

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

R.R., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Denver, CO, Employer**

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**Docket No. 15-0129
Issued: December 28, 2015**

Appearances:

*Gregory A. Hall, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 25, 2014 appellant, through counsel, filed a timely appeal from a May 1, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 OWCP properly found that appellant's actual part-time earnings as a modified letter carrier beginning July 22, 2004 fairly and reasonably represented his wage-earning capacity.

FACTUAL HISTORY

OWCP accepted that on January 25, 1991 appellant, then a 34-year-old letter carrier, sustained herniated L4-5 and L5-S1 discs. The claim was later expanded to include a

¹ 5 U.S.C. § 8101 *et seq.*

consequential pain disorder and major depressive disorder. At the time of his January 25, 1991 work injury, appellant was working on a full-time basis for the employing establishment.²

In an August 8, 2003 report, Dr. Michael Shrift, a Board-certified psychiatrist serving as an OWCP referral physician, opined that appellant could work eight hours per day, five days per week. In a December 2, 2003 report, Dr. Jeffrey Hrutkay, a Board-certified orthopedic surgeon serving as an impartial medical specialist, opined that appellant could work eight hours per day, five days per week.

On July 22, 2004 appellant returned to a light-duty work as a modified letter carrier for the employing establishment, working 4 hours per day for a total of 20 hours per week. He stopped work again on May 20, 2010 when the employing establishment withdrew his assignment under the National Reassessment Process.

In an August 6, 2010 decision, OWCP reduced appellant's compensation based on its determination that his actual earnings in the modified letter carrier position fairly and reasonably represented his wage-earning capacity.³ Appellant requested a hearing. In a March 16, 2011 decision, an OWCP hearing representative affirmed OWCP's August 6, 2010 decision.

In a June 12, 2012 order,⁴ the Board reversed the March 16, 2011 hearing representative's decision. The Board found that OWCP impermissibly based its wage-earning capacity determination on appellant's actual wages in the part-time position of modified letter carrier despite the fact that he held a full-time position at the time of his injury.

Beginning June 7, 2013, appellant filed claims for wage-loss benefits for the balance of his work schedule not covered under the partial wage-loss payments he was receiving on the periodic rolls.

In an August 7, 2013 decision, OWCP determined that appellant's wage-earning capacity, effective July 22, 2004, was fairly and reasonably represented by his actual wages in the part-time position of modified letter carrier. It found that the modified carrier position to which he returned on July 22, 2004 was not makeshift work and was within his stable, established work restrictions that limited him to part-time work. OWCP noted that, effective

² Appellant's regular work schedule was 6:30 a.m. to 3:00 p.m., Tuesday through Saturday.

³ In a September 22, 2004 decision, OWCP reduced appellant's compensation based on its determination that his actual earnings as a modified letter carrier fairly and reasonably represented his wage-earning capacity. In a June 8, 2006 decision, the Board set aside OWCP's September 22, 2004 decision noting that OWCP had not adequately explained the basis for its wage-earning capacity determination. Docket No. 05-1901 (issued June 8, 2006).

⁴ Docket No. 11-2063 (issued June 12, 2012).

June 4, 2013, OWCP changed its procedures to allow, in some circumstances, for basing wage-earning capacity on actual wages in a part-time position when the date-of-injury position was a full-time position.⁵

Appellant requested an oral telephonic hearing with an OWCP hearing representative. During the March 20, 2014 hearing, counsel argued that OWCP improperly applied the new OWCP procedures on a retroactive basis.

By decision dated May 1, 2014, OWCP's hearing representative affirmed OWCP's August 7, 2013 wage-earning capacity determination noting that it was appropriate to apply the new OWCP procedures on a retroactive basis. The hearing representative stated, "I do not find the argument that the recent updates in the [Federal (FECA) Procedure Manual] violate any principal of *ex post facto*, as these changes were explicitly made to clarify interpretation of [FECA] -- not to change any law."

