

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

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L.C., Appellant )

and )

**DEPARTMENT OF VETERANS AFFAIRS,**  
**VETERANS ADMINISTRATION MEDICAL**  
**CENTER, Portland, OR, Employer** )

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**Docket No. 13-1934**  
**Issued: September 29, 2014**

*Appearances:*

*John E. Goodwin, Esq., for the appellant*  
*Office of Solicitor, for the Director*

Oral Argument July 9, 2014

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Alternate Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On August 20, 2013 appellant, through her attorney, filed a timely appeal from a February 25, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (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 OWCP properly determined that appellant's wage-earning capacity was represented by her actual earnings.

**FACTUAL HISTORY**

On August 24, 2003 appellant a 40-year-old registered nurse, injured her right thumb when attempting to restrain a patient. OWCP accepted right thumb sprain and joint derangement

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

of the right hand and authorized surgery on the first metacarpal on the right hand which was performed on February 19, 2004. Appellant was hired as a part-time temporary employee and began working on October 20, 2002.<sup>2</sup> She retired on October 9, 2009.

There is prior development which is relevant to the claim before the Board. On February 4, 2008 OWCP found a conflict of medical opinion between appellant's treating physician, Dr. J. Theodore Swartz, Jr., a Board-certified orthopedic surgeon, who found that she could work four hours a day within certain restrictions and the January 24, 2008 opinion of Dr. Stephen J. Thomas, a Board-certified orthopedic surgeon and OWCP referral physician, who found that appellant could work eight hours a day within specified restrictions. To resolve the conflict appellant was referred to Dr. Joseph Mandiberg, a Board-certified orthopedic surgeon. In a March 26, 2008 report, Dr. Mandiberg found that appellant could work eight hours a day at, sedentary work with the following restrictions: keyboarding on occasional basis, fine motor activities on an occasional basis, right upper extremity repetitive grasping up to 10 pounds on an occasional basis, pulling and lifting with only the right upper extremity limited to 10 pounds on an occasional basis, repetitive right upper extremity pinching (lateral pinch and three-point pinch) limited to six pounds and five pounds respectively on an occasional basis, reaching over the shoulder height is not limited, handwriting is limited to an occasional basis (modified pen with built-up foam grip is recommended for easier pinching), driving performed on a frequent basis (as it is a bilateral upper extremity activity) and minimal crawling (defined by Dr. Mandiberg as less than 10 percent of the workday).

On October 30, 2008 the employing establishment offered appellant a modified temporary position as a nurse in the compliance office in a support role for the compliance program and the compliance officer effective January 6, 2009. The job title was a nurse 1, grade 1, step 16 with a salary of \$76,012.00 per annum with a tour of duty of 7:15 a.m. to 3:45 p.m. Appellant was instructed to report to Sheri Russell, the compliance officer, as her supervisor. The position was described as sedentary. Appellant was to assist the compliance officer in ensuring that the medical center exercised due diligence with respect to business

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<sup>2</sup> This case was previously before the Board. On August 30, 2005 the Board set aside a November 16, 2004 OWCP decision reducing appellant's compensation benefits for failing to cooperate with vocational rehabilitation. Docket No. 05-433 (issued August 30, 2005). In a December 23, 2008 decision, the Board set aside August 21, 2006 and May 3, 2007 decisions and remanded the case for further development to determine the correct pay rate for purposes of establishing wage-earning capacity. Docket No. 08-224 (issued December 23, 2008). On March 8, 2010 the Board affirmed May 20 and November 17, 2008 decisions denying appellant's compensation claim. Docket No. 09-1173 (issued March 8, 2010). In a March 17, 2010 decision, the Board remanded the case for a proper determination of the pay rate to be used in determining wage-earning capacity. Docket No. 09-1816 (issued March 17, 2010). On October 26 and 29, 2010 the Board dismissed appellant's appeals for lack of jurisdiction in Docket No. 10-531 (issued October 26, 2010) and Docket No. 10-260 (issued October 29, 2010). On January 20, 2012 the Board dismissed her appeal of a July 13, 2010 decision as the case was in an interlocutory posture. Docket No. 11-554 (issued January 20, 2012). On October 1, 2012 the Board set aside the November 22, 2011 decision which affirmed a finding that a modified nurse position fairly and reasonably represented appellant's wage-earning capacity and was not makeshift in nature. The Board found that OWCP's hearing representative denied counsel's request to question an employer representative regarding whether the position was makeshift at the September 28, 2011 hearing without referencing FECA regulations or providing sufficient reasoning. Docket No. 12-978 (issued October 26, 2012). The facts and law contained in those decisions and orders are incorporated herein by reference.

