

requested ergonomic equipment. She noted, however, that the employing establishment had failed to provide her with the chair requested by her physician. Appellant explained that as a result of this failure to honor her medical restrictions, she developed low back pain in the performance of her duties. The employing establishment explained that she was a part-time flexible clerk and her duties were to work the window and mark up.

OWCP accepted the claim for exacerbation of somatic dysfunction (lumbar and sacral). Appellant stopped work on November 16, 2007. On December 12, 2008 OWCP expanded the claim to include exacerbation recurrent major depression.² Appellant received wage-loss compensation benefits.³

On February 26, 2009 appellant completed a form indicating that she did not wish to be involuntarily reassigned to another installation and wished to convert to part-time regular in lieu of the involuntary assignment. On March 4, 2009 the employing establishment provided appellant a revised modified permanent assignment as a part-time regular modified mail processing clerk. It explained the details of her position which included that she worked 30 hours per week at a rate of \$24.40 per hour at a level 6, Step M.⁴

On July 13, 2009 the employing establishment indicated that appellant was working as a part-time flexible employee (PTF) before her work stoppage, working approximately 20 to 30 hours each week. It was noted that for the period August 16, 2008 to February 27, 2009, appellant was a full-time, regular employee, who was guaranteed 40 hours per week. The employing establishment noted that any other employee in this situation with the same level/step would earn the same base pay. During this time, appellant earned \$27,170.00 in base pay, and zero in night differential and Sunday premium. Furthermore, she was off work from March 1, 2008 through August 15, 2008 in a leave-without-pay status due to the work injury and received wage-loss compensation. The employing establishment explained that, effective February 28, 2009, pursuant to her request appellant was moved into a fixed, part-time regular position, where she worked 30 hours per week at a rate of \$24.40 per hour at a level 6, Step M. It advised that she should be compensated for the other 10 hours per week.

On September 10, 2009 OWCP found that appellant's actual earnings as a part-time regular modified mail processing clerk, effective February 28, 2009, fairly and reasonably

² Appellant has current conditions of major depression and adjustment reaction; and lumbar and sacral condition.

³ The record reflects that appellant was working full time 40 hours a week until November 2007. In 2008 she was provided a modified position of 40 hours per week as a lobby clerk. Appellant noted that in February 2009 she was provided a part-time position of a mail processing clerk for 35 hours per week.

⁴ The description of duties included that she screen customers entering the lobby to identify eligible automated postal center (APC) transactions, know what APC transactions were available for the customer, and educated the customer regarding the transactions. Additionally, she was to monitor the drop box, provide feedback to customers and employees, encourage the use of APC machine by customers, maintain the appearance of the store by setting up, arranging and replenishing merchandise and postal forms, be neat and presentable, wear something that identified her as an employee, practice good customer service, and use the greet, inquire, suggest and thank (GIST) techniques to communicate with customers. The physical requirements included that she stand/sit and walk intermittently, use a chair with support as necessary and push/pull or lift up to 15 pounds intermittently.

represented her wage-earning capacity. It found that, based on actual earnings, appellant no longer had a loss of wage-earning capacity and reduced her wage-loss benefits to zero.

On September 14, 2009 counsel for appellant requested a telephonic hearing, which was held on December 10, 2009. Appellant continued filing claims for wage-loss compensation.

In a February 22, 2010 decision, OWCP denied appellant's claims for wage-loss compensation. It referred to the September 10, 2009 wage-earning capacity decision as one that denied claims for wage-loss compensation beginning February 28, 2009.

Counsel filed an application for review of the February 22, 2010 decision on March 15, 2010.

In an April 21, 2011 order remanding case, the Board found that appellant's wage-loss claims were actually requesting modification of the wage-earning capacity decision. The Board set aside the February 22, 2010 decision and remanded the case for OWCP to apply the proper standard of review and to issue an appropriate merit decision.⁵

Upon remand, OWCP further reviewed the record and by decision dated October 1, 2014, OWCP denied modification of the September 10, 2009 wage-earning capacity decision, as appellant had not met any of the three criteria for modifying the decision.

