



## **FACTUAL HISTORY**

The case has previously been before the Board. Appellant filed an occupational disease claim (Form CA-2) dated May 21, 1997 alleging that she sustained bilateral carpal tunnel syndrome as a result of her federal employment as a claims examiner. OWCP accepted the claim for bilateral carpal tunnel syndrome. Appellant also has a February 1990 claim accepted for cervical strain. She worked intermittently and then stopped working in December 2000 and received compensation for wage loss. By decision dated October 21, 2003, OWCP terminated appellant's compensation effective November 1, 2003, finding that she refused an offer of suitable work. The Board reversed the October 21, 2003 decision, finding the evidence did not establish the offered position of modified claims examiner was medically suitable.<sup>3</sup>

Appellant returned to work at the employing establishment on July 12, 2005 at 15 hours per week. As of July 12, 2005, she began receiving partial compensation. By decision dated January 17, 2007, the Board set aside an August 18, 2005 OWCP decision with respect to the compensation payable for partial disability.<sup>4</sup> The Board indicated that OWCP had not made proper findings as to the date of injury.

On December 22, 2005 the employing establishment offered appellant a position as a front desk receptionist. The organizational title was contact representative, and the position was a GS5, Step 10 position with wages of \$36,919.00 annually. Appellant returned to work as a front desk receptionist on April 3, 2006. By decision dated June 7, 2006, OWCP found that appellant's actual earnings of \$733.15 per week in the receptionist position fairly and reasonably represented her wage-earning capacity.

Appellant filed a claim for a recurrence of disability (Form CA-2a) commencing June 21, 2006. OWCP accepted the claim for a recurrence of disability on August 15, 2006, and then rescinded that acceptance by decision dated September 14, 2006. By decision dated February 2, 2007, it determined that appellant was not entitled to compensation based on a July 12, 2005 pay rate, as this was neither a date of injury nor a date of recurrence of disability. In a decision dated October 11, 2007, the Board affirmed the June 7, 2006 wage-earning capacity decision and the February 2, 2007 pay rate OWCP decisions.<sup>5</sup>

By decision dated February 5, 2007, OWCP again found that the front desk receptionist position, with earnings of \$733.15 per week, represented appellant's wage-earning capacity. It reduced appellant's compensation based on her wage-earning capacity. The calculations used a pay rate date for compensation purposes of December 12, 2000, when appellant stopped working.

Appellant filed another claim for a recurrence of disability commencing October 5, 2007. By decision dated March 17, 2008, OWCP denied modification of the February 5, 2007 wage-

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<sup>3</sup> Docket No. 04-0341 (issued November 12, 2004).

<sup>4</sup> Docket No. 06-0129 (issued January 17, 2007).

<sup>5</sup> Docket No. 07-0938 and No. 07-1493 (issued October 11, 2007).

earning capacity determination. The Board affirmed the March 17, 2008 OWCP decision on December 8, 2008.<sup>6</sup> The Board found appellant had not established modification of the loss of wage-earning capacity based on December 12, 2000 date-of-injury pay rate. As to error in the February 5, 2007 decision, appellant again had argued that OWCP should have used a pay rate from July 2005, when she returned to part-time work. The Board noted this was not appropriate under 5 U.S.C. § 8101(2), and OWCP had properly used a date of December 12, 2000 as a date of recurrence of disability.

On September 17, 2010 appellant submitted a CA-7 (claim for compensation) for wage loss from April 2, 2006.<sup>7</sup> By decision dated October 27, 2010, OWCP handled the claim as a request for modification of loss of wage-earning capacity and found the evidence insufficient to warrant modification of the February 5, 2007 wage-earning capacity determination. An OWCP hearing representative affirmed the October 27, 2010 OWCP decision in a decision dated May 16, 2011. The hearing representative found there was no medical evidence of a material change in appellant's condition, nor was there evidence to support appellant's argument that the receptionist job was inappropriate for a wage-earning capacity determination.

The Board affirmed the hearing representative's decision on March 15, 2012.<sup>8</sup> The Board found no error in the February 5, 2007 wage-earning capacity determination, noting the front desk receptionist position was not makeshift or otherwise inappropriate for a wage-earning capacity determination.

