

ISSUE

The issue is whether appellant has met her burden of proof to establish that her loss of wage-earning capacity determination should be modified.

FACTUAL HISTORY

This case has previously been before the Board. The facts of the case as presented in the Board's prior decision are incorporated herein by reference. The relevant facts are set forth below.

OWCP accepted that on or before October 19, 1992 appellant, then a 30-year-old mail processing machine operator, sustained lumbar disc herniations at L4-5 and L5-S1 due to repetitive lifting and bending in the performance of duty. She underwent an L5-S1 fusion in 1993. On April 6, 1994 appellant underwent a posterior L4-5 fusion with screw and plate instrumentation. OWCP approved both surgical procedures.

Dr. William A. Earman, Jr., an attending osteopathic physician Board-certified in orthopedic surgery, opined on July 7, 1995 that appellant had reached maximum medical improvement. Appellant required permanent physical restrictions due to her postsurgical status. Dr. Earman limited lifting to 20 pounds, with no bending, stooping, or twisting. Appellant also required frequent changes of position. Dr. Edward G. Nicholson, an attending osteopathic physician Board-certified in family practice, reduced her lifting limitation to 10 pounds due to lumbar instability.

On December 30, 1996 appellant accepted a permanent job offer as a modified mail processor in the cancellation division, working from 3:00 p.m. to 11:30 p.m. Monday through Friday. The position complied with her permanent medical restrictions of no lifting over 10 pounds, no bending or twisting, and the ability to sit or stand at will, sorting one ounce mail rejected from a cancellation machine. The employing establishment explained that it offered the position because of contractual obligations to provide "work available to employees injured on the job." It noted the tasks required in the job and the physical requirements.

By decision dated May 15, 1997, OWCP determined that appellant had no loss of wage-earning capacity as she had worked in the modified mail processor position at retained pay for more than 60 days.

From June 2000 through 2005, appellant continued working as a modified mail processor under the limitations specified in the December 30, 1996 position description. In 2002, OWCP assigned a vocational rehabilitation counselor to her case to assist the employing establishment in obtaining a prescribed ergonomic chair.

On August 23, 2006 appellant accepted a full-time modified reassignment position in the cancellation unit. She had no production quota and could work at her own pace. Appellant was allowed to change positions at will, with lifting limited to five pounds. In reports from June 8, 2007 to December 6, 2010, Dr. Yolanda Escalona, an attending Board-certified internist,

affirmed appellant's work restrictions against lifting more than five pounds, with no kneeling, bending, stooping, or twisting.

Appellant claimed wage-loss compensation beginning September 13, 2010. She claimed 80 hours of wage-loss compensation for the period December 6 to 17, 2010. On the reverse side of the claim forms, the employing establishment wrote "NRP [National Reassessment Process], No Work Available." By decision dated January 13, 2011, OWCP denied appellant's claim for a recurrence of disability as the medical evidence did not establish a spontaneous worsening of the accepted lumbar conditions.

The employing establishment placed appellant in "stand by" status on February 4, 2011. In a March 4, 2011 letter, it advised her that, under the limited-duty guidelines of NRP, there was no work available within her restrictions as of that day. A review of area operations demonstrated that there were no necessary tasks within the medical restrictions due to appellant's accepted injuries available in her commuting area. Appellant was not to report for duty until work could be found for her. The employing establishment instructed her to claim wage-loss compensation under FECA. Appellant claimed compensation for total disability commencing March 4, 2011.

Appellant submitted reports dated from March 2011 through October 2012, from Dr. Holly Carobene, an attending physician Board-certified in pain management, diagnosing cervical and lumbar radiculopathy. Dr. Carobene administered lumbar epidural injections. Dr. Escalona affirmed prior work restrictions through November 3, 2011.

In a February 22, 2012 letter, appellant contended that the May 15, 1997 loss of wage-earning capacity determination was in error as it was based on a makeshift job specifically designed to accommodate her work limitations and was not available on the open labor market.

In an April 5, 2012 letter, OWCP advised appellant of the evidence needed to establish that the May 15, 1997 loss of wage-earning capacity determination should be modified. It noted that she must submit factual evidence that the original determination was in error or that she had been vocationally retrained. Alternatively, appellant was to submit medical evidence demonstrating a material worsening of the accepted conditions such that she could no longer perform the permanent modified-duty position. OWCP afforded her 30 days to submit such evidence.