operations and compliance with applicable laws, regulations and policies. Work assignments were to include conducting physical and record audits of part-time physicians and the part-time physician program; collaborating with services and human resources/payroll regarding part-time physician time and attendance; making telephone calls, facilitating meetings for managers and timekeepers; conducting seated review of physician log sheets for their scheduled tours; comparing paper documents to electronic records; aggregating part-time physician monitor reports; reviewing paper or electronic spreadsheets sent from the medical center services and entering the results *via* computer into Excel spreadsheets involving minimal one handed typing; performing resident supervision documentation audits with minimal one handed data entry; reviewing electronic patient lists; assisting with preparation of routine compliance reports; maintaining program records; collaborating with managers, supervisors and front line staff as needed; assisting with compliance program development by attending committee meetings involving planning, education and training programs; and completing miscellaneous web-based or onsite training as required for understanding of the compliance program. The physical requirements of the job included walking, standing, sitting, reaching, alternating throughout the day, fine manipulation, keyboarding and grasping with no right side upper extremity involvement over an occasional basis, no right hand grasping over 10 pounds occasionally, no pulling or lifting over 10 pounds with the right hand occasionally, no right handed pinching beyond five to six pounds, no handwriting over an occasional basis using a built up grip pen, no crawling with ergonomic equipment to include ergonomic chair, left handed keyboard and mouse, headset, keyboard tray and a built up foam grip pen.

On November 3, 2008 OWCP found the position of registered nurse, modified, to be suitable to her work capabilities. It provided appellant 30 days to accept the position or provide reasons for refusing the position. On December 15, 2008 appellant accepted the modified temporary position as a nurse in the compliance office effective January 6, 2009. On April 27, 2009 the employment establishment noted that she worked in the modified position until April 3, 2009 when the assignment expired.

On May 11, 2009 OWCP issued a loss of wage-earning capacity (LWEC) decision reducing her monetary benefits based on actual wages earned in her modified position as a nurse 1. The May 11, 2009 decision was subsequently set aside and remanded on the issue of pay rate.<sup>3</sup>

In a May 20, 2011 decision, OWCP issued a LWEC decision reducing appellant's compensation based on the actual wages earned in the modified nurse position that she worked from January 6 to April 3, 2009.

Appellant, through her attorney, requested an oral hearing, which was held on September 28, 2011. He contended that the position on which the LWEC decision was based was makeshift in nature. Yvonne Carson, a registered nurse and injury management program manager, attended the hearing on behalf of the employing establishment. Counsel requested that he be permitted to question Ms. Carson, who was responsible for structuring and presenting to

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<sup>3</sup> In a decision dated March 17, 2010, the Board set aside the May 11, 2009 decision and remanded the case to OWCP for a proper calculation of appellant's pay rate. Docket No. 09-1816 (issued March 17, 2010).

appellant the modified nurse position. OWCP's hearing representative denied the request. At the hearing, appellant testified that she did not perform the duties outlined in her modified position description, rather, she went into work and essentially did nothing. She sat at her desk and watched the clock, took long lunches, made telephone calls, went to Starbucks, helped her daughter with her homework, watched television, surfed the internet and listened to her iPod. Appellant testified that she did perform the job duty of locating part-time doctors at workstations and documenting their presence.

In a statement dated October 18, 2011, Ms. Carson noted that the October 30, 2008 job offer was in accordance with appellant's prescribed permanent work restrictions. She noted a nursing job description was prepared to describe appellant's nurse position which was created to fill an agency need and fit her physical requirements. Ms. Carson noted appellant was hired to function as a nurse in support capacity to Ms. Russell, a compliance officer. She noted that Ms. Russell performed the tasks of the October 30, 2008 job offer and appellant's job was to support those functions. Ms. Carson noted that a functional statement was made to describe appellant's position and was written by the hiring service, approved by the employing establishment and placed on the employing establishment organization chart before it was offered. The job duties were varied and included verifying the participation of physicians and were listed in expanded form to include all the possible tasks of that position which could be asked of appellant within her restrictions. Ms. Carson noted, however, that all of the tasks for the position did not have to be included in appellant's daily experience on the job and Ms. Russell may not have had occasion to ask appellant to perform everything on the list. She noted that the employing establishment carefully designed the modified position to comply with appellant's physical restrictions and she was not aware that appellant was not performing those duties in accordance with the job description.

In a November 22, 2011 decision, OWCP's hearing representative affirmed the May 20, 2011 decision finding that appellant's actual earnings in the modified position of nurse 1 fairly and reasonably represented her wage-earning capacity and was not makeshift in nature.