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of his or her duty.⁶ Disability means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.⁷

Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.⁸ The wage-earning capacity of an employee is determined by the employee's actual earnings if the employee's actual earnings fairly and reasonably represent his or her wage-earning capacity.⁹

In the case of *O.V.*,¹⁰ the Board found that OWCP abused its discretion when it determined that the claimant's actual earnings in part-time reemployment fairly and reasonably

⁵ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Actual Earnings*, Chapter 2.815.5c (June 2013); FECA Transmittal No. 13-09 (issued June 4, 2013). Chapter 2.815.5c(1)(b)(2) provides:

"A part-time position may form the basis for a [wage-earning capacity] for an employee who was a full-time employee on the [date of injury] if his/her stable, established work restrictions limit him/her to part-time work. This policy change is consistent with the statutory purpose of 5 U.S.C. § 8115 which anticipates [loss of wage-earning capacity] determinations for partial disability based on actual earnings where those earnings fairly and reasonably represent the injured employee's [wage-earning capacity].

⁶ 5 U.S.C. § 8102(a).

⁷ 20 C.F.R. § 10.5(f).

⁸ *Albert L. Poe*, 37 ECAB 684 (1986); *David Smith*, 34 ECAB 409 (1982).

⁹ 5 U.S.C. § 8115(a).

¹⁰ Docket No. 11-98 (issued September 30, 2011).

represented his capacity to earn wages in the open labor market. The Board explained that OWCP procedures prohibited a loss of wage-earning capacity determination based on part-time reemployment unless the claimant was a part-time worker at the time of injury.

ANALYSIS

In an August 6, 2010 decision, OWCP reduced appellant's compensation based on its determination that his actual earnings in the modified letter carrier position fairly and reasonably represented his wage-earning capacity. In a March 16, 2011 decision, an OWCP hearing representative affirmed OWCP's August 6, 2010 decision. In a June 12, 2012 order,¹¹ the Board reversed the March 16, 2011 hearing representative's decision. The Board found that OWCP impermissibly based its wage-earning capacity determination on appellant's actual wages in the part-time position of modified letter carrier despite the fact that he held a full-time position at the time of his injury. In August 7, 2013 and May 1, 2014 decisions, OWCP determined that appellant's wage-earning capacity effective July 22, 2004 was fairly and reasonably represented by his actual wages in the part-time position of modified letter carrier. OWCP noted that, effective June 4, 2013, it had changed its procedures to allow for basing wage-earning capacity on actual wages in a part-time position when the date-of-injury position was a full-time position.¹²

The Board has final authority to determine questions of fact and law. The Board's determinations are binding upon OWCP and must, of necessity, be so accepted and acted upon by the Director of OWCP. Otherwise, there could be no finality of decisions and the whole procedure would be nullified and questions would remain moot.¹³

Section 501.6(c)-(d) of OWCP's implementing federal regulations provide that the decisions and orders of the Board are final as to the subject matter appealed, and such decisions and orders are not subject to review, except by the Board. The decisions and orders of the Board will be final upon the expiration of 30 days from the date of issuance unless the Board has fixed a different period of time therein. Following the expiration of that time, the Board no longer retains jurisdiction over the appeal unless a timely petition for reconsideration is submitted and granted.¹⁴ Section 501.7 of OWCP's implementing federal regulations provide that appellant or the Director may file a petition for reconsideration of a decision or order issued by the Board within 30 days of the date of issuance, unless another time period is specified in the Board's order.¹⁵

¹¹ Docket No. 11-2063 (issued June 12, 2012).

¹² See *supra* note 5.

¹³ See *L.C.*, Docket No. 09-1816 (issued March 17, 2010); *Paul Raymond Kuyoth*, 27 ECAB 498, 503-04 (1976); *Anthony Greco*, 3 ECAB 84, 85 (1949).

¹⁴ 20 C.F.R. § 501.6(c)-(d).