Appellant submitted April 17 and 24, 2012 reports from Dr. Carobene reiterating prior work restrictions.

By decision dated July 23, 2012, OWCP denied appellant's claim for wage-loss compensation beginning March 4, 2011 as the medical evidence failed to establish a worsening of the accepted conditions such that she was totally disabled for work.

On August 16, 2012 appellant requested an oral hearing before an OWCP hearing representative, held on November 27, 2012. At the hearing, she asserted that the May 15, 1997 loss of wage-earning capacity decision was erroneous as it was based on a makeshift position. Appellant submitted physical therapy notes and an October 2, 2012 report from Dr. Carobene noting administration of a left L5 nerve root block.

By decision dated February 11, 2013, an OWCP hearing representative affirmed the July 23, 2012 decision, finding that appellant had presented insufficient medical evidence to establish a material worsening of the accepted condition. She further found that the evidence failed to establish that the May 15, 1997 loss of wage-earning capacity determination was erroneous. Appellant then appealed to the Board.

During the pendency of the prior appeal, appellant submitted claims for wage-loss compensation from February 4 to September 27, 2013.³

In an August 26, 2013 letter, an employing establishment human resources manager asserted that the “Rehabilitation Modified Assignment offered to and accepted by [appellant] on December 30, 1996, was a makeshift position. The loss of wage-earning capacity determination issued on May 15, 1997, as a result of this makeshift position appears to have been made in error.”

By decision and order issued September 10, 2013,⁴ the Board set aside the February 11, 2013 decision, finding that OWCP had not addressed FECA Bulletin No. 09-0005 or fully follow the procedures outlined therein for claims, such as this, in which limited-duty positions were withdrawn pursuant to NRP. The Board remanded the case for additional development, including a review of the medical evidence to determine if it established continuing work-related disability. A *de novo* decision was to follow.

On October 21, 2013 appellant claimed wage-loss compensation from October 14 to 25, 2013.

In an October 22, 2013 letter, OWCP advised appellant to submit additional evidence regarding the requested modification of the May 15, 1997 loss of wage-earning capacity determination, establishing that the original rating was in error, that she had been retrained or rehabilitated, or that the accepted condition had materially worsened. It afforded her 30 days to submit such evidence. Appellant did not submit evidence within the allotted time.

By decision dated December 11, 2013, OWCP denied modification of the May 15, 1997 loss of wage-earning capacity determination, finding that there was “no information of record that either implies or contends that the loss of wage-earning capacity decision was without any factual basis at the time it was issued,” that appellant had been retrained, or that the accepted condition had materially worsened.

Appellant disagreed and on January 9, 2014 requested an oral hearing. She submitted a February 19, 1997 personnel action form (SF-50) and a June 8, 2004 human resources form noting her return to work on December 30, 1996 in a permanent limited-duty assignment as a

³ By decision dated September 24, 1998, OWCP granted a schedule award for 11 percent permanent impairment of the right lower extremity due to the accepted lumbar disc herniations. By decision dated February 27, 2013, OWCP denied appellant’s claim for a schedule award for extremity impairment related to accepted lumbar disc displacement. It found that she had not submitted medical evidence establishing that the accepted condition caused a ratable impairment of a scheduled member.

⁴ Docket No. 13-0993 (issued September 10, 2013).

modified mail processor. Appellant also provided a copy of the March 4, 2011 letter advising her that the limited-duty position had been eliminated under the NRP.

At the hearing, held May 14, 2014, appellant contended that the August 26, 2013 employing establishment letter confirming that the December 30, 1996 job offer was for a makeshift position established that the original determination was in error. She also asserted that the termination of her permanent limited-duty position constituted a recurrence of disability requiring modification of the May 15, 1997 loss of wage-earning capacity determination. Appellant noted that she was approved for disability retirement, effective October 15, 2013.

By decision dated August 6, 2014, an OWCP hearing representative set aside OWCP's December 11, 2013 decision and remanded the case for additional development on whether the December 30, 1996 job offer was for a *bona fide* or makeshift position. Following such development, OWCP was to issue a *de novo* decision regarding whether the May 15, 1997 loss of wage-earning capacity determination should be modified.

In an August 28, 2014 letter, appellant asserted that the December 30, 1996 job offer was a position not available on the open labor market. The job offer was created solely to accommodate her physical restrictions. "It was never available for bid or application by any other employee, and would cease to exist once [appellant] left."