On October 1, 2012 the Board set aside the November 22, 2011 decision and remanded the matter for further action. The Board found that OWCP's hearing representative denied appellant's request to question Ms. Carson with regards to the job offer without proper regard to FECA implementing regulations and failed to adequately explain the reasoning behind his decision.

On remand, OWCP conducted a telephone conference on November 7, 2012 between the senior claims examiner and Ms. Carson to determine if the offered position was makeshift. Ms. Carson advised that the specific duties of the October 2008 job offer were matched with appellant's permanent restrictions and the employing establishment's needs and added to the organizational chart once approved. She stated that other employees had performed the duties of the October 2008 job offer, noting that the compliance office performed the duties as a registered nurse in a support capacity to the medical center director and appellant's position was to support those same functions. Ms. Carson noted that the duties were in compliance with appellant's restrictions. The claims examiner indicated that a copy of the conference call was provided to counsel.

By decision dated November 26, 2012, OWCP found that appellant's actual earnings in the modified position of nurse 1 fairly and reasonably represented her wage-earning capacity and was not makeshift in nature. The decisions were mailed to the address of record for appellant and her attorney but were returned as undeliverable. On December 12, 2012 OWCP reissued the November 26, 2012 decision to her and counsel. It provided a copy of the conference memorandum dated November 7, 2012.

On December 25, 2012 counsel requested an oral hearing. He received a copy of the November 7, 2012 conference memorandum but noted that he was not invited to participate in the conference call and OWCP failed to provide him 15 days to respond to the memorandum as provided in OWCP procedures. In a February 6, 2013 decision, an OWCP hearing representative set aside the December 12, 2012 decision and instructed OWCP to provide appellant and counsel 15 days to respond to the conference memorandum. On February 7, 2013 OWCP provided appellant and counsel with the conference call memorandum and provided 15 days to submit written comments.

On February 14, 2013 counsel asserted that the employing establishment created a makeshift job for the purpose of keeping appellant on the payroll for 90 days. He stated that the job did not exist before or after appellant was terminated. Counsel requested a copy of the compliance officer's job description and asserted that she did not do the specific job tasks in the compliance officer's job description and that the compliance officer did not do the tasks listed in her makeshift job offer. He contended that appellant was not performing duties that were performed by other administrative nursing positions. Counsel did not dispute that the job created for her was within her physical restrictions set out by the physician. He contended that the tasks appellant performed were performed by no other person, that she was not trained to do the compliance officer's tasks when the compliance officer was away from the office nor did the compliance officer train her to learn the duties of the compliance officer so she could obtain work as a compliance officer in the private sector.

In a decision dated February 25, 2013, OWCP found that appellant's actual earnings in the modified position of nurse 1 fairly and reasonably represented her wage-earning capacity and was not makeshift in nature.

### **LEGAL PRECEDENT**

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 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.<sup>4</sup>

OWCP procedures state that after a claimant has been working for 60 days, OWCP will make a determination as to whether actual earnings fairly and reasonably represent wage-earning

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<sup>4</sup> *Dennis E. Maddy*, 47 ECAB 259 (1995).

capacity.<sup>5</sup> 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 not appropriate for a wage-earning capacity determination.<sup>6</sup>

In addition, 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.<sup>7</sup> 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.<sup>8</sup>

The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision,<sup>9</sup> has been codified at 20 C.F.R. § 10.403. 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.<sup>10</sup>

### ANALYSIS

Appellant's claim was accepted for right thumb sprain and joint derangement of the right hand. She was hired as a part-time temporary employee and began working on October 20, 2002. In determining appellant's wage-earning capacity, OWCP properly found that appellant received actual earnings as a part-time temporary nurse 1 for more than 60 days. Appellant worked in the position effective January 6 until April 3, 2009.<sup>11</sup> According to the evidence of record, the job offer was in accordance with the restrictions provided by the referee physician Dr. Mandiberg. The Board notes that the position was a part-time temporary position not to exceed 90 days. A wage-earning capacity may be based on a part-time temporary position, where as in the present case, the position the employee held when injured was also part

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<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (February 2013).

<sup>6</sup> *Id.* at Chapter 2.814.7(a) (February 2013).

<sup>7</sup> *See A.J.*, Docket No. 10-619 (issued June 29, 2010).

<sup>8</sup> *Id.*

<sup>9</sup> 5 ECAB 376 (1953).

<sup>10</sup> 20 C.F.R. § 10.403(d).

