

FACTUAL HISTORY

This case was previously before the Board. By decision and order issued August 5, 2011,² the Board set aside OWCP's March 23, 2010 decision which erroneously denied appellant's December 17, 2009 request for modification of a May 22, 1998 wage-earning capacity determination as an untimely recurrence of disability. The Board remanded the case to OWCP to adjudicate the wage-earning capacity issue. The facts of the case as set forth in the Board's prior decision are incorporated by reference.³

OWCP accepted that, on June 26, 1979, appellant, then a full-time machinist, sustained tarsal and metatarsal fractures of the left foot, chondromalacia of the left patella, a torn left medial meniscus and a ligament sprain of the left knee. Appellant returned to full duty as a machinist following these injuries. In 1980, OWCP accepted that, on June 16, 1980, he sustained an L1 compression fracture, lumbar strain and lumbago in a separate traumatic incident. Appellant stopped work on June 16, 1980 and received total disability compensation.

On October 18, 1993 appellant returned to work for four hours a day as an identification clerk with permanent restrictions. An October 17, 1993 notification of personnel action (Form SF-50) states that the identification clerk position was part time. OWCP issued a loss of wage-earning capacity determination on January 13, 1995 based on appellant's actual earnings as an identification clerk. Appellant stopped work on June 30, 1995 and did not return. He was terminated from the employing establishment on October 31, 1995 when his identification clerk position was eliminated due to a reduction-in-force affecting all arsenal divisions. On May 22, 1998 OWCP modified the original wage-earning capacity determination to reflect a change to a compressed part-time work schedule prior to the reduction-in-force. It paid wage-loss compensation based on the May 22, 1998 wage-earning capacity determination. On December 17, 2009 appellant requested modification of the wage-earning capacity determination.

In a September 14, 2011 letter, OWCP requested that appellant explain his reasons for requesting modification of the May 22, 1998 wage-earning capacity determination. In an October 10, 2011 letter, appellant asserted that the original January 13, 1995 wage-earning capacity determination was erroneous as the identification clerk position required him to bend, twist, squat and kneel in violation of his permanent medical restrictions. He submitted additional evidence.⁴

² Docket No. 10-2327 (issued August 5, 2011).

³ Evidence relevant to the present appeal that was not discussed in the Board's prior decisions is set forth below.

⁴ Appellant also submitted medical records regarding his current treatment for the accepted injuries. On April 15, 2010 he underwent an arthroscopic chondroplasty of the left knee. Appellant submitted progress notes from July 10, 2008 to November 10, 2011 from Dr. Luke V. Rigolosi, an attending Board-certified physiatrist, finding appellant totally disabled for work due to lumbar pain due to accepted lumbar injuries. Dr. Zandra Rios-Rivera, an attending internist, submitted reports from December 3, 2009 to November 23, 2011 finding appellant totally disabled for work due to the accepted lumbar injuries.

In a September 6, 1995 report, Dr. Joseph F. Emrich, an attending Board-certified neurosurgeon, found that appellant had attained maximum medical improvement. In an October 19, 1995 work capacity evaluation (Form OWCP-5), he found that appellant was permanently unable to lift, bend, squat, climb, kneel or twist.

In a November 19, 2008 letter, appellant's supervisor from 1993 to 1995 stated that appellant's duties required lifting, bending, squatting, kneeling and twisting. In an August 18, 2010 letter, the supervisor noted that appellant's duties required him to access filing cabinets, necessitating bending, kneeling and squatting. As appellant was the sole employee in the security office during his four-hour shift, he had to perform all duties himself.

By decision dated December 7, 2011, OWCP vacated the May 22, 1998 loss of wage-earning capacity determination on the grounds that it was erroneous. It found that the statements of appellant's supervisor established that the identification clerk position exceeded the work restrictions prescribed by Dr. Emrich. Therefore, the wage-earning capacity determination was predicated on a position that was not suitable.

