

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

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**T.T., Appellant**

**and**

**DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL  
CENTER, Kerrville, TX, Employer**

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**Docket No. 13-685  
Issued: June 7, 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 January 25, 2013 appellant filed a timely appeal from a December 19, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) denying modification of her loss of wage-earning capacity (LWEC). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (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 denied modification of the March 28, 2012 wage-earning capacity determination.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On May 31, 2011 appellant, then a 39-year-old nursing assistant, filed a traumatic injury claim alleging that on May 23, 2011 she sustained a left hand and left thumb strain when a demented patient grabbed her left hand and thumb.<sup>2</sup> She stopped work on May 23, 2011 and returned to limited duty on May 27, 2011. OWCP accepted appellant's claim for disorder of the bursae and tendons in the left shoulder and left bicipital tenosynovitis.

On September 30, 2011 appellant underwent left shoulder arthroscopy with arthroscopic biceps tenodesis and subacromial decompression. She stopped work again and received disability compensation.

In an October 14, 2011 report, Dr. Casey Taber, a Board-certified orthopedic surgeon, authorized appellant to return to work full time with restrictions of pushing, pulling, reaching, twisting and walking up to two hours a day and no overhead reaching or lifting with her left hand.

On October 16, 2011 appellant accepted a job offer as a modified nursing assistant. The duties included: dispensing fresh water and nourishments every two hours; cleaning drawers in patient chests and bedside tables; assisting with patient feeding; cleaning overbed tables and patients' rooms; reading to patients; documenting observations; assisting in oral care; answering call lights and the telephone at the nurse's station; restocking boxes of gloves; placing name tags on doors and bedsides; transporting specimens to the lab; changing bed linens; and applying hot and cold packs. The duties were to be performed within the physical restrictions of absolutely no lifting, no use of her left hand and no writing with her left hand.

In a November 11, 2011 work status report, Dr. Taber authorized appellant to return to work with restrictions of pushing, pulling, lifting and carrying up to five pounds for four hours a day and wrist flexion, extension, reaching, overhead reaching and fine manipulation of the hands for four hours a day.

On November 14, 2011 appellant accepted a job offer as a modified nursing assistant. The duties involved dispensing fresh water and other nourishments every two hours, cleaning drawers in patient chests and bedside tables, assisting with patient feeding, cleaning tables and rooms, reading mail, books and newspapers to patients, writing and delivering mail for patients, documenting observations, answering call lights and the telephone, restocking boxes of globes, placing name tags on doors and bedsides, transporting specimens to the lab, totaling and recording all intake and outputs, changing bed linens, assembling equipment and performing catheter care, applying hot and cold packs and performing colostomy care. Appellant was restricted to five pounds of lifting and to use the buddy system. It required intermittent lifting and carrying no more than five pounds and to use the buddy system. The physical activities required to perform these duties also included lifting and carrying up to 10 pounds for 2.6 hours a day, climbing stairs, bending, stooping, twisting, pushing and pulling, simple grasping and reaching above the shoulder for 2.6 hours a day and sitting, standing and walking for 5.3 hours a day.

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<sup>2</sup> The record reflects that appellant is left hand dominant.

By decision dated March 28, 2012, OWCP found that appellant's actual earnings as a modified nursing assistant fairly and reasonably represented her wage-earning capacity. As she had demonstrated the ability to perform her duties for over two months, appellant's earnings fairly and reasonably represented her wage-earning capacity. Her earnings were equal to or exceeded the current earnings of her date-of-injury position, OWCP reduced her wage-loss compensation to zero.

On March 28, 2012 appellant accepted another restricted-duty job offer as a modified nursing assistant. The duties involved dispensing fresh water and other nourishments every two hours, cleaning drawers in patient chests and bedside tables, assisting with patient feeding, cleaning tables and rooms, reading mail, books and newspapers to patients, writing and delivering mail for patients, documenting observations, answering call lights and the telephone, taking and recording patient vital signs, monitoring blood glucose, restocking boxes of globes, placing name tags on doors and bedsides, transporting specimens to the lab, totaling and recording all intake and outputs, changing bed linens, assembling equipment and performing catheter care, applying hot and cold packs and performing colostomy care. The duties were restricted to no lifting, pulling, pushing or carrying more than 10 pounds and to use the buddy system. The physical activities required to perform these duties also included lifting and carrying up to 10 pounds for 2.6 hours a day, climbing stairs, bending, stooping, twisting, pushing and pulling, simple grasping and reaching above the shoulder for 2.6 hours a day and sitting, standing and walking for 5.3 hours a day.

On August 6, 2012 appellant filed a claim for recurrence of disability beginning on September 2, 2012. When she returned to work, she had restrictions of how many pounds she was able to push, pull and lift and no patient care. Appellant was returned to patient care with assistant, but she still had to push, pull and lift patients to help. She stopped work on August 6, 2012 and did not return. Appellant also filed claims for disability compensation for the period August 7 to 26, 2012.

