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

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| **P.J., Appellant** | ) | |
| **and** | ) | **Docket No. 13-1191** |
| | ) | **Issued: December 20, 2013** |
| **DEPARTMENT OF COMMERCE, U.S. PATENT & TRADEMARK OFFICE, Alexandria, VA, Employer** | ) | |

*Appearances:*
*Richard A. Daniels*, for the appellant
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

### ***JURISDICTION***

On May 8, 2013 appellant, through her representative, filed a timely appeal from the March 8, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (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 OWCP properly determined that the position of babysitter fairly and reasonably reflected appellant's wage-earning capacity, effective September 26, 2010, the date that it adjusted her compensation.

[1] 5 U.S.C. §§ 8101-8193.

## ***FACTUAL HISTORY***

In April 1999, appellant, then a 37-year-old legal instrument examiner, filed an occupational disease claim. OWCP accepted neck, right shoulder and upper arm sprains, myalgia myositis, intervertebral cervical disc disorder with myelopathy and brachial neuritis/radiculitis. In December 2000, appellant filed an occupational disease claim for a work-related wrist condition that OWCP accepted for bilateral carpal tunnel syndrome. At the time of her injuries, she was working in a full-time position for the employing establishment. OWCP paid compensation for periods of disability.

In an August 14, 2009 report, Dr. Daniel R. Ignacio, Board-certified in physical medicine and rehabilitation, provided an opinion that appellant was totally disabled from work.

In a Form EN1032 signed on August 20, 2009, appellant reported earnings of $12,000.00 for the 15 months prior to August 20, 2009 for watching her grandchildren when their mother worked. In response to a question about how often she performed this work, appellant stated, "After school for maybe three or four hours."[2]

By decision dated September 15, 2010, OWCP reduced appellant's compensation effective September 26, 2010 on the grounds that her actual wages as a babysitter fairly and reasonably represented her wage-earning capacity. It found her wages of $218.13 per week and noted that she demonstrated the ability to earn wages in this position for more than 60 days.

Appellant requested a hearing before an OWCP hearing representative. At the February 10, 2011 hearing, she stated that she received free rent from her daughter for watching her grandchildren. Appellant watched the children on a sporadic basis when their mother was at work and could not care for them. She ceased watching her grandchildren after she suffered a heart attack in April 2009.

In a May 2, 2011 decision, an OWCP hearing representative affirmed the September 15, 2010 decision finding that OWCP had properly reduced appellant's compensation effective September 26, 2010 on the grounds that her actual wages as a babysitter fairly and reasonably represented her wage-earning capacity. She indicated that the evidence supported that appellant worked for more than 60 days as a babysitter.[3]

Appellant requested modification of OWCP's September 15, 2010 wage-earning capacity determination. In a September 28, 2012 decision, OWCP affirmed its prior wage-earning capacity determinations and denied her modification request. In a March 8, 2013 decision, it affirmed its September 28, 2012 decision.

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[2] Appellant appears to have inadvertently given information about her work in both the employment and volunteer work portions of the form. She noted, "Watched my four grandkids, three in school, one stay home." On a Form SSA-1826 the Social Security Administration indicated that appellant had $11,083.00 in self-employment income for 2009. The form did not specify the particular source of this income.

[3] Appellant requested reconsideration of OWCP's May 2, 2011 decision. In an August 24, 2011 decision, OWCP denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

## ***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. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.[4] OWCP's procedure manual provides that, "[i]f a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss. In this instance the [claims examiner] will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity."[5]

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.[6] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[7]

OWCP's procedure manual provides guidelines for determining wage-earning capacity based on actual earnings:

> "a. Factors considered. To determine whether the claimant's work fairly and reasonably represents his or her WEC [wage-earning capacity], the CE [Claims examiner] should consider whether the kind of appointment and tour of duty (see FECA PM 2.900.3) are at least equivalent to those of the job held on date of injury. Unless they are, the CE may not consider the work suitable.
>
> "For instance, reemployment of a temporary or casual worker in another temporary or casual (USPS) position is proper, as long as it will last at least 90 days, and reemployment of a term or transitional (USPS) worker in another term or transitional position is likewise acceptable. However, the reemployment may not be considered suitable when:
>
> > "(1) The job is part-time (unless the claimant was a part-time worker at the time of injury) or sporadic in nature;
> >
> > "(2) The job is seasonal in an area where year-round employment is available….

[4] *Katherine T. Kreger*, 55 ECAB 633 (2004).

[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

[6] *Stanley B. Plotkin*, 51 ECAB 700 (2000).

[7] *Id.*

"(3) The job is temporary where the claimant's previous job was permanent."[8]

## ***ANALYSIS***

In April 1999, appellant filed an occupational disease claim that OWCP accepted for neck, right shoulder and upper arm sprains, myalgia myositis, intervertebral cervical disc disorder with myelopathy and brachial neuritis/radiculitis. In December 2000, she filed an occupational disease claim for a work-related wrist condition that OWCP accepted for bilateral carpal tunnel syndrome. OWCP paid compensation for disability. By decision dated September 15, 2010, it reduced appellant's compensation effective September 26, 2010 finding that her actual wages as a babysitter fairly and reasonably represented her wage-earning capacity.

The record indicates that appellant's date-of-injury job as a legal instrument examiner was a full-time position. The actual earnings in this case were based on a part-time job of babysitter. The record reflects that appellant watched her grandchildren in her home on a sporadic, part-time basis when her daughter was working and could not look after them.[9] As OWCP procedure manual indicates, in situations where an employee is working full time when injured and is reemployed in a part-time position, a formal wage-earning capacity determination is generally not appropriate. The Board has held that OWCP must address the issue and explain why a part-time position is suitable for a wage-earning capacity determination based on the specific circumstances of the case.[10]

OWCP did not address this issue in its decisions. It made a finding that the babysitter position fairly and reasonably represented appellant's wage-earning capacity, without clearly explaining why the actual earnings were based on a part-time position and appellant was not a part-time employee when she sustained her injuries. The Board finds that OWCP failed to meet its burden of proof in determining appellant's wage-earning capacity effective September 26, 2010 based on her part-time work as a babysitter in her home.

## ***CONCLUSION***

The Board finds that OWCP improperly determined that the position of babysitter fairly and reasonably reflected appellant's wage-earning capacity effective September 26, 2010, the date that it adjusted her compensation.

[8] Federal (FECA) Procedure Manual, Part 2 – Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7a (July 1997).

[9] *See William D. Emory*, 47 ECAB 365 (1996) (actual earning for babysitting activities by a grandfather found not to represent his wage-earning capacity).

[10] *Connie L. Potratz-Watson*, 56 ECAB 316 (2005).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the March 8, 2013 decision of the Office of Workers' Compensation Programs is reversed.

Issued: December 20, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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