In a report dated April 24, 2014, Dr. Olayinka Ogunro, a Board-certified orthopedic surgeon, provided results on examination. He opined that appellant could return to a claims examiner position with four hours of keyboarding and four hours using a voice-activated system.

On January 9, 2015 the employing establishment offered appellant a full-time position as a claims examiner, with four hours of assisted, voice-activated equipment. The position was a GS-9, Step 10 position with annual wages of \$66,508.00 (\$1,279.00 per week), and was available January 25, 2015.<sup>9</sup> Appellant accepted the job offer. The employing establishment indicated on April 9, 2015 that appellant had been successfully working as a claims examiner.

OWCP requested that the employing establishment provide information regarding the current salary for a front desk receptionist (GS-5, Step 10). The employing establishment indicated in a May 12, 2015 e-mail that a GS-5, Step 10 was currently paid \$43,899.00 annually (\$844.21 per week). With respect to the date-of-injury position, the employing establishment

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<sup>6</sup> Docket No. 08-1975 (issued December 8, 2008).

<sup>7</sup> Appellant was still working at the employing establishment. She submitted a "desk audit evaluation summary" for the contact representative position, which reflected that as of October 1, 2009 she had been moved from the front desk location.

<sup>8</sup> Docket No. 11-1639 (issued March 15, 2012).

<sup>9</sup> The record contains a similar job offer dated January 5, 2015, which reports the wages as \$65,850.00.

indicated that appellant was a GS-7, Step 8 at the time of the injury, and the current salary was \$51,583.00 annually (\$991.98 per week).

By letter dated May 21, 2015, OWCP advised appellant it proposed to modify the February 5, 2007 wage-earning capacity determination. It found she had been vocationally rehabilitated and had returned to a new job earning at least 25 percent more than the current salary for the earlier loss of wage-earning capacity and more than the current salary of her date-of-injury position.

On June 23, 2015 appellant submitted a statement dated June 16, 2015, asserting that she had not performed the duties of a contact representative. She alleged that she had been performing makeshift duties according to a desk audit. Appellant resubmitted a copy of a July 7, 2010 desk audit of her work duties.

By decision dated July 2, 2015, OWCP modified the February 5, 2007 wage-earning capacity determination finding that the current full-time position of claims examiner reflected her current wage-earning capacity. It found appellant had been employed in a new job, with additional training, earning at least 25 percent more than the earlier wage-earning position and more than her date-of-injury position.

In a separate decision dated July 2, 2015, OWCP found the earnings from the present claims examiner position fairly and reasonably represented appellant's wage-earning capacity. It found her current earnings exceeded the current pay rate for the date-of-injury position, and she therefore had no loss of wage-earning capacity.

### **LEGAL PRECEDENT -- ISSUE 1**

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.<sup>10</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>11</sup>

With respect to modification of wage-earning capacity, OWCP's procedure manual provides:

“Vocationally Rehabilitated. It may be appropriate to modify the loss of wage-earning capacity rating on the grounds that the claimant has been vocationally rehabilitated if the claimant is employed in a new job (a job different from the job for which he or she was rated) obtained with additional training which pays at least 25 percent more than the current pay of the job for which the claimant was rated.

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<sup>10</sup> *Sue A. Sedgwick*, 45 ECAB 211 (1993).

<sup>11</sup> *Id.*

(1) If there is evidence of increased earnings as outlined above, and these earnings have continued for at least 60 days, the claims examiner should:

(a) Determine the duration, exact pay, duties and responsibilities of the current job.

(b) Determine whether the claimant underwent training or vocational preparation to earn the current salary.

(c) Assess whether the actual job differs significantly in duties, responsibilities, or technical expertise from the job at which the claimant was rated.”

### **ANALYSIS -- ISSUE 1**

In the present case, OWCP issued a February 5, 2007 wage-earning capacity determination based on the position of desk receptionist/contact representative. It has determined that appellant was vocationally rehabilitated and modified the wage-earning capacity determination effective July 2, 2015. The Board finds OWCP met its burden of proof to modify the wage-earning capacity determination.

The position of claims examiner clearly represented a new job from the desk receptionist/contact representative position that was the basis for the February 5, 2007 wage-earning capacity determination. The job differed significantly in duties and responsibilities. In addition, appellant clearly underwent retraining as the position required different duties and extensive use of voice-activated equipment for half of the workday. The employing establishment indicated that appellant had worked more than 60 days and was successfully performing the duties of the claims examiner position.