In a September 17, 2014 e-mail, an employing establishment health and resources manager explained that appellant's "rehab Job Modified Mail Processor Job ... effective December 30, 1996, was created specifically for [appellant] and in strict compliance with her medical restrictions." Appellant's duties were not associated with an organized work unit, but instead charged to a separate operations code classification for "Rehabilitation." The manager noted that although appellant performed her duties "in an isolated location within the building," her assigned tasks were an "essential part of the mail processing operation" that were "currently performed today" under a new classification code, with duties "absorbed into the various mail processing units, charged to the regular productive mail processing operation associated with the type of mail being processed, and where the damaged mail occur[s]."

By decision dated November 17, 2014, OWCP denied modification of the May 15, 1997 loss of wage-earning capacity determination, finding that the September 17, 2014 e-mail from the employing establishment proved that the December 30, 1996 job offer was for a *bona fide* position. As appellant's assigned tasks were "essential in the mail processing operation," they were not makeshift. Therefore, the May 15, 1997 loss of wage-earning capacity determination was not issued in error.

Appellant disagreed, and in a December 10, 2014 letter requested an oral hearing, held April 29, 2015. At the hearing, she asserted that if her job tasks as a modified mail processor were essential as asserted by the employing establishment in the September 17, 2014 e-mail, then her position should not have been eliminated under the NRP.

The employing establishment submitted comments to the hearing transcript. In a May 20, 2015 letter, a health and resources manager newly alleged that appellant's permanent modified assignment was not eliminated, but that she "removed herself from her job assignment

when on February 20, 2010 she stopped work on total disability for [File No.] xxxxxx591 and underwent arthroscopic repair of her left shoulder.” The manager asserted that appellant “reported for duty February 4, 2011 with restrictions for” nonoccupational lumbar and cervical spine conditions. She contended that appellant was sent home on March 4, 2011 not because there was no work available within the permanent restrictions due to the accepted conditions, but because of the additional restrictions for the nonindustrial complaints.

By decision dated June 22, 2015, an OWCP hearing representative affirmed the November 17, 2014 decision denying modification of the May 15, 1997 loss of wage-earning capacity determination. The hearing representative found that appellant had not established that the December 30, 1996 position was makeshift, that the accepted conditions had materially worsened, or that she had been retrained or vocationally rehabilitated.

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.⁵

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.⁶ OWCP’s procedures provide that, “[i]f 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 CE [claims examiner] will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity.”⁷ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁸

Factors to be considered in determining if a position fairly and reasonably represents the injured employee’s wage-earning capacity include: (1) whether the kind of appointment and tour of duty are at least equivalent to those of the date-of-injury job; (2) whether the job is part time (unless the claimant was a part-time worker at the time of injury), or sporadic in nature; (3) whether the job is seasonal in an area where year-round employment is available; and (4) whether the job is temporary where the claimant’s previous job was permanent.⁹

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

⁶ *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sue A. Sedgwick*, 45 ECAB 211 (1993).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (June 2013). See *Harley Sims, Jr.*, 56 ECAB 320 (2005).

⁸ *Selden H. Swartz*, 55 ECAB 272, 278 (2004).

⁹ *Supra* note 7 at Part 2 -- Claims, *Reemployment: Modification of Loss of Wage-Earning Capacity Decisions*, Chapter 2.1501(3)a (June 2013).

Additionally, a makeshift or odd-lot position designed to meet an injured employee's particular needs will not be considered representative of one's wage-earning capacity.¹⁰

Assuming the position is both vocationally and medically suitable and conforms to the above-noted criteria, the position will generally be deemed to represent the employee's wage-earning capacity after she has successfully performed the required duties for at least 60 days.¹¹

ANALYSIS

OWCP accepted that appellant sustained L4-5 and L5-S1 disc herniations in the performance of duty. Appellant underwent L5-S1 fusion with plate fixation in 1993, and a posterior L4-5 fusion in 1994. On December 30, 1996 she returned to work in a permanent rehabilitation position as a full-time modified mail handler, within permanent restrictions offered by her attending physicians. OWCP issued a May 15, 1997 loss of wage-earning capacity determination, based on appellant's actual earnings in the modified mail handler position.

On August 23, 2006 appellant accepted another full-time modified mail handler position within her permanent work limitations. The position had no production quota and allowed her to work at her own pace. The employing establishment terminated that position, effective March 14, 2011 under the NRP. Appellant requested modification of the May 15, 1997 loss of wage-earning capacity determination, contending that it was erroneous as it was based on a makeshift position. OWCP denied modification by decisions dated June 22, 2015, finding that the December 30, 1996 position was *bona fide*.

