

FACTUAL HISTORY

On April 15, 2003 appellant, then a 47-year-old transportation security screener, filed a traumatic injury claim alleging that on that date she injured her left shoulder pushing a heavy bag. She began working as a transportation security screener in November 2002. By decision dated May 28, 2003, OWCP accepted appellant's claim for left shoulder sprain. It also accepted the additional condition of left shoulder impingement syndrome and approved arthroscopic surgery on October 7, 2003. Appellant underwent a left shoulder arthroscopy with resection of the subacromial bursa and the coracoacromial ligament as well as a subacromial decompression and distal clavicle excision on November 20, 2003. She underwent a second left shoulder arthroscopy on September 21, 2005 due to a full thickness tear of the supraspinatus tendon and left shoulder resection of the subacromial bursa.

Appellant accepted a temporary light-duty assignment on December 25, 2005 performing duties as an exit lane monitor, line monitor, divestiture, and recomposure. Her attending physician, Dr. Frank B. Giacobetti, a Board-certified orthopedic surgeon, later indicated on January 23, 2006 that she could return to modified duty with no over-the-shoulder use of her left arm. Appellant accepted a light-duty assignment on January 9, 2006 as an exit lane monitor. On September 24, 2007 Dr. Giacobetti indicated that appellant should not lift more than five pounds.

On September 30, 2008 appellant accepted a temporary light-duty assignment with no grasping, manipulation, or lifting over the left shoulder. Dr. Giacobetti completed work status reports in March through June 2009, diagnosing bilateral carpal tunnel syndrome and indicating that appellant could perform modified duty with no forceful gripping or grasping of her left hand and no overhead use of her left arm.

On June 23, 2009 the employing establishment submitted a copy of appellant's temporary limited-duty assignment as a travel document checker working full time five days a week. This position required appellant to check a passenger's travel documents and photo identification prior to allowing them to enter the sterile area. The position was identified as sitting and requiring repetitive use of the hands. Appellant was required to perform visual inspection of identification badges to determine validity (expired and altered) as well as performing pat down searches and bag checks. The physical activities were sitting, walking, standing continuously for eight hours a day, lifting and carrying up to five pounds continuously for eight hours a day, twisting, bending, squatting, kneeling, and utilizing steps and stairs continuously for eight hours a day and no grasping manipulation, or reaching over the left shoulder. Appellant accepted this limited-duty assignment on June 23, 2009.

On August 5, 2009 the employing establishment provided appellant with the temporary limited-duty assignment of travel document checker. This position requested appellant to perform visual inspection of identification badges to determine the validity and to perform pat down searches and bag checks. The position required sitting and repetitive use of the hands. The position noted that she could not lift or carry with her left hand or grasp manipulate with her left hand or reach over her left shoulder. Appellant accepted this temporary position on August 10, 2009.

On forms dated June 6 and July 11, 2011 Dr. Giacobetti diagnosed bilateral carpal tunnel syndrome and indicated that appellant could perform light-duty effective July 11, 2011 with no lifting more than five pounds and no work over the shoulder.

By decision dated December 15, 2011, OWCP determined that appellant's position of transportation security officer, "E band," with wages of \$737.57 per week fairly and reasonably represented appellant's wage-earning capacity. It stated that she began working in her current position on August 5, 2009 and that she had held the position for more than two months.

On January 20, 2012 the employing establishment stated that it was unable to offer appellant an adequate job offer due to the lack of medical documentation. In a telephone memorandum dated February 1, 2012, it advised OWCP that it wished to terminate appellant because she would never return to full duty.

Dr. Giacobetti provided continuing consistent work restrictions of no lifting over five pounds and no over the shoulder use of the left arm due to appellant's left shoulder condition on April 16 and October 15, 2012. Appellant underwent a left carpal tunnel release.

