

ISSUE

The issue is whether appellant met her burden of proof to modify an October 28, 2008 loss of wage-earning capacity.

On appeal counsel asserts that the original loss of wage-earning capacity determination was in error as it was based on a part-time position and that the September 14, 2007 statement of accepted facts was incorrect.

FACTUAL HISTORY

On September 14, 2005 appellant, then a 36-year-old customer service representative who worked full time, filed a traumatic injury claim (Form CA-1) alleging that she injured her right wrist, lower back, and left knee when she slipped and fell on a wet floor that day. She stopped work. On December 12, 2005 OWCP accepted brachial neuritis/radiculitis, other, and unspecified thoracic/lumbar neuritis/radiculitis. Appellant received appropriate continuation of pay and was placed on the periodic compensation rolls.

Dr. Leonard A. Bruno, a Board-certified neurosurgeon, began treating appellant in December 2005. He diagnosed cervical sprain and herniated disc at C6-7, C7 radiculitis, sciatica, questionable nerve bruising, and lumbar sprain secondary to the September 2005 fall. Dr. Bruno continued to submit reports describing appellant's treatment. He referred her to Dr. Gregory W. Cooper, a Board-certified neurologist, who opined that appellant's complaints of neck pain and left arm paresthesias were the result of the September 14, 2005 work injury. Dr. Simon Galapo, Board-certified in anesthesia and pain medicine, began pain management in November 2006.³

In September 2006, OWCP referred appellant to Dr. Richard J. Mandel, a Board-certified orthopedic surgeon, for a second-opinion evaluation. In a November 2, 2006 report, Dr. Mandel concluded that she could work part-time modified duty.

On September 18, 2007 OWCP referred appellant to Dr. Kevin F. Hanley, a Board-certified orthopedic surgeon, for a second-opinion evaluation. On October 12, 2007 Dr. Hanley diagnosed aggravated cervical disc disease with whiplash syndrome, mild lumbar discomfort, tinnitus, and vertigo of the left side. He opined that the September 14, 2005 employment injury permanently aggravated a degenerative process in the neck, manifested by significant pain, limitation of motion, and unresponsiveness to normal treatment. Dr. Hanley advised that appellant could work eight hours a day with permanent restrictions.

Appellant continued treatment with Dr. Bruno and Dr. Galapo. On August 14, 2008 Dr. Bruno advised that she could work a four-hour day of limited duty.

By letter dated August 28, 2008, the employing establishment advised appellant that medical evidence revealed she was capable of returning to part-time work effective

³ An October 9, 2006 electrodiagnostic study of the upper extremities was mildly abnormal, consistent with mild nerve root irritation to either the C5-6 nerve root or to the upper brachial plexus trunk on the left.

August 25, 2008. It offered her the position of a part-time customer service representative. On August 29, 2008 appellant accepted the modified customer service representative position for four hours daily.

OWCP next referred appellant to Dr. Raoul Biniaurishvili, a Board-certified neurologist. On September 3, 2008 Dr. Biniaurishvili diagnosed mild degenerative cervical spine disease, myofasciitis of the cervical paraspinal musculature, and tension headaches. He advised that appellant could continue working as a customer service representative and could gradually increase her work hours.

By decision dated October 28, 2008, OWCP determined that appellant's actual earnings in the part-time modified customer service representative position fairly and reasonably represented her wage-earning capacity and reduced her compensation accordingly.⁴

Appellant received a third-party settlement regarding the September 14, 2005 employment injury. She continued treatment with Dr. Bruno and Dr. Galapo.

In reports dated November 4 and 7, 2014, Dr. Bruno noted appellant's complaint of neck pain radiating into her head with severe headaches, bilateral arm pain, and increasing vertigo. He diagnosed worsening C5-6 and C6-7 herniated disc, recommended surgery, and advised that she could not work from November 4, 2014 to March 1, 2015 due to the herniated discs from C5 to C7.

Appellant stopped work on November 4, 2014 and filed Form CA-7 claims for compensation beginning that day. Dr. Bruno continued to advise that she could not work.

Dr. Stephen J. Dante, a Board-certified neurosurgeon, examined appellant on February 10, 2015. He reviewed imaging studies and diagnosed cervical spondylosis with radiculopathy. Dr. Dante concluded that a treatment option would be cervical decompression and fusion surgery.

In February 2015, OWCP referred appellant to Dr. Robert Allen Smith, a Board-certified orthopedic surgeon, for a second-opinion evaluation. In a February 27, 2015 report, Dr. Smith opined that there were no objective examination findings to support her complaints and nothing to suggest an ongoing soft tissue sprain of the neck or any active neuritis/radiculitis in the extremities, and that, based on multiple MRI scan reports, she had preexisting degenerative disease of both her neck and back. He advised that appellant could return to work with regard to the accepted conditions. On April 8, 2015 Dr. Smith advised that, as the findings of the October 9, 2006 electrodiagnostic study were mild and more than eight years old,⁵ it would be inappropriate to base any decision on surgery without an updated study showing a progressive neurological deficit.

