

FACTUAL HISTORY

In 1993 appellant, a 34-year-old full-time markup clerk (automated), filed an occupational disease claim alleging that she developed a bilateral wrist condition as a result of her federal employment, which required fine manipulation, grasping and keying. OWCP accepted her claim for bilateral wrist tendinitis and bilateral carpal tunnel syndrome.²

On February 16, 1999 OWCP noted that appellant was reemployed as a modified postal clerk for 20 hours a week with wages of \$328.91. The employment was effective on July 15, 1996. OWCP found that the duties of appellant's new position reflected the work tolerance limitations established by the weight of the medical evidence. Further, it also considered her training, education and work experience in determining the suitability of the job. Citing 5 U.S.C. § 8115, OWCP notified appellant that it was adjusting her compensation for wage loss to reflect her capacity to earn wages in her new position.

On March 12, 2010 appellant filed a claim for compensation for wage loss. She explained that her doctor felt she could work only four hours a day for three days a week effective March 3, 2010.

In a decision dated June 21, 2010, OWCP denied modification of its 1999 determination of wage-earning capacity. It noted that medical evidence from September 2009 through May 2010 did not provide objective clinical findings to support a material worsening of appellant's condition to substantiate the reduction in her work hours.

In a September 21, 2010 decision, OWCP's hearing representative found that, while OWCP's June 21, 2010 decision was correct at the time it was issued, new evidence warranted further development. The hearing representative directed OWCP to obtain a second opinion on whether appellant's condition had materially worsened as of March 2010 to the point that she could no longer perform the modified duty that she had been performing since 1996.

Dr. Joseph P. Laico, a Board-certified orthopedic surgeon, examined appellant on May 12, 2011 and found that she was able to perform the modified duty she had been performing for four hours a day, five days a week. He found no material worsening of her condition as of March 2010.

In a decision dated July 12, 2011, OWCP denied modification of its 1999 determination of wage-earning capacity. It found that appellant did not meet at least one of the three standards for obtaining modification.

On September 30, 2011, however, OWCP's hearing representative remanded the case for a supplemental report from Dr. Laico, as appellant had accepted a new limited-duty job in October 2009 after her prior limited-duty position was eliminated.

In a decision dated February 7, 2012, OWCP denied modification of its 1999 determination of wage-earning capacity. Dr. Laico reported no material worsening of appellant's

² In 2012 OWCP expanded its acceptance to include left wrist dorsal syndrome.

condition as of March 2010. OWCP found that she failed to establish that her medical condition had changed, that she had been vocationally rehabilitated or that the original loss of wage-earning capacity determination was in error.

By decision dated August 1, 2012, OWCP's hearing representative affirmed its denial of modification. The hearing representative reviewed the medical evidence contemporaneous to the March 2010 reduction in work hours and found no objective evidence of a worsening in appellant's condition. The hearing representative also noted that Dr. Laico's review of the medical records failed to reveal that appellant underwent a material change in the nature and extent of her employment-related condition on or about March 1, 2010.

On appeal, appellant argues that her left dorsal wrist syndrome, accepted in February 2012, warrants modification of the loss of wage-earning capacity determination.

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of her duty.³ "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.⁴

Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.⁵ The wage-earning capacity of an employee is determined by the employee's actual earnings if the employee's actual earnings fairly and reasonably represent her wage-earning capacity.⁶

Once the loss of wage-earning capacity 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. The burden of proof is on the party attempting to show modification of the award.⁷

ANALYSIS

In the case of *O.V.*,⁸ the Board found that OWCP abused its discretion when it determined that the claimant's actual earnings in part-time reemployment fairly and reasonably represented his capacity to earn wages in the open labor market. The Board explained that

³ 5 U.S.C. § 8102(a).

⁴ 20 C.F.R. § 10.5(f).

⁵ *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

⁶ 5 U.S.C. § 8115(a).

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

⁸ Docket No. 11-98 (issued September 30, 2011).

OWCP procedures prohibited a loss of wage-earning capacity determination based on part-time reemployment unless the claimant was a part-time worker at the time of injury.

Procedures that were in effect when OWCP issued its February 16, 1999 loss of wage-earning capacity determination also prohibited a loss of wage-earning determination based on part-time reemployment where the claimant was a full-time worker at the time of injury.⁹ The Board's holding in *O.V.*, thus applies to the instant case.

As appellant was a full-time worker at the time of injury, the Board finds that OWCP's February 16, 1999 loss of wage-earning capacity determination, based on her part-time reemployment as a modified postal clerk, was, in fact, erroneous. Modification is therefore warranted. Accordingly, the Board will reverse OWCP's August 1, 2012 decision and remand the case for a proper adjudication of appellant's claim for wage-loss compensation beginning on or about March 3, 2010.

CONCLUSION

The Board finds that modification of OWCP's February 16, 1999 loss of wage-earning capacity determination is warranted.

⁹ See FECA Circular No. 95-7 (February 12, 1995): "The FECA Procedure Manual notes in Chapter 2.814.7a that a job actually held may be considered to fairly and reasonably represent the claimant's loss of wage-earning capacity, with certain exceptions. One of these exceptions is where the employee who formerly held a full-time position obtains part-time work." See also *Robert F. Goodheart*, Docket No. 99-1872 (issued January 16, 2001) (reversing OWCP's 1999 determination that the claimant's actual earnings in part-time reemployment fairly and reasonably represented his wage-earning capacity).

ORDER

IT IS HEREBY ORDERED THAT the August 1, 2012 decision of the Office of Workers' Compensation Programs is reversed. The case is remanded for further action.

Issued: July 24, 2013
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