

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

K.S., Appellant)
and) Docket No. 14-999
U.S. POSTAL SERVICE, POST OFFICE,) Issued: October 27, 2014
Aumsville, OR, Employer)

)

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 25, 2014 appellant filed a timely appeal from a September 30, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for modification of OWCP's wage-earning capacity determination. Pursuant to the Federal Employees' Compensation Act¹ (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 appellant met her burden of proof to establish that modification of OWCP's wage-earning capacity decision was warranted.

FACTUAL HISTORY

This case has previous been before the Board. By decision dated July 1, 2013, the Board found that OWCP improperly denied appellant's application for reconsideration without merit

¹ 5 U.S.C. § 8101 *et seq.*

review of the claim.² The Board found that appellant's March 5, 2012 request for reconsideration was a request for modification of OWCP's May 19, 2011 wage-earning capacity decision, which determined that her actual earnings as a limited-duty rural carrier as of January 8, 2011 fairly and reasonably represented her wage-earning capacity. The Board set aside OWCP's May 31, 2012 decision and remanded the case for further review. The facts of the case as set forth in the Board's prior decision are incorporated by reference. The relevant facts are as follows.

On February 3, 2003 appellant, then a 41-year-old rural mail carrier, filed an occupational disease claim for a right shoulder condition which she attributed to her rural carrier duties. Her regular work hours were from 7:00 a.m. to 16:00 p.m. The employing establishment noted that appellant was working modified duty of not more than eight hours per day, five days a week. OWCP accepted the claim for right shoulder strain and paid all appropriate periods of compensation when limited duty within appellant's restrictions was not available. It also accepted a March 1, 2008 recurrence of disability due to a right shoulder strain and impingement and a consequential left shoulder adhesive capsulitis. Compensation was paid for total disability until November 24, 2008, when appellant returned to a limited-duty position for four hours a day. OWCP thereafter paid wage-loss compensation for partial disability. From August 3, 2009 to February 20, 2010, appellant was on a detailed assignment as an examiner. She returned to a limited-duty rural carrier position on March 8, 2010, working four hours a day. Appellant stopped work on December 8, 2010 as no work within her restrictions were available.

On December 30, 2010 the employing establishment offered appellant a modified assignment of limited-duty rural carrier, which she accepted under protest. The position required appellant to case and associated office duties of city auxiliary route 1, with an average time spent of 1:15; and deliver walk out route 1, approximately four to five miles, with an average time spent of four hours per day. The physical requirements of the position included reaching up to the shoulder level and push/pull/lift up to 20 pounds. Appellant returned to work on January 8, 2011, but refused to perform the delivery portion of the position, asserting that the use of a utility cart exceeded her work restrictions. She filed CA-7 claim forms for time lost from work from January 15, 2011 and continuing. Appellant noted on the CA-7 forms the intermittent hours she had worked and she also noted that work was unavailable for the remaining hours or that the work that was available was not within her medical restrictions.

In a March 8, 2011 letter, OWCP advised appellant that the position of limited-duty rural carrier was suitable to her work capabilities and was available to her. It informed her that, upon performance of the position in its entirety, she would be paid compensation based on the difference, if any, between the pay of the offered position and the pay of her date-of-injury position. OWCP noted that appellant submitted documentation to support that the physical requirements of the job offer exceeded her physician's restrictions; however, the employing establishment submitted sufficient documentation refuting her contentions that the push cart requirements were not within her permanent restrictions. Appellant was advised of the provisions of 5 U.S.C. § 8106(c)(2) with respect to refusal of suitable work and afforded 30 days to either accept and perform the position or provide an explanation for refusal.

² Docket No. 13-338 (issued July 1, 2013).

By decision dated March 8, 2011, OWCP denied payment of wage-loss compensation from January 15 to 28, 2011 and ongoing, greater than that previously paid, which was based on pay appellant would have received had she worked all the hours available to her in her limited-duty position. It further found that appellant failed to establish that she was medically unable to work during the additional hours claimed due to her accepted work injury or provide evidence that she exceeded her permanent restrictions.

On March 14, 2011 appellant began performing the full duties of her limited-duty position, but continued to assert that such duties exceeded her work restrictions.

In a Form CA-7 dated April 18, 2011, appellant noted that an employing establishment representative from the National Reassessment Program (NRP) team inspected her work duties regarding the push cart. She related that she was told that she would be given a new cart and tools to help her deliver her mail above her shoulder level. Appellant had not yet received these tools.

