

on November 16, 1993 and right hip replacement on April 23, 1996. OWCP accepted appellant's claim for aggravation of bilateral hip osteoarthritis.²

OWCP referred appellant for a second opinion examination to Dr. Bharat V. Mehta, a Board-certified orthopedic surgeon. In a report dated October 28, 1998, Dr. Mehta examined appellant and observed well-healed bilateral thigh incisions and diminished bilateral hip flexion, internal rotation and external rotation. X-rays exhibited excellent prosthetic positioning without complications and a neurological evaluation was unremarkable. Based on the physical findings and a review of the medical file, Dr. Mehta opined that appellant could not stand for a prolonged period, lift items weighing above five pounds, bend, squat, kneel or operate a vehicle that had limited legroom or required greater than 90 degrees of hip flexion in a seated position. He specified in an October 28, 1998 work capacity evaluation form that appellant could walk, stand and drive for two hours each and lift items weighing up to five pounds, but must refrain from twisting, pushing, pulling, squatting, kneeling and climbing. Dr. Mehta recommended sedentary duty.

On October 13, 1998 the employing establishment offered appellant the full-time position of rehabilitation clerk at a base salary of \$37,831.00. Duties included: filing and retrieving documents, typing and preparing reports, bookkeeping, photocopying, answering telephone calls, using a laser scanner weighing less than a pound, assisting customers and occasionally sorting mail while utilizing an adjustable rest bar. The job did not require squatting, stooping, bending over, prolonged standing, repetitive stair-climbing or driving. Appellant accepted the offer and returned to work on October 24, 1998. In a November 23, 1998 report, Dr. Mehta confirmed that the position of rehabilitation clerk was suitable in view of appellant's employment injury.

By decision dated December 28, 1998, OWCP found that appellant's actual earnings as a rehabilitation clerk fairly and reasonably represented his wage-earning capacity. Because appellant's current salary met or exceeded the salary of the job he held at the time of injury,³ it determined that he was not entitled to wage-loss compensation.

The employing establishment informed appellant in a December 29, 2010 letter that work was no longer available within his medical restrictions pursuant to the National Reassessment Process (NRP). Appellant was placed on administrative leave through January 15, 2011 and leave without pay thereafter. He subsequently filed a claim for disability compensation on February 18, 2011.⁴

OWCP advised appellant in a March 8, 2011 letter that a formal loss of wage-earning capacity determination decision was previously issued and additional evidence was needed to establish modification was warranted. It gave him 30 days to submit evidence to establish that the original loss of wage-earning capacity determination decision rating was erroneous or that he sustained a change in the nature and extent of his injury-related condition. Appellant furnished

² By decision dated August 2, 2001, OWCP granted a schedule award for 37 percent permanent impairment of the left lower extremity and 37 percent permanent impairment of the right lower extremity.

³ The case record indicates that appellant earned \$35,271.00 annually as a letter carrier at the time of injury.

⁴ The case record contains multiple compensation claims.

May 11, 2010 and April 19, 2011 duty status reports from Dr. Henry A. Finn, a Board-certified orthopedic surgeon, who placed him on permanent partial disability and recommended sedentary work.

By decision dated April 26, 2011, OWCP denied appellant's claim for compensation beginning January 18, 2011. It found the evidence insufficient to modify the December 18, 1998 loss of wage-earning capacity determination.

An April 19, 2011 x-ray obtained by Dr. Stephanie R. Rosania, a Board-certified diagnostic radiologist, showed bilateral total hip arthroplasties in anatomic alignment and a preexisting left femoral diaphyseal fracture.

Appellant requested an oral hearing, which was held on October 11, 2011. He testified that he experienced left hip pain and deterioration, but did not contest the validity of the 1998 loss of wage-earning capacity determination.

On December 28, 2011 an OWCP hearing representative affirmed denial of modification. The Branch of Hearings and Review amended and reissued this decision on April 17, 2012.⁵ It modified the December 28, 1998 loss of wage-earning capacity determination to find appellant established a material worsening of his work-related left hip condition based on the reports of Dr. Finn. OWCP reinstated compensation effective April 10, 2012.

In a December 11, 2012 decision,⁶ the Board set aside OWCP's April 17, 2012 decision and remanded the case to OWCP for further development. It found that OWCP failed to address all of the guidelines in FECA Bulletin No. 09-05 with respect to modification of loss wage-earning determinations in NRP cases.⁷ The Board directed that, after compliance with FECA Bulletin No. 09-05, OWCP issue a *de novo* decision on appellant's entitlement to wage-loss compensation.