<sup>11</sup> *See James D. Champlain*, 44 ECAB 438, 440-441 (1993).

time and temporary in nature.<sup>12</sup> The issue is whether there was a basis to find the position worked was not appropriate for a wage-earning capacity determination.

Counsel asserts in his August 9, 2013 request for appeal and March 30, 2014 letter to the Board that the position was makeshift arguing that it was a special job designed for appellant's particular needs, the employing establishment failed to provide a job description, the job did not exist before or after she was terminated, she did not do the specific job tasks in the compliance officer's job, the tasks she performed were performed by no others and that she was not trained for the compliance officer's tasks. Counsel did not dispute that the job created for her was within her physical restrictions. The Board finds that appellant has not established her assertions. Appellant did not submit sufficient evidence to establish that the modified position was not reasonably available on the open labor market or could not have been performed by another employee. There was no evidence establishing that the duties assigned to her were merely to keep her employed or that the duties and or the position was created especially for her to fill until such time it could be determined whether she could physically return to another position or alternative status.<sup>13</sup>

In reviewing the relevant factors regarding a makeshift position, the Board finds insufficient evidence to establish the modified temporary position as a nurse 1 in the compliance office was makeshift. It has an official title and a detailed job description. Ms. Carson indicated that the specific duties of the October 2008 job offer matched appellant's permanent restrictions and that the October 30, 2008 nursing job description was prepared to describe her nurse position which was created to fill the employing establishments need and fit her physical requirements. The position was added to the organizational chart once approved. Additionally, appellant testified she performed the duty of locating part-time doctors at workstations and documenting their presence. Ms. Carson noted that appellant was hired to function as a nurse in support capacity to Ms. Russell, is a compliance officer. She indicated that Ms. Russell has performed the tasks of the October 30, 2008 job offer and appellant's job was to support those functions. Ms. Carson noted the job duties were varied and included verifying the participation of physicians and was listed in expanded form to include all the possible tasks of that position which could be asked of appellant within her restrictions. She noted, however, that all possible duties of the position did not have to be included in appellant's daily experience on the job and Ms. Russell may not have had occasion to ask appellant to perform everything on the list, and it was reasonable that she would not have performed all the duties in the 90-day period in which she worked.

Counsel further asserts that the job position was for a one handed person and appellant could not perform nursing duties with one hand. He contended that the restrictions were so extensive that she could not obtain a nursing job in the general labor market. Counsel also contended that this case was analogous to *A.J.*,<sup>14</sup> in which the Board determined that the duties outlined in the limited-duty assignment for a postal clerk were makeshift in nature and were

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<sup>12</sup> See *P.C.*, Docket No. 13-939 (issued August 27, 2013).

<sup>13</sup> See *P.L.*, Docket No. 13-1803 (issued January 15, 2014).

<sup>14</sup> *Supra* note 8.

designed to meet the employee's particular needs. In *A.J.*, the Board noted that the position did not have an official title or a formal position description and the job was eliminated when the employee could no longer perform the duties which suggested that the job was created specifically for her. Moreover, the strict limitations, such as lifting no more than five pounds and performing no casing duties, precluded the performance of many regular clerk duties which would be required in the general labor market. The Board notes that the facts in *A.J.*, can be distinguished from the present case in that appellant's position had a functional job description and was created to fill the employing establishment's need. Ms. Carson noted that a functional statement was made to describe appellant's position and was written by the hiring service, approved by the employing establishment and placed on its organization chart before it was offered. The record supports that appellant was hired to function as a nurse in support capacity to Ms. Russell, a compliance officer. Ms. Russell performed the tasks of the October 30, 2008 job offer and appellant's job was to support those functions. The job involved meaningful tasks. The test is not whether the tasks that the employee performs would have been done by someone else, but instead whether appellant occupied a regular position that would have been performed by another employee.<sup>15</sup> The modified temporary position as a nurse 1 in the compliance office in this case had meaningful tasks and a detailed job description without overly strict physical restrictions.

The Board finds that, the modified position as a nurse 1 in the compliance office performed beginning January 6, 2009 was appropriate for a wage-earning capacity determination. It was not makeshift. OWCP properly reduced appellant's compensation based on actual wages earned in her modified position. The Board finds that it properly reduced appellant's benefits based on her actual earnings.

### **CONCLUSION**

The Board finds that OWCP properly determined that appellant's wage-earning capacity was represented by her actual earnings commencing January 6, 2009.

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<sup>15</sup> See *Jeffrey T. Hunter*, 52 ECAB 503 (2001) (where 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).



**ORDER**

**IT IS HEREBY ORDERED THAT** the February 25, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 29, 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