By decision dated May 19, 2011, OWCP found appellant's employment as a limited-duty rural carrier as of January 8, 2011 fairly and reasonably represented her wage-earning capacity. It also determined her compensation based on the wage-earning capacity determination.

On June 2, 2011 appellant requested a review of the written record of the May 19, 2011 decision. She alleged that the modified rural carrier position was temporary and that she had been told that the job offer would be reassessed pursuant to NRP process. Appellant also alleged that the position was not a reasonable accommodation and that it was not within her medical restrictions. In support of her request, she submitted a statement and several supporting documents.

By decision dated October 3, 2011, OWCP's hearing representative affirmed the May 19, 2011 wage-earning capacity decision. The hearing representative found that, while appellant contended that the position was temporary, the employing establishment stated that the position was part of NRP process and was indefinite in duration. The hearing representative also stated the fact that the employing establishment was continuing to work with appellant on the issue of reasonable accommodation did not establish that the job was not suitable.

On March 5, 2012 appellant requested reconsideration of the March 8, 2011 decision which denied her compensation for intermittent time loss during the period January 15 through 28, 2011 and ongoing. In her letter, she argued that her limited-duty position was not suitable and exceeded her work restrictions. Appellant argued that she had no choice but to report for duty and perform the job in its entirety, even though it was outside her physical restrictions. She stated that the position was aggravating her hip condition, which was noted by her physician in September 2011.

In a September 27, 2011 report, Dr. Christopher J. Rae, a Board-certified family practitioner, advised that appellant's current job assignment aggravated a right hip condition. He requested that she be accommodated with a position that does not require repetitive bending at the waist.

By decision dated May 31, 2012, OWCP denied appellant's reconsideration request on the grounds the evidence submitted was either previously considered or not relevant.

On remand from the Board, OWCP received additional medical evidence with a September 4, 2013 statement from appellant. Appellant contended that the wage-earning capacity decision was issued in error as her position exceeded her work restrictions, she had new medical conditions that arose since her original injury and she was rated for and performing a part-time job but was a full-time employee at the time of injury.

In a May 20, 2013 report, Dr. John P. Seymour, Board-certified in occupational medicine, advised that appellant had pain and tightness in her cervical spine, tenderness and tightness in her right trapezial region and full active shoulder range of motion bilaterally. He noted that appellant also had right hip and knee arthritis and diabetes and permanent restrictions of no commuting over 20 miles, no reaching above shoulder, limit pushing, pulling and lifting to 20 pounds due to right shoulder injury.

In a July 12, 2013 report, Dr. Beata Anasz-Kopecka, a Board-certified internist, noted that appellant has shoulder pain, major depression, diabetes and female cystocele. She obtained a history that appellant's shoulder pain was worse with sorting the mail and that she had shoulder bruising at night. Appellant's major depression was worsened by work environment, stress pain and difficulty managing with work environment and requirements which were a problem due to her diabetes, bladder problems and musculoskeletal pain.

By decision dated September 30, 2013, OWCP found that appellant did not establish that the May 19, 2011 wage-earning capacity determination should be modified. Appellant did not establish that the original wage-earning capacity determination was in error or submit probative medical evidence showing that she could no longer perform the light-duty rural carrier duties due to her accepted injury-related conditions.

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. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.³ OWCP's procedure manual provides that, if a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss. In this instance the claims examiner will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity.⁴

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

³ Katherine T. Kreger, 55 ECAB 633 (2004).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.⁵ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁶ The Board has held that a new injury does not constitute a material change in the nature and extent of the original injury-related condition such that a wage-earning capacity determination should be modified.⁷

Chapter 2.814.11 of the procedure manual contains provisions regarding the modification of a formal loss of wage-earning capacity. The relevant part provides that a formal loss of wage-earning capacity will be modified when: (1) the original rating was in error; (2) the claimant's medical condition has changed; or (3) the claimant has been vocationally rehabilitated. OWCP procedures further provide that the party seeking modification of a formal loss of wage-earning capacity decision has the burden to prove that one of these criteria has been met.⁸

Section 8115(a) of FECA provides that the wage-earning capacity of an employee is determined by his or her actual earnings if his or her actual earnings fairly and reasonably represent his or her wage-earning capacity.⁹ The Board has held, generally, that 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.¹⁰ However, a wage-earning capacity may not be based on an odd-lot or makeshift position designed for an employee's particular needs or a position that is seasonal in an area where year-round employment is available.¹¹ Wage-earning capacity may only be based on a temporary or part-time position if the position held by the employee at the time of injury was a temporary or part-time position.¹² OWCP procedures direct that a wage-

⁵ *Stanley B. Plotkin*, 51 ECAB 700 (2000).