It is axiomatic that an employee with an occupational injury may require job modifications or accommodations in order to return to work. The Board has long recognized that an employing establishment may accommodate an employee's work-related medical restrictions by modifying the way a job is performed, if the assigned tasks of that position are those of a regular job, available in the community or open labor market, that would have been performed by another employee.¹² However, the Board has also held that a job created specifically for a claimant, composed of odd-lot tasks within an employee's medical restrictions, is makeshift.¹³

In *A.J.*, the Board set forth criteria for determining whether an offered position was makeshift and not a regular position. These criteria include: (1) lack of an official title or position description; (2) strict limitations which indicated that the claimants would not be able to secure a position in the community-at-large with such limited duties; (3) a lack of meaningful tasks; and (4) a job that is temporary in nature.¹⁴ In this case, the December 30, 1996 job offer, upon which the loss of wage-earning capacity was based, was for a permanent position with a

¹⁰ *A.J.*, Docket No. 10-0619 (issued June 29, 2010).

¹¹ *Supra* note 7 at Chapter 2.815.5(e) (June 2013).

¹² *L.C.*, Docket No. 13-1934 (issued September 29, 2014), *Jeffrey T. Hunter*, 52 ECAB 503 (2001).

¹³ *P.G.*, Docket No. 14-1797 (issued September 16, 2015).

¹⁴ *Supra* note 10.

job title and detailed description. It thus meets the first and fourth criteria under *A.J.* The physical restrictions, including the 10-pound lifting limitation, prohibition on bending and stooping, and the ability to sit or stand at will, are not overly strict. Lifting restrictions as low as five pounds have not been found to preclude finding a similar position in the community at large.¹⁵ The modified mail handler position thus meets the second criterion.

The modified mail handler position also met the third criterion, whether the job required meaningful tasks, such that it was a “regular” position that would have been performed by another employee. Appellant was assigned to process one-ounce mail rejected by a cancellation machine. The employing establishment explained in its September 17, 2014 letter that, at the time of the assignment on December 30, 1996, these tasks were an “essential part of the mail processing operation” for handling damaged mail. It added that these tasks were still performed in the regular mail processing operation. The Board finds that the employing establishment’s explanation supports that the permanent, modified position was not makeshift.¹⁶

The Board notes that, in the August 26, 2013 letter, an employing establishment human resources manager asserted that the December 30, 1996 job offer was for a makeshift position. However, the employing establishment did not explain how the modified mail handler position did not meet the four criteria under *A.J.*, or why it was not a regular position that would have been performed by another employee. Therefore, this letter is insufficient to establish that the position was makeshift, or that the May 15, 1997 loss of wage-earning capacity determination was otherwise in error.

On appeal, appellant describes severe financial and personal hardships. She contends that she meets all criteria for modifying a loss of wage-earning capacity determination under the Board’s holding in *Elmer Strong*.¹⁷ Appellant alleges that the May 15, 1997 loss of wage-earning capacity determination was erroneous as it was based on a makeshift position. As found above, the Board finds that the modified mail handler position was *bona fide*.

Appellant also argues that the employing establishment’s withdrawal of her light-duty position under the NRP from March 4, 2011 to October 15, 2013 constituted a recurrence of disability. However, the employing establishment submitted a May 20, 2015 letter explaining that she voluntarily stopped work on February 20, 2010, and was sent home on March 4, 2011 due to additional restrictions imposed for nonoccupational complaints. Additionally, appellant asserts that the accepted condition worsened with no intervening injury, and that she was vocationally rehabilitated through OWCP’s vocational rehabilitation program. However, she did not submit sufficient evidence to establish either argument.

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

¹⁵ *T.P.*, Docket No. 14-1207 (issued November 7, 2014).

¹⁶ *L.C.*, *supra* note 12.

¹⁷ 17 ECAB 226 (1965) (where the Board held that the three criteria for modification of a standing loss of wage-earning capacity determination were: (1) a material change in the nature and extent of the injury-related condition; (2) the employee has been retrained or vocationally rehabilitated; and (3) the original determination was in error).

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that a loss of wage-earning capacity determination should be modified.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 22, 2015 is affirmed.

Issued: June 7, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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