



## **FACTUAL HISTORY**

This case was previously before the Board.<sup>2</sup> In an order issued February 14, 2006, the Board remanded the case to OWCP for further development as to the appropriate percentage of left upper extremity impairment. In a decision dated October 6, 2008,<sup>3</sup> the Board remanded the case to OWCP for additional development regarding the percentage of permanent impairment of the left upper extremity. The facts of the case as set forth in the Board's prior decisions are incorporated by reference.

On September 27, 2007 appellant accepted a rehabilitation job offer as a modified city carrier at retained pay. By decision dated February 22, 2008, OWCP found that his actual earnings as a modified city carrier fairly and reasonably represented his wage-earning capacity. It reduced appellant's monetary compensation to zero as his actual earnings equaled those of the job and step of the position he held at the time of a January 26, 2007 recurrence of disability.<sup>4</sup>

Dr. Harry Steinman, an attending Board-certified orthopedic surgeon, provided permanent work restrictions on June 8, 2008. He advised against lifting above shoulder level, lifting more than 15 pounds, use of the hands above shoulder level and repetitive upper extremity motion. Beginning in January 2009, appellant was followed by Dr. Thomas Odmark, an attending Board-certified orthopedic surgeon, who noted that appellant was status post repeat bilateral rotator cuff repair surgeries and bilateral shoulder impingement. Dr. Odmark renewed Dr. Steinman's work restrictions commencing July 8, 2009.

The employing establishment placed appellant on administrative leave effective September 25, 2009 as there was no work available within his restrictions. Appellant received wage-loss compensation on the periodic rolls.

On August 13, 2010 Dr. Odmark provided work restrictions, limiting lifting to 15 pounds and no overhead activity. OWCP subsequently referred appellant for vocational rehabilitation. A vocational rehabilitation counselor administered aptitude and interest tests. OWCP also authorized appellant's participation in a clerical computer training course. Dr. Odmark provided updated work limitations on April 22, 2011, restricting lifting to 15 pounds with no overhead reaching or lifting.

As the placement plan did not result in appellant's reemployment, the vocational rehabilitation counselor selected the positions of customer service representative (U.S. Department of Labor, *Dictionary of Occupational Titles* (DOT) #239.362.014, and information

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<sup>2</sup> Docket No. 05-1507 (issued February 14, 2006). OWCP accepted that appellant sustained synovitis, bursitis, osteoarthritis, a loose body, and superior labrum anterior and posterior (SLAP) tear of the left shoulder. Appellant underwent surgery on June 10 and August 26, 2013.

<sup>3</sup> Docket No. 08-1918 (issued October 6, 2008).

<sup>4</sup> By decision dated October 15, 2008, OWCP granted appellant an additional schedule award for 18 percent impairment of the left upper extremity, in addition to 5 percent schedule award issued previously. By decision dated October 22, 2008, it granted him a schedule award for an additional 13 percent impairment of the right upper extremity, in addition to the 9 percent previously awarded.

clerk (DOT #237.367.022) as within his medical limitations and vocational abilities. The vocational rehabilitation counselor performed a labor market survey to determine whether entry level positions were available for both positions in appellant's commuting area.

By notice dated February 1, 2012, OWCP advised appellant that it proposed to modify the 2008 loss of wage-earning capacity determination by reducing his wage-loss compensation benefits based on his ability to earn \$457.60 a week in the selected position of customer service representative. Appellant was afforded 30 days to present evidence or argument. He did not respond to OWCP's notice.

By decision dated March 7, 2012, OWCP reduced appellant's wage-loss compensation effective March 11, 2012 under sections 8106 and 8115 of FECA,<sup>5</sup> based on his ability to earn \$457.60 a week in the constructed position of customer service representative.

On January 23, 2013 appellant accepted a position with the employing establishment as a modified sales solution team member at retained pay of \$56,508.00 a year. The employing establishment noted that the offer was modified due to his accepted conditions. The job required answering the telephone, making telephone calls, computer keyboarding, using a computer mouse, clerical tasks, sitting, and standing. Appellant began work on February 11, 2013.

