

FACTUAL HISTORY

This case has previously been before the Board.² Appellant's claim was accepted for lumbar and cervical strains while lifting a patient. The prior appeals to the Board concerned an overpayment of compensation arising when she received a voluntary separation incentive payment in the amount of \$25,000.00 while also in receipt of wage-loss compensation for total disability. The facts of the case, as set forth in the Board's prior decisions, are incorporated herein by reference.

Appellant returned to a modified position as a clerk in the appointment center at the employing establishment on December 5, 2011. On January 17, 2012 OWCP reduced her compensation to reflect her earnings. On February 12, 2012 she began a position as a utilization review nurse.³

On March 2, 2012 appellant filed a Form CA-7, claim for compensation, claiming four hours of compensation for a doctor visit, and four hours of leave without pay on February 29, 2012. On March 15, 2012 she filed additional claims for compensation for the period March 1 to 29, 2012, indicating that she stopped work on her doctor's orders.

In a March 15, 2012 decision, OWCP found that appellant's earnings as a nurse, effective February 12, 2012, fairly and reasonably represented her wage-earning capacity with zero loss. In an April 27, 2012 decision, it found that appellant's actual earnings as an appointment clerk fairly and reasonably represented her wage-earning capacity and reduced her compensation effective December 5, 2011, when she assumed the position. OWCP determined that her wage-earning capacity for the period December 5, 2011 to February 12, 2012 was 42 percent.⁴

On August 6, 2012 appellant filed a recurrence of disability claim, stating that she sustained a recurrence of disability on February 28, 2012. She stated that her modified duties of sitting and typing data into a computer for eight hours a day caused pain in her neck, shoulders, low back and legs. The pain became so severe on February 28, 2012 that she stopped work.

The employing establishment controverted the recurrence claim, noting that on March 1, 2012 appellant requested a retirement application for March 31, 2012. On March 15, 2012

² *L.J.*, 59 ECAB 264 (2007); Docket No. 08-1958 (issued September 3, 2009); Docket No. 10-510 (issued October 1, 2010).

³ Both positions were identified as transitional assignments with the primary duties, identified as sedentary work only, consisting of data entry, scanning and answering telephones. The specific duties were different including that in the clerk position appellant was responsible for scheduling, canceling and rescheduling patient appointments, and in the nurse position, she was to review clinical data and documentation in the computerized patient record system. The annual salary for the clerk position was \$36,384.00 and for the nursing position \$78,212.00.

⁴ OWCP procedures in effect at the time OWCP issued the wage-earning capacity determination provided that OWCP could make a retroactive wage-earning capacity determination if the claimant worked in the position for at least 60 days, the position fairly and reasonably represented his or her wage-earning capacity and the work stoppage did not occur because of any change in his injury-related condition affecting the ability to work. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (July 1997); *Selden H. Swartz*, 55 ECAB 272 (2004).

appellant filed a new occupational disease claim. She resigned from the employing establishment, effective March 12, 2012, stating that it was for medical reasons.

In a September 10, 2012 statement, appellant noted that, prior to her return to work on December 5, 2011, she was experiencing progressive cervical and lumbar pain with decreased mobility. After her return to work, the cervical and lumbar pain increased such that she had to stop work. Appellant maintained that her job duties of sitting and entering data into a computer aggravated the accepted cervical and lumbar conditions, and that she also developed bilateral carpal tunnel syndrome. She submitted medical reports from Dr. Patrick H. Waring, Board-certified in anesthesiology and pain medicine, dated February 29 to September 19, 2012.

In a February 21, 2013 decision, OWCP denied appellant's recurrence claim on the grounds that the medical evidence was insufficient to establish that her accepted conditions had worsened. On April 30, 2013 appellant, through counsel, filed an appeal from the February 21, 2013 decision with the Board.

Appellant submitted additional medical reports from Dr. Waring. In treatment notes dated from February 29, 2012 to December 4, 2013, Dr. Waring advised that appellant had retired. He diagnosed lumbar disc disease, lumbar spondylosis and lumbar disc displacement.⁵

In a November 4, 2013 order remanding case, the Board found that OWCP should have adjudicated appellant's recurrence claim as a request for modification of her wage-earning capacity determination. The Board remanded the case to OWCP for proper adjudication, to be followed by an appropriate merit decision to preserve appellant's appeal rights.⁶

By decision dated February 26, 2014, OWCP found that appellant did not meet her burden of proof to establish that the April 27, 2012 wage-earning capacity determination should be modified.