On October 6, 2014 appellant requested a telephonic hearing, which was held on April 17, 2015. Counsel argued that OWCP failed to address whether the original rating was in error or whether she was retrained or otherwise vocationally rehabilitated. He further argued that appellant was retrained for another job which resulted in a loss of her wage-earning capacity. Counsel indicated that the original position was based upon a modified make-shift position and did not provide the same amount of work hours as her original preinjury position and that she was entitled to compensation for the difference in work hours. Appellant testified that she had accepted the part-time job and was placed in the position as a result of her injury. She explained that the employing establishment was transferring clerks to various locations and she was unable to transfer as a result of the medication she was taking, which affected her driving ability.

By decision dated July 27, 2015, the OWCP hearing representative affirmed the October 1, 2014 decision, finding that appellant had not established a basis for modifying the 2009 loss of wage-earning capacity. She found that the job on which the wage-earning capacity was based was a valid job and not odd-lot or makeshift.

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

⁵ Docket No. 10-1146 (issued April 21, 2011).

wages. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.⁶

OWCP procedures provide 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.⁷

Chapter 2.1501 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. If OWCP is seeking modification, it must establish that the original rating was in error, that the injury-related condition has improved or that the claimant has been vocationally rehabilitated.⁸

ANALYSIS

On September 10, 2009 OWCP found that appellant's actual earnings as a part-time regular modified mail processing clerk, effective February 28, 2009, fairly and reasonably represented her wage-earning capacity and reduced her wage-loss benefits to zero.

Counsel argued that OWCP failed to address whether the original rating was in error or whether appellant was retrained or vocationally rehabilitated. He further argued that she had been retrained for another job that resulted in a loss of her wage-earning capacity, that the original position was based upon a modified make-shift position and did not provide the same amount of work hours as her original preinjury position, and that she was entitled to compensation for the difference in work hours.

The Board finds no error in the original wage-earning capacity determination. The record reflects and appellant does not contest that she had the capacity to earn wages as modified mail processing clerk. Counsel argues that she should have been rated based upon a 40-hour workweek and that she should be allowed 10 hours per week additional compensation. The Board finds that this position was medically and vocationally suitable and reasonably represented her wage-earning capacity. Furthermore, appellant requested to be transferred to this position and the employing establishment confirmed in a July 13, 2009 letter that appellant was a part-time flexible employee (PTF) at the date of injury and before her work stoppage, working

⁶ *Katherine T. Kreger*, 55 ECAB 633 (2004).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Wage-Earning Capacity*, Chapter 2.1501 (June 2013).

⁸ *Id.* at Chapter 2.1501.3.a(1) (June 2013).

approximately 20 to 30 hours each week. The Board notes that her wage-earning capacity was based upon a 30-hour workweek.

Counsel's argument that appellant was retrained for another job which resulted in a loss of her wage-earning capacity is contradicted by the record. Appellant requested to be transferred to the part-time modified position. Her argument that she wanted to continue in her full-time position but was concerned about being transferred due to her medication is not supported by the record.

Counsel also argued that the original position was based upon a modified make-shift position and did not provide the same amount of work hours as her original preinjury position. He argued that she was entitled to compensation for the difference in work hours. The Board finds that the modified mail processing clerk job which appellant accepted contained a clear position description, identified the title of the job, had a set schedule, and had clearly articulated the duties of the position. It was not a temporary position. In fact appellant had worked in this position since February 28, 2009. She has provided no evidence that she was unable to perform the duties of the modified position, there is no indication that appellant needed assistance from her supervisor or his coworkers to fulfill the assigned duties of her position or that she worked in a self-directed manner or schedule. The Board finds that OWCP has established that the position was a bona fide position.

The Board further notes that counsel did not argue that there was material change in the injury-related condition or argue that her accepted conditions had changed so as to prevent her from performing the job of a modified mail processing clerk.

The burden of proof is on the party attempting to show a modification of the wage-earning capacity. In this case, appellant has not submitted any medical evidence establishing a material change in the nature and extent of her injury-related conditions. She has not shown that she was retrained or otherwise vocationally rehabilitated or that the original wage-earning capacity was erroneous.⁹ Appellant therefore did not meet her burden of proof to establish that modification of the wage-earning capacity determination was warranted.

CONCLUSION

The Board finds that appellant has failed to establish modification of the September 10, 2009 wage-earning capacity.

⁹ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the July 27, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 15, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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