Appellant sought treatment from Dr. Scott M. Wisotsky, an attending Board-certified orthopedic surgeon. On January 21, 2013 Dr. Wisotsky renewed Dr. Odmark's restrictions against lifting over 15 pounds and any overhead activity. In a June 20, 2013 report, he diagnosed bilateral shoulder impingement and rotator cuff tears. Dr. Wisotsky also restricted appellant from repetitive work.

Appellant stopped work on June 21, 2013 as the employing establishment could not accommodate the additional restriction against repetitive motion. OWCP placed him on the periodic rolls effective June 21, 2013. In a July 15, 2013 memorandum, it stated that the wage-earning capacity determination required modification as appellant had been vocationally rehabilitated. OWCP noted that there was no error in the original wage-earning capacity determination and that his physical condition had not worsened.

In an August 23, 2013 letter, the employing establishment asserted that the modified sales solution team position required very little repetitive work and no lifting. The job remained open and available.

In a September 16, 2013 report, Dr. Wisotsky advised that appellant was not at maximum medical improvement.<sup>6</sup> He diagnosed bilateral rotator cuff syndrome, impingement and possible rotator cuff tears. Dr. Wisotsky restricted appellant from overhead reaching, repetitive use of upper extremity, no lifting away from the body, and no overhead lifting.

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<sup>5</sup> 5 U.S.C. §§ 8106 and 8115.

<sup>6</sup> A September 6, 2013 arthrogram of the left shoulder showed a SLAP lesion, supraspinatus tendinosis with partial thickness tear, a partial tear of the biceps tendon, acromioclavicular arthrosis, and impingement.

On September 26, 2013 the employing establishment offered appellant the modified sales solution team member job which he had worked from February 11 to June 21, 2013, stating that it required “very little repetitive work and no lifting.” It noted that the position required fine manipulation of a keyboard from four to eight hours a day and use of a computer mouse.

On September 30, 2013 Dr. Wisotsky noted that appellant continued to work light duty and made approximately 1,500 calls a day. He advised that appellant had positive impingement of both shoulders and would need to remain on limited duty with no repetitive use of the upper extremities. The record contains a copy of an October 1, 2013 letter from the employing establishment to Dr. Wisotsky, received by OWCP on October 11, 2013. The employing establishment asked Dr. Wisotsky to check either “yes” or “no” as to whether appellant could return to work in the sedentary capacity as a “customer care agent.” There is a checkmark on the “yes” line, indicating that appellant could perform the job. Appellant returned to work on October 10, 2013 at retained pay of \$56,508.00 a year.

In an October 17, 2013 report, Dr. Wisotsky opined that appellant needed surgical revision of the previous decompression and resection of the left rotator cuff, but was unable to undergo arthroscopy secondary to a stent placement. He noted that appellant remained on the same restrictions against repetitive use of the bilateral upper extremities, no lifting away from the body or overhead.<sup>7</sup>

On January 23, 2014 appellant accepted a position as a modified sales solution team member at his previous retained pay salary. The duties included keyboarding for four to eight hours a day intermittently and using a telephone.

By decision dated March 10, 2014, OWCP reduced appellant’s wage-loss compensation under sections 8106 and 8115 of FECA on the grounds that he had no loss of wage-earning capacity. It noted that his medical benefits remained unaffected. OWCP noted that the current pay rate for appellant’s job and step as of January 26, 2007 when disability recurred was \$1,086.70, equal to his actual earnings as a modified sales solution team member. It found that actual earnings were the best measure of earning capacity.

### **LEGAL PRECEDENT**

Once OWCP has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction of benefits.<sup>8</sup> Under section 8115(a), 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. If the actual earnings 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 is determined with due regard to the nature of the injury, the degree of physical impairment, his or her usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect wage-

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<sup>7</sup> On October 21, 2013 OWCP approved Dr. Wisotsky’s request to authorize left shoulder arthroscopy.