LEGAL PRECEDENT

Under section 8115(a) of FECA, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. Generally, wages actually earned are the best measure of a wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.⁷

⁵ Dr. Waring also noted that appellant was being treated by another physician for carpal tunnel syndrome. Appellant filed a second claim for this condition, adjudicated under file number xxxxxx174, that was initially denied on May 8, 2012, affirmed by an OWCP hearing representative on August 31, 2012, and denied in a merit decision dated January 10, 2014. Appellant filed an application for review with the Board from the January 10, 2014 decision, assigned Docket No. 14-688. Docket No. 14-688 will be adjudicated separately.

⁶ Docket No. 13-1261 (issued November 4, 2013). On December 3, 2013 the Board issued an *erratum*, noting that the November 4, 2013 decision indicated that appellant was appearing *pro se* when it should have reflected that she was represented by counsel. She is now appearing *pro se*.

⁷ *Dennis E. Maddy*, 47 ECAB 259 (1995).

OWCP procedures state that, after a claimant has been working for 60 days, it will make a determination as to whether actual earnings fairly and reasonably represent wage-earning capacity.⁸ The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision,⁹ has been codified at section 10.403 of OWCP regulations. OWCP first calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the current pay rate for the date-of-injury position.¹⁰

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.¹¹ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.¹²

ANALYSIS

The Board notes that the wage-earning capacity determination at issue is dated March 15, 2012, not that dated April 27, 2012. The April 27, 2012 decision was for a proscribed period, December 5, 2011 to February 12, 2012, when appellant worked as a clerk with a 42 percent wage-earning capacity. She received compensation, based on the loss of wage-earning capacity for this period and did not claim total disability compensation. The March 15, 2012 wage-earning capacity determination was for the period beginning February 12, 2012 when appellant began work as a utilization review nurse with zero loss of wage-earning capacity. She stopped work on February 29, 2012, and on March 15, 2012 filed claims for compensation. On August 6, 2012 appellant filed a recurrence claim, which OWCP denied on February 21, 2013.

Following the Board's November 4, 2013 order instructing OWCP to adjudicate the recurrence claim as a modification of wage-earning capacity, in a February 26, 2014 decision, OWCP found that appellant had not met her burden of proof to modify the "April 27, 2012" decision.

The modification of a wage-earning capacity determination is warranted if the wage-earning capacity decision was erroneous.¹³ The Board finds that the March 15, 2012 wage-earning capacity decision was erroneous. OWCP procedures provide that a wage-earning capacity determination should not be made until the injured employee has completed 60 days of employment.¹⁴ The record supports that appellant initially returned to work as an appointment

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.815.5) (June 2013), Chapter 2.814.7(c) (October 2009).

⁹ 5 ECAB 376 (1953).

¹⁰ 20 C.F.R. § 10.403(d).

¹¹ *Sue A. Sedgwick*, 45 ECAB 211 (1993).

¹² *Id.*

¹³ *Id.*

¹⁴ *Supra* note 11.

clerk with a 42 percent wage-earning capacity and worked in that position until February 12, 2012 when she began working as a utilization review nurse. She worked in the nursing position for approximately 20 days when she filed claims for total disability. On March 15, 2012, less than 60 days after appellant assumed the nursing position, OWCP issued a wage-earning capacity decision determining that, based on her salary as a utilization review nurse, she had zero loss of wage-earning capacity. The clerk position and the nursing position had different duties at different salaries.¹⁵

As appellant had not been performing the utilization review nurse position for 60 days when OWCP issued the March 15, 2012 decision, it was erroneously issued. Appellant has established a basis for modifying the March 15, 2012 wage-earning capacity decision. The Board will reverse the March 15, 2012 decision and remand the case for proper adjudication of her claims for wage-loss compensation beginning March 1, 2012.¹⁶

CONCLUSION

The Board finds that modification of OWCP's March 15, 2012 wage-earning capacity determination is warranted.

¹⁵ *Supra* note 6.

¹⁶ *See generally T.T.*, Docket No. 13-685 (issued June 7, 2013).

ORDER

IT IS HEREBY ORDERED THAT the February 26, 2014 decision of the Office of Workers' Compensation Programs is reversed.

Issued: August 21, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

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

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