On remand OWCP sent the employing establishment a January 11, 2013 letter which requested information regarding whether the rehabilitation clerk position appellant performed was a *bona fide* position under FECA Bulletin No. 09-05. In a letter dated February 5, 2013, Patricia Stamps-Stephens, an official from the employing establishment, stated:

“The position on which the [loss of wage-earning capacity determination] was based December 28, 1998 was a *bona fide* position at that time. The work provided and identified was adequate based on the information in the injury file. The attached job offers and descriptions indicate that the duties identified in 1998 were performed until the work was withdrawn in December 2010.”

⁵ The cover sheet of the December 28, 2011 decision improperly stated that the case was remanded. The April 17, 2010 decision corrected this error.

⁶ Docket No. 12-1138 (issued December 11, 2012).

⁷ See *infra* notes 15 and 16.

In an April 5, 2013 decision, OWCP denied appellant's request for modification of OWCP's December 28, 1998 loss of wage-earning capacity determination for the period January 18, 2011 to April 9, 2012. It found that he did not establish that the December 28, 1998 loss of wage-earning capacity determination was erroneous or that medical evidence showed that he could not perform the position due to a worsening in his work-related condition for the period January 18, 2011 to April 9, 2012.

Appellant requested a hearing before an OWCP hearing representative. At the August 13, 2013 hearing, counsel argued that the rehabilitation clerk position was makeshift work because it was not a classified position and was not permanent, given the fact that it was eventually eliminated.

By decision dated November 1, 2013, the hearing representative affirmed the April 5, 2013 decision. She found that appellant did not establish that the December 28, 1998 determination was erroneous or that a worsening in his work-related condition prevented him from working as a rehabilitation clerk from January 18, 2011 to April 9, 2012.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.⁸ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁹

Under 5 U.S.C. § 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. Generally, wages actually earned are the best measure of 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.¹⁰ A determination regarding whether actual earnings fairly and reasonably represents one's wage-earning capacity should be made only after an employee has worked in a given position for more than 60 days.¹¹

OWCP's procedure manual provides guidelines for determining wage-earning capacity based on actual earnings. A job that is part time (when the claimant was a full-time employee at the time of injury), seasonal in an area where year-round employment is available, or temporary (when the date-of-injury position was a permanent position) is generally not appropriate for a wage-earning capacity determination.¹²

⁸ *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

⁹ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

¹⁰ *E. W.*, Docket No. 14-584 (issued July 29, 2014); *Dennis E. Maddy*, 47 ECAB 259, 262 (1995).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7c (July 1997); *id.* at Chapter 2.815.5 (June 2013).

¹² *Id.* at Chapter 2.814.7a (December 1993); *id.* at Chapter 2.815.5(c)(3) (June 2013).

It is well established that a position that is considered an odd-lot or makeshift position designed for a claimant's particular needs is not appropriate for a wage-earning capacity determination.¹³ The Board has discussed several factors that may support a finding that the offered position was makeshift in nature. These factors include: (1) the position did not have an official title or formal position description; (2) there were strict limitations, such as five-pound lifting and no casing of mail, which indicated that the claimant would not be able to secure a position in the community at large with such limited duties; (3) the claimant did not perform any meaningful tasks in the position; and (4) the job appeared to be temporary in nature.¹⁴

When a loss of wage-earning capacity decision has been issued, FECA Bulletin No. 09-05 requires OWCP to develop the evidence to determine whether a modification of the decision is appropriate.¹⁵ To this end, FECA Bulletin No. 09-05 asks OWCP to confirm that the file contains documentary evidence supporting that the position was an actual *bona fide* position. It requires OWCP to review whether a current medical report supports work-related disability and establishes that the current need for limited duty or medical treatment is a result of injury-related residuals, and to further develop the evidence from both the claimant and the employing establishment if the case lacks current medical evidence.¹⁶

ANALYSIS

OWCP accepted appellant's claim for aggravation of bilateral hip osteoarthritis and he underwent surgery for an authorized left hip replacement on November 16, 1993 and right hip replacement on April 23, 1996. On October 24, 1998 appellant began work in the full-time position of rehabilitation clerk at a base salary of \$37,831.00. His duties included: filing and retrieving documents, typing and preparing reports, bookkeeping, photocopying, answering telephone calls, using a laser scanner weighing less than a pound, assisting customers and occasionally sorting mail while utilizing an adjustable rest bar. The job did not require squatting, stooping, bending over, prolonged standing, repetitive stair-climbing or driving. The work appellant performed was reviewed and approved by his attending physician, Dr. Mehta on November 23, 1998.

By decision dated December 28, 1998, OWCP found that appellant's actual earnings in the position of rehabilitation clerk fairly and reasonably represented his wage-earning capacity. Because appellant's current salary met or exceeded the salary of the job he held at the time of injury, OWCP determined that he was not entitled to wage-loss compensation.