⁶ *Id.*

⁷ M.E., Docket No. 07-2306 (issued March 24, 2008).

⁸ See Federal (FECA) Procedure Manual, *supra* note 4 at Chapter 2.814.11 (June 1996).

⁹ *Floyd A. Gervais*, 40 ECAB 1045, 1048 (1989); *Clyde Price*, 32 ECAB 1932, 1934 (1981). Disability is defined in the implementing federal regulations as the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. (Emphasis added.) 20 C.F.R. § 10.5(f). Once it is determined that the actual wages of a given position represent an employee's wage-earning capacity, OWCP applies the principles enunciated in *Albert C. Shadrick*, 5 ECAB 376 (1953), in order to calculate the adjustment in the employee's compensation. 5 U.S.C. § 8115(a).

¹⁰ See *James D. Champlain*, 44 ECAB 438, 440-41 (1993); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7a(1) (July 1997). In *Jeffery T. Hunter*, 52 ECAB 503 (2001), the Board found that the duties of regular employment are covered by a specific job classification and such duties would have been performed by another employee if the employee did not perform them. The test is not whether the tasks that the employee performs would have been done by someone else, but instead whether he occupied a regular position that would have been performed by another employee.

¹¹ Federal (FECA) Procedure Manual, *supra* note 8.

¹² See *id.* at Chapter 2.814.7c (December 1993).

earning capacity determination based on actual wages be made following 60 days of employment.¹³

ANALYSIS

OWCP accepted appellant's claim for right shoulder strain and consequential left shoulder adhesive capsulitis condition and paid appropriate benefits. In a May 19, 2011 decision, OWCP adjusted her monetary compensation finding that her actual earnings as a limited-duty rural carrier as of January 8, 2011 fairly and reasonably represented her wage-earning capacity. OWCP's hearing representative affirmed this decision on October 3, 2011. Appellant requested modification of OWCP's May 19, 2011 wage-earning capacity determination, but it was denied.

The record reflects that appellant's date-of-injury job as a rural carrier was a full-time position. However, the actual earnings in this case were based on a part-time job of a light-duty rural carrier. Appellant worked approximately five hours per day in this position five days a week. OWCP's procedure manual provides, in situations where an employee is working full time when injured and is reemployed in a part-time position, a formal wage-earning capacity determination is generally not appropriate.¹⁴ The Board has held that OWCP must address the issue and address why a part-time position is suitable for a wage-earning capacity determination based on the specific circumstances of the case.¹⁵

OWCP did not address this issue in the 2011 wage-earning capacity decision. It made a finding that appellant's actual earnings fairly and reasonably represented her wage-earning capacity. OWCP did not address the part-time position or the fact that appellant was not a part-time employee when she sustained injury. The Board finds that OWCP failed to meet its burden of proof in determining appellant's wage-earning capacity effective May 19, 2011 based on her part-time work as a limited-duty rural carrier.

OWCP has not shown that appellant's wages as a limited-duty rural carrier fairly and reasonably represent her wage-earning capacity and it improperly adjusted her compensation based on this wage-earning capacity determination. Therefore, appellant has shown that OWCP's original determination with regard to her wage-earning capacity was erroneous and that modification of the determination is warranted on this basis.¹⁶

¹³ *Connie L. Potratz-Watson*, 56 ECAB 316 (2005); *K.N.*, Docket No. 13-1020 (issued January 30, 2014); *see also N.C.*, Docket No. 14-370 (issued May 15, 2014) OWCP failed to follow the procedure manual when it erroneously relied on her part-time employment as a basis for finding that her actual earnings fairly and reasonably represented her wage-earning capacity.

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7a (July 1997).

¹⁵ *Connie L. Potratz-Watson*, *supra* note 13.

¹⁶ *See Stanley B. Plotkin*, 51 ECAB 700 (2000).

CONCLUSION

The Board finds that appellant met her burden of proof to modify OWCP's May 19, 2011 wage-earning capacity determination.¹⁷

ORDER

IT IS HEREBY ORDERED THAT the September 30, 2013 decision of the Office of Workers' Compensation Programs is reversed.

Issued: October 27, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

¹⁷ Due to the disposition of this case, the remainder of appellant's arguments before OWCP and on appeal will not be addressed.