In a telephone memorandum dated December 5, 2012, OWCP noted that the employing establishment could no longer provide appellant with light-duty work. In a letter dated February 1, 2013, the employing establishment asked that appellant provide medical documentation regarding her ability to perform the required physical duties of her position. On February 27, 2013 Dr. Giacobetti indicated that appellant could perform modified duties with no lifting over five pounds and no over the shoulder work on the left. By letter dated May 7, 2013, the employing establishment informed OWCP that appellant was separated from service on May 3, 2013 as she was not medically qualified for her transportation security officer position.

On May 22, 2013 appellant filed a claim for compensation requesting wage-loss compensation from May 4, 2014. In a letter dated June 26, 2013, OWCP informed appellant that as a formal loss of wage-earning capacity decision had been issued in her claim, the claim for compensation would be treated as a request for modification of the formal loss of wage-earning capacity decision. It allowed appellant 30 days to submit evidence forming the basis for modifying her loss of wage-earning capacity determination. Counsel responded on July 24, 2013 and stated that the position upon which the loss of wage-earning capacity determination was based was make shift and not a position open to the general public.

By decision dated November 15, 2013, OWCP denied appellant's claim for compensation benefits finding that she had not established that the December 15, 2011 loss of wage-earning capacity determination, based on the position of travel document checker, should be modified. It stated that the position of travel document checker was not a make-work position, but work done as part of her date-of-injury position. OWCP further found that appellant had not submitted medical evidence establishing a material change in her injury-related condition.

Counsel requested an oral hearing before an OWCP hearing representative on November 22, 2013. He submitted the April 24, 2013 notice of proposed removal from the employing establishment to appellant. This document stated that appellant did not meet the

medical guidelines for a transportation security officer position as she was permanently medically restricted from lifting more than five pounds. The employing establishment stated that transportation security officers must meet and maintain the ability to repeatedly lift up to 70 pounds. It stated that an individual may not be deployed as a security screener unless he or she meets all of the physical qualifications and that appellant was medically disqualified to be a transportation security officer. Counsel also provided the job analysis tool for transportation security officers which included the ability to repeatedly lift and carry items weighing up to 70 pounds.

Appellant appeared at the oral hearing on May 19, 2014. Counsel argued that the original loss of wage-earning capacity determination was in error and that the employing establishment terminated appellant's employment as a transportation security officer rather than a travel document checker which was a light-duty job reserved for people with disabilities. He also noted that appellant's claim for carpal tunnel syndrome had been accepted. Appellant testified that the position of travel document checker was a special position for injured employees. She stated that the travel document checker position was originally a rotated position that all transportation security officers had to perform, but as more employees were injured, then the injured employees would perform these duties. Counsel noted that the original loss of wage-earning capacity decision did not address the difference between appellant's date-of-injury position and her modified position upon which her loss of wage-earning capacity determination was based.

By decision dated July 8, 2014, an OWCP hearing representative affirmed the November 15, 2013 decision of OWCP. He found that the position of travel document checker was not makeshift or odd-lot as it contained a specific title, work schedule, limitations as to use of appellant's left arm, and duties consistent with transportation security. The hearing representative further found that the medical evidence did not establish that appellant had sustained a material change in her injury-related condition such that she could no longer perform the duties of a travel document checker.

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.² Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn and not on actual wages lost.³ Compensation payments are based on the wage-earning capacity determination, which remains undisturbed until properly modified.⁴

Modification of a standing wage-earning capacity determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee

² 5 U.S.C. § 8115(a); *K.R.*, Docket No. 09-415 (issued February 24, 2010); *Lee R. Sires*, 23 ECAB 12, 14 (1971) (the Board held that actual wages earned must be accepted as the measure of a wage-earning capacity in the absence of evidence showing they do not fairly and reasonably represent the employee's wage-earning capacity).