Effective February 18, 2011, appellant's position as a rehabilitation clerk ceased to be available to him due to NRP. He requested modification of OWCP's December 28, 1998 loss of wage-earning capacity determination, but his request was denied by OWCP for the period

¹³ See *A.J.*, Docket No. 10-619 (issued June 29, 2010).

¹⁴ *Id.* See also *V.H.*, Docket No. 13-2076 (issued March 5, 2014).

¹⁵ FECA Bulletin No. 09-05 (issued August 18, 2009).

¹⁶ *Id.* at §§ I.A.1-2.

January 18, 2011 to April 9, 2012.¹⁷ OWCP reinstated appellant on the periodic rolls as of April 10, 2012 finding that Dr. Finn's reports established a material change of his accepted left hip condition.

Appellant alleged that OWCP's original wage-earning capacity determination was, in fact, erroneous. He argued that the position upon which the rating was based, *i.e.*, rehabilitation clerk, was makeshift or odd-lot in nature and therefore could not be used to support the wage-earning capacity determination.

In the case of *A.J.*,¹⁸ the Board discussed several factors that may support a finding that an offered position was makeshift or odd-lot in nature. These factors include: (1) the position did not have an official title or formal position description; (2) there were strict limitations, such as five-pound lifting and no casing of mail, which indicated that the claimant would not be able to secure a position in the community at large with such limited duties; (3) the claimant did not perform any meaningful tasks in the position; and (4) the job appeared to be temporary in nature.¹⁹

The Board finds that the facts of the present case are distinguishable from those of *A.J.* The rehabilitation clerk position which served as the basis for OWCP's wage-earning capacity determination does not constitute a makeshift or odd-lot position. Although the position that appellant began performing on October 24, 1998 was not classified, it did have the title of rehabilitation clerk. The position description for the job listed specific work duties and physical requirements. The limitations of the position were not unduly strict and it required the performance of meaningful tasks such as filing and retrieving documents, typing and preparing reports, bookkeeping, photocopying, answering telephone calls, using a laser scanner weighing less than a pound, assisting customers and occasionally sorting mail while utilizing an adjustable rest bar. The position was not temporary in nature as appellant performed it for more than 12 years. There was no evidence that the position was created specifically for appellant. Further, it was approved by Dr. Mehta, his attending physician.

Counsel argued at the hearing that the position was not permanent because it was eventually taken away. The Board has held that the fact that the employing establishment may eventually eliminate positions, does not, by itself, establish that a given position constituted makeshift or odd-lot work.²⁰ In a letter dated February 5, 2013, an official from the employing establishment stated, "The position on which the [loss of wage-earning capacity determination] was based December 28, 1998 was a *bona fide* position at that time." The weight of the evidence of record establishes that the rehabilitation position was not makeshift or odd-lot in nature

¹⁷ The Board notes that effective April 10, 2012 OWCP modified its December 28, 1998 loss of wage-earning capacity determination to reflect appellant's worsening work-related left hip condition based on reports of Dr. Finn, an attending Board-certified orthopedic surgeon, including a report dated April 10, 2012. It reinstated compensation effective April 10, 2012.

¹⁸ See *supra* note 13.

¹⁹ See also *V.H.*, Docket No. 13-2076 (issued March 5, 2014).

²⁰ *C.S.*, Docket No. 12-1221 (issued February 11, 2013).

because it had a detailed job description, was performed within recommended physical restrictions and involved meaningful tasks.²¹

Actual earnings are generally the best measure of wage-earning capacity and OWCP properly used appellant's actual wages in the rehabilitation clerk position to determine his wage-earning capacity. There was no substantial evidence that OWCP's December 28, 1998 wage-earning capacity determination was erroneous.

The Board finds that OWCP complied with the Board's December 11, 2012 decision by addressing, upon remand, the guidelines of FECA Bulletin No. 09-05. The Board received confirmation from the employing establishment that the position on which the loss of wage-earning capacity determination was based on was a *bona fide* position at the time of the rating. OWCP also reviewed its files to determine whether the medical evidence showed work-related disability from the rated position.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to modify OWCP's December 28, 1998 loss of wage-earning capacity determination for the period January 18, 2011 to April 9, 2012.

²¹ See *K.A.*, Docket No. 13-1652 (issued January 6, 2014) (position serving as basis for wage-earning capacity determination found to not be makeshift or odd-lot because it had a detailed job description, was performed without overly strict physical restrictions and involved meaningful tasks).

ORDER

IT IS HEREBY ORDERED THAT the November 1, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 7, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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