



knee chondromalacia of the lateral tibial plateau, right and left knee discoid of the lateral meniscus, left knee lateral meniscal tear, and bilateral plantar fasciitis, bilateral ankle strain, foot strain, and lumbar strain. It did not initially accept any period of disability as causally related to the accepted injury. Appellant accepted a modified employment position on May 11, 2010. She received intermittent wage-loss compensation benefits on the supplemental rolls commencing April 6, 2011. Appellant underwent a left plantar fascia release on May 25, 2012 and received wage-loss compensation benefits on the periodic rolls as of July 29, 2012. On June 6, 2013 she underwent an accepted left knee arthroscopy with partial lateral menisectomy and debridement.

Appellant's treating physician, Dr. Hosea Brown III, a specialist in internal medicine, reported on February 3, 2014 that appellant could return to modified work on February 3, 2014. He completed a duty status report (Form CA-17) on February 3, 2014 wherein he noted appellant's work restrictions. Dr. Brown continued to examine appellant and provide work restrictions throughout 2014 and 2015.

In a duty status report dated December 29, 2015, Dr. Brown recommended work restrictions of lifting no more than 10 pounds intermittently, no more than four hours of standing intermittently, no more than four hours of walking intermittently, no more than half an hour of climbing intermittently, and no kneeling, pushing, or pulling more than two hours intermittently. He advised that appellant must have sedentary work, and that she should have one five-minute break per hour.

On January 6, 2016 appellant accepted a position as a customer care agent at the employing establishment, effective January 9, 2016. The physical requirements of the position required sitting in an office chair, occasional simple grasping of a computer mouse, occasional pushing/pulling of a computer mouse, and occasional fine manipulations when using a keyboard. The use of the mouse and keyboard were not continuous. Appellant began work in this position on January 11, 2016.

By decision dated July 14, 2016, OWCP determined that appellant's actual earnings as a customer care agent commenced January 11, 2016 and fairly and reasonably represented her wage-earning capacity. Appellant's weekly pay rate when disability began was \$1,086.69 (effective March 28, 2012) her current weekly pay rate for the job when injured (effective January 11, 2016) was \$1,151.13, and the current pay rate for her position (effective January 11, 2016) as a customer care agent was \$1,151.13. It was noted that appellant returned to work on January 11, 2016 as a customer care agent for \$59,859.52, which equaled a weekly salary of \$1,151.13. Because the wages she earned as a customer care agent equaled the adjusted wages of her date-of-injury position, OWCP found that there was no loss of wage-earning capacity. Therefore, appellant was not entitled to receive further wage-loss compensation. However, she remained eligible for medical benefits associated with her work injury.

### **LEGAL PRECEDENT**

Section 8115(a) of FECA provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by the employee's actual earnings if the actual earnings fairly and reasonably represent the employee's wage-earning

capacity.<sup>2</sup> Generally, wages actually earned are the best measure of a wage-earning capacity, and in the absence of showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such a measure.<sup>3</sup>

OWCP procedures state that, after a claimant has been working for 60 days, it will make a determination as to whether actual earnings fairly and reasonably represent wage-earning capacity.<sup>4</sup> The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision,<sup>5</sup> has been codified at section 10.403 of OWCP regulations. 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>6</sup>

### ANALYSIS

The Board finds that appellant's actual earnings as a customer care agent for the employing establishment fairly and reasonably represents her wage-earning capacity. On January 6, 2016 appellant accepted a position as a customer care agent at the employing establishment, effective January 11, 2016. The current pay rate for her position as a customer care agent was \$1,151.13, which equaled the adjusted wages of her date-of-injury position. Thus, there was no loss of wage-earning capacity.<sup>7</sup> On July 14, 2016 OWCP determined that appellant's actual earnings as a customer care agent beginning January 11, 2016 fairly and reasonably represented her wage-earning capacity.

Dr. Brown, appellant's treating physician, reported on December 29, 2015 that appellant could work full-time modified duty with restrictions of no lifting no more than 10 pounds intermittently, no more than four hours of standing intermittently, no more than four hours of walking intermittently, no more than half an hour of climbing intermittently, no kneeling, pushing, or pulling more than two hours intermittently. Dr. Brown advised that appellant must have sedentary work, and that she should have one five-minute break per hour.

Appellant began full-time work as a customer care agent on January 11, 2016 and had worked in this position for more than 60 days when OWCP determined her wage-earning capacity.

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<sup>2</sup> 5 U.S.C. § 8115(a); *Loni J. Cleveland*, 52 ECAB 171 (2000).

<sup>3</sup> *Lottie M. Williams*, 56 ECAB 302 (2005).

<sup>4</sup> See *L.J.*, Docket No. 14-0970 (issued August 21, 2014); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.815.5 (June 2013).

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

<sup>6</sup> 20 C.F.R. § 10.403(d). The pay rate for compensation purposes is then multiplied by the wage-earning capacity percentage. This amount is subtracted from the pay rate for compensation purposes to determine the loss of wage-earning capacity.

<sup>7</sup> The Board notes that under FECA, the term "disability" is defined as an inability, due to an employment injury, to earn the wages the employee was receiving at the time of the injury, *i.e.*, an impairment resulting in a loss of wage-earning capacity. See generally, *Y.O.*, Docket No. 16-1886 (issued February 24, 2017); *Prince W. Wallace*, 52 ECAB 357 (2001).

There is no evidence demonstrating that this employment position was seasonal or temporary and there is no evidence demonstrating that she was working less than eight hours per day. There is also no evidence that the position consisted of makeshift work designed for appellant's particular needs.<sup>8</sup> Furthermore appellant did not stop work as a customer care agent because of a change in her injury-related conditions. The evidence supports that appellant's wages as a customer care agent fairly and reasonably represented her wage-earning capacity.<sup>9</sup>

As appellant's actual earnings in her position as a customer care agent fairly and reasonably represent her wage-earning capacity, the Board must determine whether OWCP properly calculated her wage-earning capacity based on her actual earnings.<sup>10</sup> The Board finds that OWCP properly found that she had no loss of wage-earning capacity based on her actual earnings. Appellant was placed in a saved salary position and her current weekly earnings equaled the current weekly wages of her date-of-injury position. Therefore, she had no loss of wage-earning capacity under the *Shadrick* formula.

Accordingly, OWCP properly determined that appellant had no loss of wage-earning capacity based on its finding that her actual earnings as a customer care agent fairly and reasonably represented her wage-earning capacity.

On appeal, appellant expresses frustration at delayed payment of compensation regarding past claims for wage-loss compensation. As OWCP has not issued a formal decision denying appellant's claim for wage loss, the Board lacks jurisdiction over that issue.<sup>11</sup>

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

### **CONCLUSION**

The Board finds that appellant's actual earnings as a customer care agent fairly and reasonably represented her wage-earning capacity effective January 11, 2016.

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<sup>8</sup> See *J.C.*, 58 ECAB 700 (2007).

<sup>9</sup> *Id.*

<sup>10</sup> See *J.C.*, Docket No. 08-1046 (issued August 19, 2008).

<sup>11</sup> See 20 C.F.R. § 501.2(c).

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 14, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 6, 2017  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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