The claims examiner position also paid at least 25 percent more than the contact representative position. The current wages for the desk receptionist/contact representative position, a GS-5 Step 10 position, was \$43,898.92 per year (or \$844.21 per week). The claims examiner position was a GS-9, Step 10 position, with wages of \$66,508.00 per year, or \$1,279.00 per week.

The Board accordingly finds OWCP properly found appellant was vocationally rehabilitated. Appellant was employed in a different job from that job on which the wage-earning capacity was originally determined, with significantly different duties and responsibilities, she was retrained in the position as to working with voice-activated equipment and had greater than 25 percent increased earnings. OWCP met its burden of proof to modify the wage-earning capacity determination.

Appellant may request modification of a wage-earning capacity determination supported by new evidence or argument, at any time before OWCP.

## LEGAL PRECEDENT -- ISSUE 2

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 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>12</sup>

OWCP procedures indicate that a formal decision cannot be issued until the injured employee has completed 60 days of employment.<sup>13</sup> OWCP's procedure manual provides guidelines for determining wage-earning capacity based on actual earnings:

“(1) *Type of Appointment.* To determine whether the injured employee's work fairly and reasonable represents his/her [wage-earning capacity], the [claims examiner] should consider whether the kind of appointment and tour of duty are at least equivalent to those of the job held on the [date of injury]. If they are not, the [claims examiner] should not consider the work representative of the injured employee's [wage-earning capacity] unless one of the exceptions noted in subparagraphs (a) or (b) below apply.

(a) Temporary or Casual Employment. Reemployment of a temporary or casual worker in another temporary or casual position is proper, as long as it will last at least 90 days.

(b) Part-Time Positions.

(i) A part-time position may form the basis for a [wage-earning capacity] if the employee was a part-time worker at the time of injury.

(ii) 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].”<sup>14</sup>

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

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<sup>12</sup> *Dennis E. Maddy*, 47 ECAB 259 (1995).

<sup>13</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity Based on Actual Earnings*, Chapter 2.815.5 (June 2013).

<sup>14</sup> *Id.* at Chapter 2.815.5(c) (June 2013).

determination.<sup>15</sup> The Board has discussed several factors that may support a finding 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>16</sup>

In addition to a job that is odd lot or makeshift, OWCP procedures identify other instances where reemployment may not be the basis for a wage-earning capacity: an injured employee who has been released to full-time work is working less than full-time hours; a job represents permanent seasonal employment in an area where year-round employment is available (unless the employee was a career seasonal or temporary employee when injured; and a job that is temporary where the employee's job when injured was permanent.<sup>17</sup>

The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision,<sup>18</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>19</sup>

### **ANALYSIS -- ISSUE 2**

As previously noted, appellant returned to work as a claims examiner. As of July 2, 2015, she had been working in the position for at least 60 days. The claims examiner position was a permanent, full-time position with no evidence that it was makeshift or otherwise inappropriate for a wage-earning capacity determination.

To properly determine the loss of wage-earning capacity, OWCP applies the *Shadrick* formula. As noted above, the employee's current earnings are divided by current pay rate for the date-of-injury job, and the wage-earning capacity in terms of percentage is calculated.<sup>20</sup> In this case the current earnings were \$1,279.00 per week, while the current pay rate for the date-of-injury job was \$991.98 per week. Since current earnings exceed the current date-of-injury job pay rate, appellant has a 100 percent wage-earning capacity, or zero percent loss of wage-earning capacity.

Based on the evidence of record, the Board finds OWCP properly reduced appellant's compensation to zero.

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<sup>15</sup> See *A.J.*, Docket No. 10-619 (issued June 29, 2010).

<sup>16</sup> *Id.*

<sup>17</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity Based on Actual Earnings*, Chapter 2.815.5(c)(2) (June 2013).

<sup>18</sup> 5 ECAB 376 (1953).

<sup>19</sup> 20 C.F.R. § 10.403(d).

<sup>20</sup> *Id.*

**CONCLUSION**

The Board finds that OWCP properly modified the February 5, 2007 wage-earning capacity. The Board further finds that OWCP properly reduced appellant's compensation benefits to zero.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated July 2, 2015 are affirmed.

Issued: May 20, 2016  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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