

FACTUAL HISTORY

On March 22, 1996 appellant, then a 42-year-old rural carrier, filed an occupational disease claim alleging that on December 29, 1995 she first realized that her two cervical slipped discs were due to her work duties. She stopped work on December 29, 1995. OWCP accepted the claim for cervical strain and aggravation of preexisting fibromyalgia.

On August 15, 1997 appellant accepted a part-time (four hours per day) position as a modified rural carrier, which was available effective September 3, 1997.

On May 5, 1999 OWCP noted that appellant was reemployed as a modified rural carrier for 20 hours a week with wages of \$366.57. The employment was effective on September 3, 1997. OWCP found that the duties of appellant's new position reflected the work tolerance limitations established by the weight of the medical evidence and that she met the training, education and work experience 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 April 12, 2001 appellant accepted a new position of rehabilitation distribution clerk, which was effective April 23, 2001. The hours of the position were from 8:00 a.m. to 12:00 p.m.

On April 20, 2010 appellant filed a recurrence claim (Form CA-2a). Effective April 20, 2010, the employing establishment eliminated her part-time limited-duty assignment pursuant to the National Reassessment Process (NRP).

By decision dated August 2, 2010, OWCP denied modification of the May 5, 1999 LWEC, and thereby denied her claim for a recurrence of disability effective April 20, 2010.

In an October 29, 2010 letter, appellant requested reconsideration on the denial of her request for modification of the May 5, 1999 LWEC.

By decision dated January 7, 2011, OWCP denied modification.

On February 15, 2011 appellant requested reconsideration.

By decision dated May 17, 2011, OWCP denied modification.

On June 22, 2011 appellant requested reconsideration.

By decision dated September 23, 2011, OWCP denied reconsideration, finding that appellant had neither submitted relevant evidence not previously reviewed or advanced legal contentions not previously considered.

In a letter dated April 13, 2012, appellant's counsel requested modification of the May 5, 1999 LWEC. She argued that the LWEC was erroneous as it was based upon a part-time job when appellant had been a full-time employee.

By decision dated July 20, 2012, OWCP denied modification.

By order dated July 25, 2013, the Board set aside the July 20, 2012 OWCP decision as the record before the Board was incomplete due to missing evidence and claim files.³

On remand, OWCP followed the Board's instructions to combine file numbers xxxxxx967⁴ and xxxxxx579.

By decision dated October 17, 2013, OWCP denied modification.

LEGAL PRECEDENT

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages.⁵ Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.⁶

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

A recurrence of disability includes an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his work-related injury or illness is withdrawn -- except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force (RIF).⁹ Absent a formal wage-earning capacity determination and assuming the position was not withdrawn for cause or because of a RIF, the employee would be entitled to compensation based upon a showing of continuing injury-related disability for regular duty¹⁰ but when a formal wage-earning capacity determination is in place, the subsequent withdrawal of a light-duty assignment is not treated like a recurrence of disability.¹¹ Under these particular circumstances, OWCP shall review the claim for additional compensation as a request for modification of the wage-earning capacity

³ Docket No. 12-1955 (issued July 25, 2013)

⁴ Under this file number, OWCP accepted appellant's claim for bilateral carpal tunnel syndrome. (ICD9 -- File No. xxxxxx967)

⁵ See 5 U.S.C. § 8115 (determination of wage-earning capacity).

⁶ *Sharon C. Clement*, 55 ECAB 552 (2004).

⁷ *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Tamra McCauley*, 51 ECAB 375 (2000).

⁸ *Id.*

⁹ 20 C.F.R. § 10.5(x).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.6(a)(4) (June 2013).

¹¹ *Id.* at Chapter 2.1500.6(a)(5)

determination and apply the above-noted criteria in determining whether modification is warranted.¹²

ANALYSIS

Due to residuals of her accepted employment injuries, appellant was unable to resume her previous full-time duties as a rural carrier. On August 5, 1997 she accepted a part time (four hours per day) work as a modified rural carrier. OWCP issued a May 5, 1999 LWEC determination based on appellant's earnings as a part-time modified rural carrier. On April 12, 2001 appellant accepted a newly offered part-time position (working four hours per day) as rehabilitation distribution clerk. The employing establishment withdrew appellant's part-time, limited-duty assignment effective April 20, 2010. Appellant filed a claim for a recurrence of total disability based on the elimination of her position by the employing establishment under NRP. OWCP denied appellant's claim for a recurrence finding that she had failed to establish a basis for modifying the May 5, 1999 LWEC determination.

One of the grounds for modifying an LWEC determination is that the original determination was erroneous.¹³ The Board finds that the May 6, 1999 LWEC determination was erroneous because OWCP based its finding on a part-time position. Factors to be considered in determining if a position fairly and reasonably represents the injured employee's wage-earning capacity include: (1) whether the kind of appointment and tour of duty are at least equivalent to those of the date-of-injury job; (2) whether the job is part time (unless the claimant was a part-time worker at the time of injury) or sporadic in nature; (3) whether the job is seasonal in an area where year-round employment is available; and (4) whether the job is temporary where the claimant's previous job was permanent.¹⁴

The record established that, prior to her accepted employment injury, appellant worked full time. OWCP failed to follow the procedure manual when it erroneously relied on her part-time reemployment as a basis for finding that her actual earnings fairly and reasonably represented her wage-earning capacity. The procedure manual clearly states that the reemployment may not be considered suitable when the job is part time, unless the claimant was a part-time worker at the time of injury.¹⁵ The Board finds that OWCP abused its discretion in determining that appellant's actual earnings in part-time reemployment fairly and reasonably represented her wage-earning capacity. Accordingly, the May 5, 199 LWEC determination is reversed.¹⁶

¹² *Id.*; *K.R.*, Docket No. 09-415 (issued February 24, 2010); *K.R.*, Docket No. 09-28 (issued September 16, 2009).

¹³ *Tamra McCauley*, *supra* note 7.

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity on Actual Earnings*, Chapter 2.815.5(c) (June 2013).

¹⁵ *Id.*

¹⁶ *See O.V.*, Docket No. 11-98 (issued September 30, 2011).

The case will be remanded to OWCP to determine whether appellant is entitled to wage-loss compensation for total disability based on the employer's withdrawal of her limited-duty assignment effective April 20, 2010.

CONCLUSION

The Board finds that OWCP the May 5, 1999 LWEC determination is erroneous.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 17, 2013 is reversed.

Issued: May 15, 2014
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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