¹⁵ *Id.* at § 501.7. The Board notes that neither appellant nor the Director of OWCP filed a petition for reconsideration in the present case.

Appellant's wage-earning capacity effective July 22, 2004 has previously been considered by the Board in its June 12, 2012 order.¹⁶ The assertions advanced by OWCP thereafter were previously considered by the Board in its June 12, 2012 order. OWCP procedures that were in effect at the time of OWCP's original wage-earning capacity determination prohibited a loss of wage-earning determination based on part-time reemployment where the claimant was a full-time worker at the time of injury.¹⁷ In OWCP's August 7, 2013 and May 1, 2014 decisions, it essentially restated the wage-earning capacity findings of its March 16, 2011 decision, *i.e.*, the findings of a decision that the Board had reversed in its June 12, 2012 order. OWCP did not submit any additional evidence pertinent to appellant's wage-earning capacity effective July 22, 2004. It noted that, effective June 4, 2013, it changed its procedures to allow, in some circumstances, for basing wage-earning capacity on actual wages in a part-time position when the date-of-injury position was a full-time position. However, OWCP did not explain how the new OWCP procedures or FECA Transmittal No. 13-09, which explained the new procedures allowed for retroactive application of the procedures.¹⁸ In a May 1, 2014 decision, an OWCP hearing representative wrote, "I do not find the argument that the recent updates in the [Federal (FECA) Procedure Manual] violate any principal of *ex post facto*, as these changes were explicitly made to clarify interpretation of [FECA] -- not to change any law." Chapter 2.815.5c(1)(b)(2) of the new procedures provides that OWCP's policy change is consistent with the statutory purpose of 5 U.S.C. § 8115 which anticipates loss of wage-earning capacity determinations for partial disability based on actual earnings where those earnings fairly and reasonably represent the injured employee's wage-earning capacity.¹⁹ The Board notes, however, that OWCP did not make clear its intention to retroactively apply the new procedures. Therefore, OWCP may not retroactively apply the new procedures to determine appellant's wage-earning capacity effective July 22, 2014.²⁰

In the present case, the Board issued a June 12, 2012 order finding that OWCP impermissibly based its wage-earning capacity determination effective July 22, 2004 on appellant's actual wages in a part-time position. The decision became the law of the case and, absent a clear basis for retroactive application of the new OWCP procedures, remains the law of the case. As noted above, the Board's determinations are binding upon OWCP and must, of necessity, be accepted and acted upon by the Director of OWCP.²¹

¹⁶ Docket No. 11-2063 (issued June 12, 2012).

¹⁷ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7a (July 1997).

¹⁸ See *Carlotta J. Quackenbush*, Docket No. 83-2034 (issued October 16, 1984) (allowing for retroactive application of OWCP procedures when a FECA Bulletin explicitly noted that such procedures should be applied to cases already decided in which all benefits were terminated).

¹⁹ See *supra* note 9.

²⁰ The facts of the present case can be distinguished from those of *Quackenbush*, where the Board allowed retroactive application of OWCP procedures, because the procedures discussed in *Quackenbush* explicitly provided for retroactive application. See *supra* note 18.

²¹ See *supra* note 13.

Accordingly, the Board will reverse OWCP's May 1, 2014 decision and remand the case for a proper adjudication of appellant's claim for wage-loss compensation.

CONCLUSION

The Board finds that OWCP improperly found that appellant's actual part-time earnings as a modified letter carrier beginning July 22, 2004 fairly and reasonably represented his wage-earning capacity.

ORDER

IT IS HEREBY ORDERED THAT the May 1, 2014 decision of the Office of Workers' Compensation Programs is reversed. The case is remanded to OWCP for further proceedings consistent with this decision of the Board.²²

Issued: December 28, 2015
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

²² James A. Haynes, Alternate Judge, participated in the original decision but was no longer a member of the Board effective November 16, 2015.