<sup>8</sup> *David W. Green*, 43 ECAB 883 (1992).

earning capacity in his or her disabled condition.<sup>9</sup> In determining an employee's wage-earning capacity, OWCP may not rely on a makeshift or odd lot position or one not reasonably available on the open labor market.<sup>10</sup> Compensation payments are based on the wage-earning capacity determination.<sup>11</sup>

### ANALYSIS

OWCP accepted that appellant sustained bilateral shoulder impingement, bilateral rotator cuff tears, bilateral tendon conditions, and carpal tunnel syndrome in the performance of duty, requiring multiple surgeries. Dr. Steinman, an attending Board-certified orthopedic surgeon, provided permanent work restrictions on June 8, 2008 against lifting more than 15 pounds, using his hands above shoulder level, and repetitive motion of the upper extremities. Dr. Odmark, an attending Board-certified orthopedic surgeon, reduced these restrictions on August 13, 2010, limiting lifting to 15 pounds with no overhead activity.

Following a vocational rehabilitation effort, OWCP reduced appellant's wage-loss compensation effective March 11, 2012 based on his ability to earn wages in the selected position of customer service representative. Appellant then accepted an employing establishment position as a modified sales solution team member, answering the telephone and using a computer. He began work on February 11, 2013 at full salary with retained pay. Dr. Wisotsky, an attending Board-certified orthopedic surgeon, restricted appellant from repetitive use of the upper extremities as of June 20, 2013. Appellant stopped work again on June 21, 2013 as the modified position was no longer within his medical restrictions. Dr. Wisotsky renewed appellant's restrictions, including prohibiting repetitive use of the hands and arms, in reports through September 16, 2013.

The employing establishment offered appellant a modified sales solution team position at retained pay. Appellant accepted the job on January 23, 2014, with keyboarding for up to eight hours a day. By March 10, 2014 decision, OWCP reduced his wage-loss compensation to zero on the grounds that he had no loss of wage-earning capacity, based on his actual earnings. In *Michael E. Moravec*,<sup>12</sup> the Board noted that actual earnings are the preferred measure of wage-earning capacity if they fairly and reasonably represent such capacity.<sup>13</sup> The Board stated:

“This view constitutes a natural extension of the generalized principle of workers’ compensation law that wage-earning capacity is a measure of the employee’s ability to earn wages in the open labor market under normal employment

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<sup>9</sup> *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

<sup>10</sup> *E. W.*, Docket No. 14-584 (issued July 29, 2014); *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

<sup>11</sup> *See Sharon C. Clement*, 55 ECAB 552 (2004).

<sup>12</sup> 46 ECAB 492 (1995).

<sup>13</sup> *Id.* at 498.

conditions rather than in a makeshift position or other position at retained pay not necessarily reflective of true wage-earning capacity.”<sup>14</sup>

The record on appeal reflects that appellant accepted the modified sales solution team position that required computer keyboarding for up to eight hours a day. On appeal, appellant contends that the job was a pilot program renewed every six months and makeshift, but his return to work at retained pay does not establish a loss in wage-earning capacity. As used in FECA, the term “disability” means the incapacity because of an injury in employment to earn wages the employee was receiving at the time of the injury.<sup>15</sup>

The Federal (FECA) Procedure Manual provides that, if an employee has actual earnings that do not fairly and reasonably represent his wage-earning capacity, a formal loss of wage-earning capacity should not be issued but compensation payable for a period in which the employee has earnings should be reduced to reflect such earnings.<sup>16</sup> In this case, OWCP’s formal loss wage-earning capacity determination is not supported by the medical evidence of record; however, given appellant’s full salary at retained pay, he has no disability as defined under FECA.

### CONCLUSION

The Board finds that the March 10, 2014 formal wage-earning capacity should be set aside. Appellant’s earnings of retained pay equivalent to those when injured preclude a finding of disability.

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<sup>14</sup> *Id.* See also *Stanley B. Plotkin*, 51 ECAB 700 (2000).

<sup>15</sup> See *William H. Kong*, 53 ECAB 394 (2002); *Shirley A. Temple*, 48 ECAB 404 (1997).

<sup>16</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Actual Earnings*, Chapter 2.815.5(e) (June 2013).

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 10, 2014 decision of the Office of Workers' Compensation Programs is affirmed, as modified.

Issued: December 15, 2014  
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