By decision dated December 22, 2011, OWCP set aside the December 7, 2011 decision, stating that it erroneously vacated the May 22, 1998 loss of wage-earning capacity determination. It reinstated the May 22, 1998 determination and wage-loss compensation on the grounds that appellant had successfully performed the identification clerk position for more than 60 days and that his wages exceeded those of his date-of-injury position. OWCP further found that the position was not temporary or makeshift, that appellant failed to demonstrate that his actual earnings did not fairly and reasonably represent his wage-earning capacity.

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁵ When an employee cannot return to the date-of-injury job because of disability due to work-related injury or disease, but does return to alternative employment, OWCP must determine whether the earnings in the alternative employment fairly and reasonably represent the employee's wage-earning capacity.⁶

Once OWCP determines the employee's wage-earning capacity, a modification of the determination is not warranted unless there is a material change in the nature and extent of the employment-related condition, the employee has been vocationally rehabilitated or retrained, or the original determination was erroneous. These are the customary criteria for modification. The burden of proof is on the party attempting to demonstrate that a modification of the wage-earning capacity determination is warranted.⁷

⁵ 5 U.S.C. § 8102(a).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (October 2009). See also *M.A.*, Docket No. 12-316 (issued July 24, 2012).

⁷ *Daniel J. Boesen*, 38 ECAB 556 (1987).

Factors to be considered in determining if a position fairly and reasonably represents the injured employee's wage-earning capacity include: (1) whether the kind of appointment and tour of duty are at least equivalent to those of the date-of-injury job; (2) whether the job is part-time (unless the claimant was a part-time worker at the time of injury) or sporadic in nature; (whether the job is seasonal in an area where year-round employment is available and (4) whether the job is temporary where the claimant's previous job was permanent.⁸

ANALYSIS

The record establishes that, prior to the accepted June 26, 1979 and June 16, 1980 injuries, appellant was a full-time machinist. The January 13, 1995 wage-earning capacity determination, modified on May 22, 1998, was based on the identification clerk position he held beginning on October 18, 1993. The record establishes that the identification clerk job was part-time employment. The Board finds that OWCP failed to adhere to its procedure manual as it erroneously relied on appellant's part-time reemployment as a basis for finding that his earnings beginning on October 18, 1993 fairly and reasonably represented his wage-earning capacity. The procedure manual provides that reemployment may not be considered suitable when the job is part time, unless the claimant was a part-time worker at the time of injury.⁹ As appellant was a full-time employee when injured on June 16, 1980, his part-time reemployment in October 1993 is not an appropriate measure of his wage-earning capacity.

The Board finds that OWCP abused its discretion in determining that appellant's actual earnings in part-time employment fairly and reasonably represented his wage-earning capacity. Accordingly, the May 22, 1998 wage-earning capacity determination was issued in error. Therefore, OWCP's December 22, 2011 decision reinstating the May 22, 1998 decision is erroneous and will be reversed.

On appeal, appellant contends that the original wage-earning capacity determination was erroneous as the identification clerk position exceeded his medical restrictions. He asserts that OWCP only considered his left knee injuries and not his accepted spinal injuries in finding that the position was suitable work. As noted, the original wage-earning capacity was erroneous as it was based on appellant's part-time reemployment. The Board notes, however, that the record demonstrates that the identification clerk position also exceeded appellant's medical restrictions as set forth by Dr. Emrich, his attending Board-certified neurosurgeon. Therefore, the wage-earning capacity determination was additionally erroneous as the identification clerk position was not medically suitable work.

CONCLUSION

The Board finds that OWCP erred in finding that appellant's part-time, limited-duty clerk position fairly and reasonably represented his wage-earning capacity as of October 18, 1993.

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a). *See also V.D.*, Docket No. 12-1034 (issued October 9, 2012).

⁹ Federal (FECA) Procedure Manual, *supra* note 8 at Chapter 2.814.7(a); *V.D.*, *supra* note 8.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 22, 2011 is reversed.

Issued: January 4, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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