³ *K.R., id.*; *Roy Matthew Lyon*, 27 ECAB 186, 190 (1975). *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

⁴ *See Sharon C. Clement*, 55 ECAB 552, 557 (2004).

has been retrained or otherwise vocationally rehabilitated, or the original determination was erroneous.⁵ 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.⁶ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁷

When a formal loss of wage-earning capacity determination is in place and light duty is withdrawn, the proper standard of review is not whether appellant sustained a recurrence of disability, but whether OWCP should modify its decision according to the established criteria for modifying a formal loss of wage-earning capacity determination.⁸ OWCP procedures provide that when the employing establishment has withdrawn a light-duty assignment, which accommodated the claimant's work restrictions and a formal wage-earning capacity decision has been issued, the decision will remain in place, unless one of the three accepted reasons for modification applies.⁹

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.¹⁰ 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.¹¹ OWCP's procedure manual provides that the offered position must correlate to the type of appointment held by the injured employee at the time of injury. Reemployment may not be the basis of a wage-earning capacity determination when the job is temporary where the employee's job when injured was permanent.¹²

⁵ *Sue A. Sedgwick*, 45 ECAB 211, 215-16 (1993); *Elmer Strong*, 17 ECAB 226, 228 (1965).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity Decisions*, Chapter 2.1501.4(a) (June 2013).

⁷ *Selden H. Swartz*, 55 ECAB 272, 278 (2004).

⁸ *K.R.*, *supra* note 2; *K.R.*, Docket No. 09-28 (issued September 16, 2009); *Debbie A. Titus*, Docket No. 05-360 (issued June 3, 2005).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity Decisions*, Chapter 2.1501.7 (June 2013).

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

¹¹ *Id.*

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Actual Earnings*, Chapter 2.815.5.2(d) (June 2013).

ANALYSIS

At the time of her April 15, 2003 employment injury, the record indicates that appellant was a permanent employee who commenced working in the position of transportation security screener in November 2002. OWCP accepted appellant's claim for left shoulder sprain, left shoulder impingement syndrome and approved two arthroscopic shoulder surgeries. Appellant initially returned to temporary light-duty work on December 25, 2005. She accepted the temporary position of travel document checker on August 10, 2009. Appellant worked in this position until the employing establishment terminated her employment from the position of a transportation security officer on May 3, 2013. According to the evidence of record, the position of travel document checker was within appellant's restrictions as provided by her physician, Dr. Giacobetti. Appellant does not appear to argue that there was a material change in the nature and extent in the employment-related condition. In addition, she does not argue that she has been retrained or vocationally rehabilitated.

Appellant, through counsel, argues that the original loss of wage-earning capacity determination was in error as it was based on a makeshift position or odd-lot position which could not be used to support the loss of wage-earning capacity determination. Appellant noted that the employing establishment terminated appellant's employment as transportation security officer not a travel document checker.

OWCP based its loss of wage-earning capacity determination on the August 10, 2009 position of travel document checker. The employing establishment, however, specifically provided in its job offer that the offered position was temporary. When determining whether earnings in alternative employment fairly and reasonably represent the employee's wage-earning capacity, OWCP may not consider the work appropriate when the job is temporary and the employee's previous job was permanent.¹³ The record does not support that appellant's date-of-injury position was temporary and there is no evidence that the August 10, 2009 limited-duty assignment was formally classified as a permanent position. As a result, appellant has met her burden to establish that the original December 15, 2011 wage-earning capacity determination was in error.

The Board finds that OWCP failed to follow its established procedures as it based the December 15, 2011 loss of wage-earning capacity determination on a temporary travel document checker position that appellant accepted on August 10, 2009.

CONCLUSION

The Board finds that appellant has met her burden of proof to modify OWCP's December 15, 2011 loss of wage-earning capacity determination as it was improperly based on a temporary position.

¹³ *J.D.*, Docket No. 12-1026 (issued October 18, 2012); *K.V.*, Docket No. 11-145 (issued July 22, 2011).

ORDER

IT IS HEREBY ORDERED THAT July 8, 2014 decision of the Office of Workers' Compensation Programs is reversed.

Issued: August 21, 2015
Washington, DC

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

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

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