On August 16, 2012 OWCP advised appellant that her recurrence of disability claim was actually a request to modify her March 28, 2012 LWEC decision. It advised her of the evidence needed to support her claim.

In an August 27, 2012 statement, appellant explained that the recurrence started when more resident care assignments were given to her. She described her duties as preparing residents for daily living such as clothing, hygiene, turning residents during preparation and using lifts to move residents from bed, toilet, wheel chairs and broda chairs. Appellant explained that the strain on her injured shoulder and not having physical therapy caused little improvement in strength and slowed her healing. She submitted medical reports regarding her treatment for left shoulder and neck symptoms.

In a decision dated December 19, 2012, OWCP denied appellant's claim for wage-loss compensation finding that she failed to establish a basis for modifying the March 28, 2012 wage-earning capacity determination. It denied wage-loss compensation commencing August 7, 2012.

## LEGAL PRECEDENT

A wage-earning capacity determination is a finding that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages.<sup>3</sup> Actual wages earned are generally the best measure of wage-earning capacity.<sup>4</sup> In the absence of evidence showing that actual earnings do not fairly and reasonably represent the injured employee's wage-earning capacity, such earnings must be accepted as representative of the individual's wage-earning capacity.<sup>5</sup> A determination regarding whether actual earnings fairly and reasonably represent wage-earning capacity should be made only after an employee has worked in a given position for more than 60 days.<sup>6</sup>

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.<sup>7</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>8</sup>

## ANALYSIS

The Board finds that the March 28, 2012 wage-earning capacity determination was erroneous.

Appellant underwent left shoulder arthroscopy with arthroscopic biceps tenodesis and subacromial decompression on September 30, 2011 and was off work. In an October 24, 2011 report, Dr. Taber authorized her to return to full-time limited duty with restrictions of pushing, pulling, reaching, twisting and walking up to two hours a day with no overhead reaching or lifting with her left hand. On October 16, 2011 appellant accepted a job offer as a limited-duty nursing assistant. On November 14, 2011 the employing establishment offered her another limited-duty nursing assistant position. Appellant accepted the November 14, 2011 limited-duty job assignment. In a March 28, 2012 decision, OWCP found that her actual earnings as a limited-duty nursing assistant, effective October 17, 2011, fairly and reasonably represented her wage-earning capacity.

The Board finds that the wage-earning capacity determination was erroneous because it was based on the October 17, 2011 limited-duty nursing assistant position, although appellant accepted another limited-duty nursing assistant position on November 14, 2011. The

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<sup>3</sup> 5 U.S.C. § 8115(a); see *Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

<sup>4</sup> *Hayden C. Ross*, 55 ECAB 455, 460 (2004).

<sup>5</sup> *Id.*

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (October 2009).

<sup>7</sup> *Sharon C. Clement*, 55 ECAB 552 (2004).

<sup>8</sup> *Tamra McCauley*, 51 ECAB 375, 377 (2000).

November 14, 2011 limited-duty nursing assistant position is different than the position first accepted in October 2011. Although appellant's duties were similar, the November 14, 2011 limited-duty nursing assistant position included additional duties such as totaling and recording all intakes and outputs, assembling equipment and performing catheter care and performing colostomy care. The November 14, 2011 limited-duty nursing assistant position also allowed for lifting, carrying, pushing and pulling up to five pounds. The October 17, 2011 position did not allow for any lifting with her left arm. OWCP cannot base a wage-earning capacity determination on a position the employee did not hold when the LWEC was issued.<sup>9</sup> It must not only consider actual earnings but must also evaluate the suitability of the work currently being performed.<sup>10</sup> OWCP's March 28, 2012 decision focused only on appellant's October 17, 2011 position as a limited-duty nursing assistant and not on her current job duties as a limited-duty nursing assistant accepted on November 14, 2011. The Board also notes that on March 28, 2012, the same day as the wage-earning capacity determination; she accepted another limited-duty assignment with physical restrictions of lifting and carrying up to 10 pounds, increased from 5 pounds. The Board finds that the March 28, 2012 wage-earning capacity determination was erroneous. Accordingly, appellant has established a basis for modifying the LWEC determination. Upon return of the case record, OWCP shall determine her entitlement to compensation benefits.

### **CONCLUSION**

Appellant established that the March 28, 2012 wage-earning capacity determination was erroneous.

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<sup>9</sup> *C.H.*, Docket No. 11-1711 (issued February 15, 2012).

<sup>10</sup> *See supra* notes 8 and 9.

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 19, 2012 decision of the Office of Workers' Compensation Programs is reversed.

Issued: June 7, 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