

Appellant was on wage-loss compensation until, on February 13, 1995 she accepted a full-time job as a modified letter carrier. The position met her physical restrictions and allowed her to work for eight hours a day, with no pushing, pulling or lifting over 25 pounds, and no repetitive climbing. The duties of the position were data input, writing reports, answering telephones, receiving visitors, photocopying, stuffing envelopes, preparing mail, and other miscellaneous office duties.

Over time, appellant accepted other full-time modified job offers. These job offers remained in the administrative field. On May 2, 2007 appellant bid for an assignment to case letters for two hours a day, and perform administrative duties for up to eight hours a day. The record reflects that on November 20, 2009 appellant accepted a different position which was primarily administrative/clerical, including answering the telephone. On May 4, 2012 appellant was offered a modified limited-duty position, which included, in addition to administrative duties, that she case a delivery route for two hours a day.

Appellant worked full time until February 27, 2013 when the employing establishment informed OWCP that appellant was in a leave-without-pay status with the employing establishment.

By decision dated April 29, 2013, OWCP issued a retroactive wage-earning capacity decision. It found that appellant had been working full time more than 60 days in the February 13, 1995 modified position and the actual wages she earned in the position of modified letter carrier, \$684.69 per week, fairly and reasonably represented her wage-earning capacity. OWCP further found that as her actual earnings in the modified letter carrier position met or exceeded the current, effective February 13, 1995, wages of her date-of-injury job, she would not be eligible for wage-loss compensation.

On May 2, 2013 appellant requested an oral hearing before an OWCP hearing representative.

By decision dated July 31, 2013, an OWCP hearing representative set aside the April 29, 2013 decision because the April 29, 2013 decision had not been served on appellant's authorized representative.

By decision dated August 14, 2013, OWCP reissued the April 29, 2013 decision.

On August 20, 2013 appellant requested an oral hearing, which was held on April 8, 2014.

At the April 8, 2014 hearing, appellant's representative argued that the February 13, 1995 modified letter carrier position was not a valid position upon which to base the August 14, 2013 LWEC determination. He contended that actual wages earned were not the best measure of an injured worker's earning capacity if such wages were earned in sheltered or odd-lot employment, as was the case with appellant. Mike Sullivan asserted that the evidence supported a finding that the February 13, 1995 modified letter carrier position was not a position at all, using the employing establishment's definitions; rather, that it was an assignment created specifically to accommodate her permanent work restrictions.

By decision dated May 29, 2014, an OWCP hearing representative affirmed the August 14, 2013 decision.

By letter dated May 27, 2015, appellant's representative requested reconsideration and reiterated his argument that the February 13, 1995 modified letter carrier position was not a valid position upon which to base the August 14, 2013 LWEC determination. He claimed that it was an assignment created specifically to accommodate appellant's permanent work restrictions, and was a sheltered or odd-lot employment. In support of his contentions, he submitted: 300 pages of OWCP and program procedures; job offers dated June 18, July 25, August 7, September 5, and December 19, 2014, and March 19, 2015; and a letter from her treating physician Board-certified in family medicine, Dr. Tish Landrum, in advising appellant that she was discontinuing her services.

By decision dated August 5, 2015, OWCP denied modification of the August 14, 2013 reissued wage-earning capacity decision.

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.² Section 8115(a) of FECA provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by her actual earnings if her actual earnings fairly and reasonably represent her wage-earning capacity.³ Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.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 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

OWCP's procedures provide that factors to be considered in determining whether the claimant's work fairly and reasonably represents her wage-earning capacity include the kind of appointment, that is, whether the position is temporary, seasonal, or permanent, and the tour of

² See *Katherine T. Kreger*, 55 ECAB 633 (2004). See 5 U.S.C. § 8115 (determination of loss of wage-earning capacity).

³ See 5 U.S.C. § 8115 (determination of loss of wage-earning capacity).

⁴ 5 U.S.C. § 8115(a); *Loni J. Cleveland*, 52 ECAB 171 (2000).

⁵ *Sharon C. Clement*, 55 ECAB 552 (2004).

⁶ *T.M.*, Docket No. 08-975 (issued February 6, 2009); *Tamra McCauley*, 51 ECAB 375, 377 (2000).

duty, that is, whether it is part time or full time.⁷ Further, a makeshift⁸ or odd-lot position designed for a claimant's particular needs will not be considered suitable.⁹

The Board finds that the case is not in posture for decision.

Section 20 C.F.R. § 10.126 requires OWCP to issue a decision containing findings of fact and a statement of reasons.¹⁰ OWCP erred in its August 5, 2015 decision by failing to discuss or analyze the arguments raised by the May 27, 2015 request for reconsideration. While OWCP listed the evidence appellant submitted, it did not provide any discussion or analysis regarding this evidence. It merely issued a summary statement that the evidence appellant submitted was not sufficient to meet her burden of proof.

It is incumbent upon OWCP to review all of the evidence of record and make findings based upon the evidence of record. OWCP should make findings as to whether appellant met her burden of proof to establish that the original loss of wage-earning capacity was in error, that appellant's subsequent work stoppage or change in alternate positions were due to a change in her injury-related condition or that appellant had been retrained or otherwise rehabilitated.

Accordingly, the case will be set aside and remanded for consideration of the medical evidence pursuant to the standards set out in section 8128(a) and section 20 C.F.R. § 10.126. After such further development as OWCP deems necessary, it shall issue a *de novo* decision to protect appellant's appeal rights.

CONCLUSION

The Board finds that the case is not in posture for decision.

⁷ *Id.*

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.815.7 (June 2013).

⁹ A makeshift position is one that is specifically tailored to an employee's particular needs and generally lacks a position description with specific duties, physical requirements and work schedule. See *Selden H. Swartz*, 55 ECAB 272 (2004); *William D. Emory*, 47 ECAB 365 (1996); *James D. Champlain*, 44 ECAB 438 (1993).

¹⁰ 20 C.F.R. § 10.126.

ORDER

IT IS HEREBY ORDERED THAT that the August 5, 2015 decision is set aside and remanded in accordance with this decision.

Issued: March 9, 2016
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board