

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

F.W., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
New Orleans, LA, Employer**

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**Docket No. 12-1598
Issued: January 25, 2013**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 19, 2012 appellant filed a timely appeal from the March 5, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP), which reaffirmed its loss of wage-earning capacity determination. 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 OWCP properly determined appellant's loss of wage-earning capacity.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

In a prior appeal,² the Board found that appellant had not met her burden to establish that she sustained an emotional condition on or about March 15, 2000 while in the performance of duty. The facts of this case as set forth in the Board's prior decision are hereby incorporated by reference.³

In 2004, OWCP accepted appellant's claim for the conditions of generalized anxiety disorder, depressive disorder, unspecified personality disorder and other acute reactions to stress. Appellant returned to part-time work, four hours a day, as a modified city carrier. In December 2004, OWCP issued a loss of wage-earning capacity determination based on her actual part-time wages. Appellant continued in this part-time position until August 2010, when it appears she refused a limited-duty assignment under the National Reassessment Process.

Dr. Frederic L. Henderson, a Board-certified psychiatrist, completed a duty status report in August 2010. He found that appellant could work part time, four hours a day.

A vocational rehabilitation counselor performed a transferable skills analysis and identified the position of sorter. Based upon the medically determinable residuals of appellant's injury and taking into consideration all significant preexisting impairments and pertinent nonmedical factors, the rehabilitation counselor found that appellant was able to perform the duties of a sorter. She made a general finding that the position was being performed in sufficient numbers so as to make it reasonably available to appellant within her commuting area.⁴ The rehabilitation counselor confirmed through the Bureau of Labor Statistics that the selected position paid \$18.99 an hour.

On November 23, 2011 OWCP reduced appellant's compensation for wage loss on the grounds that she was no longer totally disabled for work but rather was partially disabled. It found that she had the capacity to earn wages as a sorter at the part-time rate of \$379.80 a week.

Appellant requested reconsideration of OWCP's November 23, 2011 decision. She took issue with the reduction of her compensation. Because appellant submitted new evidence, OWCP reconsidered its loss of wage-earning capacity determination.

In a March 5, 2012 decision, OWCP reaffirmed its November 23, 2011 determination. It noted that Dr. Henderson cleared appellant to work four hours a day with restrictions.

On April 17, 2012 OWCP again reaffirmed its loss of wage-earning capacity determination. On June 26, 2012 it denied appellant's May 16, 2012 reconsideration request.

² Docket No. 02-225 (issued February 20, 2003).

³ On April 26, 2000 appellant, a 39-year-old full-time letter carrier, filed an occupational disease claim alleging that she sustained an emotional condition on or about March 15, 2000 as a result of her federal employment. In a previous case, OWCP accepted that she developed an adjustment disorder while in the performance of duty on or about November 19, 1987. OWCP File No. xxxxxx164.

⁴ The rehabilitation counselor noted 465,000 jobs in 2008 and 77,900 additional job openings from 2008 to 2018.

Appellant argues on appeal that work was still available to her, that the employing establishment was responsible for providing available work and that OWCP should have continued to pay compensation benefits without interruption until the employing establishment returned her to duty. She added that her condition was now permanent, which represented a change in her condition.

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of her duty.⁵ “Disability” means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.⁶

Section 8115(a) of FECA provides that in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his or her actual earnings, if his or her actual earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings of the employee do not fairly and reasonably represent his or her wage-earning capacity or if the employee has no actual earnings, his or her wage-earning capacity as appears reasonable under the circumstances is determined with due regard to the nature of his or her injury, the degree of physical impairment, his or her usual employment, his or her age, his or her qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect his or her wage-earning capacity in his or her disabled condition.⁷

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.⁸ When it makes a medical determination of partial disability and of the specific work restrictions, it may refer the employee’s case to OWCP’s wage-earning capacity specialist for selection of a position, listed in the Department of Labor’s *Dictionary of Occupational Titles* or otherwise available in the open labor market, that fits the employee’s capabilities in light of her physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service. Finally, application of the principles set forth in *Albert C. Shadrick* will result in the percentage of the employee’s loss of wage-earning capacity.⁹

⁵ 5 U.S.C. § 8102(a).

⁶ 20 C.F.R. § 10.5(f).

⁷ 5 U.S.C. § 8115(a).

⁸ *Harold S. McGough*, 36 ECAB 332 (1984).

⁹ *Hattie Drummond*, 39 ECAB 904 (1988); see *Albert C. Shadrick*, 5 ECAB 376 (1953).

ANALYSIS

When OWCP determined appellant's loss of wage-earning capacity on November 23, 2011, it did not establish that the selected position of sorter was reasonably available to appellant on a part-time basis. If OWCP determines that the claimant is capable of performing only part-time work, then it must find a position within the claimant's work limitations that is reasonably available on a part-time basis.¹⁰ A general finding that the position is reasonably available is not sufficient because a position available on a full-time basis may not be available on a part-time basis.¹¹

The Board has carefully reviewed the record and can find no evidence that the selected position of part-time sorter was being performed in sufficient numbers so as to make it reasonably available to appellant within her commuting area. The rehabilitation counselor who conducted the labor market survey made only a general finding that the position of sorter was reasonably available and she confirmed that this position paid \$18.99 an hour. It appears that OWCP simply multiplied this full-time wage by 20 hours to determine appellant's partial wage-earning capacity.

As OWCP did not properly determine whether the selected position was reasonably available on a part-time basis, the Board will reverse OWCP's March 5, 2012 decision.¹²

CONCLUSION

The Board finds that OWCP improperly determined appellant's loss of wage-earning capacity.

¹⁰ *Lewis B. Jackson*, 32 ECAB 1225 (1981); *Wordie G. Turner*, 19 ECAB 530 (1968).

¹¹ Federal (FECA) Procedure Manual, Part -- 2 Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(c)(3) (April 2011).

¹² *D.L.*, Docket No. 10-2291 (issued July 13, 2011) (reversing on grounds OWCP did not properly determine whether the selected position was reasonably available on a part-time basis).

ORDER

IT IS HEREBY ORDERED THAT the March 5, 2012 decision of the Office of Workers' Compensation Programs is reversed.¹³

Issued: January 25, 2013
Washington, DC

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

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

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

¹³ OWCP's April 17 and June 26, 2012 decisions are thus rendered moot.