent her wage-earning capacity, they must be accepted as the best measure of her wage-earning capacity.¹⁵

The Board must next determine whether OWCP properly calculated appellant's wage-earning capacity based on her actual earnings. The Board finds that OWCP properly determined that appellant had no LWEC based on her actual earnings. The current weekly earnings of \$335.60 per week as a part-time temporary field representative exceeded the current weekly wages of the date-of-injury position of \$259.62. Appellant therefore had no LWEC under the *Shadrick* formula.¹⁶

LEGAL PRECEDENT -- ISSUE 2

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

¹¹ See *supra* note 7.

¹² See *supra* note 3.

¹³ See *supra* note 6.

¹⁴ See *supra* note 7.

¹⁵ See *Loni J. Cleveland, supra* note 3.

¹⁶ *Albert C. Shadrick, supra* note 8.

rehabilitated or the original determination was, in fact, erroneous.¹⁷ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.¹⁸

Rationalized medical opinion evidence is medical evidence that is based on a complete factual and medical background, of reasonable medical certainty and supported by medical rationale explaining the opinion.¹⁹

ANALYSIS -- ISSUE 2

The record indicated that appellant had stopped working from November 11 through December 24, 2011. OWCP's February 5, 2013 decision was limited to the claim for compensation during this period. When an employee claims compensation for total disability after a LWEC determination has been made, this raises the issue of whether the wage-earning capacity determination should be modified.²⁰ In this case, appellant did not allege that she had been retrained or otherwise vocationally rehabilitated. Although she did not allege that the original LWEC determination was erroneous, the above findings illustrates, that it was not erroneous. The issue, therefore, is whether appellant has established a material change in the nature and extent of her injury-related conditions as of November 11, 2011 warranting modification of the January 31, 2013 LWEC determination.

Dr. Hunt's September 27, 2010 progress note found that appellant had Type 1 complex regional pain syndrome of the lower limb, arthritis in the ankle and foot and a sprained ankle. Arthritis has not been accepted as causally related to the accepted injuries. If OWCP has not accepted a condition as employment related, appellant has the burden of proof to establish causal relationship.²¹ Dr. Hunt did not provide a reasoned explanation regarding how and why the accepted sprain and complex regional pain disorder of the left ankle caused the nonaccepted condition.²² The Board finds therefore, that this evidence is insufficient to establish a basis for modification of the LWEC decision.

Dr. Schakel's December 12, 2011 report found that appellant had an industrial-related left ankle fracture and complex regional pain syndrome of the left lower extremity. He listed findings on physical, neurological and psychological examination. Dr. Schakel opined that appellant was capable of performing modified work with restrictions. His report is insufficient to establish appellant's burden as he did not find that her accepted conditions had materially worsened such that she was unable to perform the duties of her part-time temporary position during the claimed period of disability. Likewise, Dr. Schakel other reports, which noted her complaints of pain and impaired activities of daily living and addressed her treatment plan, failed

¹⁷ *Sharon C. Clement*, 55 ECAB 552 (2004).

¹⁸ *Tamra McCauley*, 51 ECAB 375, 377 (2000).

¹⁹ *Jennifer Atkerson*, 55 ECAB 317, 319 (2004).

²⁰ *See Katherine T. Kreger*, 55 ECAB 633 (2004).

²¹ *See Jaja K. Asaramo*, 55 ECAB 200 (2004).

²² *Deborah L. Beatty*, 54 ECAB 340 (2003).

to provide a rationalized opinion addressing whether there was a material change in the nature and extent of her employment-related conditions that prevented her from performing the duties of her part-time temporary position.²³ Further, the Board has consistently held that pain is a symptom rather than a compensable medical diagnosis.²⁴ The Board finds that Dr. Schakel's reports are insufficient to establish appellant's burden of proof.

Appellant asserted that she was entitled to compensation due to the employing establishment's withdrawal of work within her restrictions on November 11, 2011. As a formal LWEC decision was in effect on November 11, 2011, the proper standard of review was whether OWCP should modify its January 31, 2013 decision according to the established criteria.²⁵ Compensation for LWEC is based upon loss of the capacity to earn and not on actual wages lost.²⁶ Therefore, the employing establishment's withdrawal of appellant's temporary part-time work on November 11, 2011 was immaterial. Appellant continued to have a capacity to earn wages. Absent a showing that the LWEC determination should be modified, appellant has no disability under FECA and is not entitled to compensation for wage loss when her part-time temporary work was withdrawn.²⁷

Appellant did not submit sufficiently rationalized medical evidence to establish a material change in the nature and extent of her employment-related conditions. As noted, she did not contend that she had been retrained or vocationally rehabilitated or that the original LWEC determination was erroneous. The Board finds, therefore, that appellant has failed to establish that the January 31, 2013 LWEC determination should be modified.

On appeal, appellant contended that she was entitled to compensation from November 13 through December 24, 2011 because she continued to suffer from residuals and disability related to her accepted employment-related injuries and the employing establishment no longer had any work available within her restrictions. As stated above, she did not submit sufficiently rationalized medical evidence establishing a material change in the nature and extent of her employment-related conditions. Moreover, appellant did not establish that the withdrawal of her part-time temporary field representative position by the employing establishment justified resumption of compensation for total disability.

Appellant may request modification of the LWEC determination, supported by new evidence or argument, at any time before OWCP.

²³ *T.M.*, Docket No. 08-975 (issued February 6, 2009).

²⁴ *K.W.*, Docket No. 12-1590 (issued December 18, 2012); *C.F.*, Docket No. 08-1102 (issued October 10, 2008).

²⁵ *K.R.*, Docket No. 09-28 (issued September 16, 2009).

²⁶ *Roy Matthew Lyon*, 27 ECAB 186 (1975).

²⁷ *See generally, K.H.*, Docket No. 08-2392 (issued April 21, 2009).

CONCLUSION

The Board finds that OWCP properly reduced appellant's compensation based on its determination that her actual wages as part-time temporary field representative fairly and reasonably represented her wage-earning capacity. The Board further finds that OWCP properly denied modification of the wage-earning capacity determination as of January 31, 2013.

ORDER

IT IS HEREBY ORDERED THAT the February 5 and January 31, 2013 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 27, 2013
Washington, DC

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

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

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