⁴ In a September 15, 2008 decision, OWCP determined that an overpayment of compensation in the amount of \$277.72 was created because appellant continued to receive FECA compensation after her return to work on August 25, 2008. Appellant repaid the overpayment.

⁵ *Supra* note 3.

In reports dated March 26 to April 3, 2015, Dr. James S. Harrop, a Board-certified neurosurgeon, noted seeing appellant for a long history of chronic neck and arm pain. He described physical examination and MRI scan findings. Dr. Harrop diagnosed cervical myelopathy and recommended anterior cervical fusion at C5-6 and C6-7. He requested surgical authorization.

OWCP determined that a conflict in medical evidence had been created between Dr. Bruno and Dr. Smith regarding whether appellant had continuing residuals of the September 14, 2005 employment injury. In April 2015, it referred her to Dr. William H. Simon, a Board-certified orthopedic surgeon, for an impartial evaluation. In a June 7, 2015 report, Dr. Simon described appellant's complaints and his physical examination findings. He diagnosed degenerative disc disease of the cervical spine, particularly at C5-6, with mild degenerative changes at C4-5 and C6-7, which had worsened with the passage of time, noting that it had been 10 years since the September 14, 2005 work injury.⁶ Dr. Simon concluded that the requested surgery, which was scheduled for June 8, 2015, was not for an employment-related condition, but for her underlying degenerative disc disease.

In a May 14, 2015 report, Dr. Bruno noted treating appellant since 2005 for neck and arm pain from a cervical disc herniation that also caused cervical vertigo and migraine headaches, and that, as of November 4, 2014, her disc herniations were worsening. He opined that, within a reasonable degree of medical certainty, she had herniated cervical discs at C5-6 and C6-7, which required surgery to prevent further deterioration in her clinical condition, further nerve damage and increase in symptoms of neck pain, arm pain, weakness, and numbness.

Dr. Harrop performed C5-6 and C6-7 anterior cervical discectomy and fusion on June 8, 2015.

By decision dated July 1, 2015, OWCP denied modification of the October 28, 2008 loss of wage-earning capacity decision. It found that the weight of the medical evidence rested with the opinion of Dr. Simon, the referee examiner, who determined that appellant's employment injury had resolved without residuals and that she could return to her modified part-time work, with regard to the accepted conditions.

⁶ Appellant had a number of magnetic resonance imaging (MRI) scans of the cervical spine. An October 13, 2005 scan demonstrated mild disc bulges and spurring at C4-5, C5-6, and C6-7 with possible foraminal encroachment. A September 26, 2006 scan showed disc bulging and spondylotic changes at C4-5, C5-6, and C5-7 with mild ventral impingement and mild multilevel encroachment. A May 16, 2007 scan demonstrated no major change from the September 26, 2006 study. An April 12, 2011 scan showed multilevel spondylosis resulting in multilevel neural foraminal stenosis and no evidence of frank disc herniation. An April 13, 2012 scan demonstrated no significant change when compared to the April 2011 study. A September 4, 2014 scan showed left foraminal stenosis at C6-7 due to an eccentric disc bulge, a prominent right disc herniation at C5-6, and right foraminal stenosis at C4-5. A cervical spine scan on April 14, 2015 demonstrated degenerative changes including tiny right disc protrusions at C4-5 and C5-6. A cervical spine computerized tomography scan that day revealed mild-to-moderate degenerative changes with no high-grade central or foraminal narrowing.

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of his or her duty.⁷ Disability means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.⁸

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.⁹ OWCP procedures at section 2.1501 contain provisions regarding the modification of a formal loss of wage-earning capacity.¹⁰ 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 materially changed; or (3) the claimant has been vocationally rehabilitated.¹¹

OWCP's procedures provide that factors to be considered in determining whether the claimant's work fairly and reasonably represents his or her wage-earning capacity include the kind of appointment, that is, whether the position is temporary, seasonal or permanent, and the tour of duty, that is, whether it is part time or full time.¹² Further, a makeshift or odd-lot position designed for a claimant's particular needs will not be considered suitable.¹³

In the case of *O.V.*,¹⁴ the Board found that OWCP abused its discretion when it determined that the claimant's actual earnings in part-time reemployment fairly and reasonably represented his or her capacity to earn wages in the open labor market. The Board explained that OWCP procedures prohibited a loss of wage-earning capacity determination based on part-time reemployment unless the claimant was a part-time worker at the time of injury.¹⁵

⁷ 5 U.S.C. § 8102(a).

⁸ 20 C.F.R. § 10.5(f).

⁹ *Katherine T. Kreger*, 55 ECAB 633 (2004).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity*, Chapter 2.1501 (June 2013).

¹¹ *Id.* at Chapter 2.1501.3(a).

¹² *Id.* at Chapter 2.815.5.c(1).

¹³ *Id.* at Chapter 2.815.5.c(2)(a).

¹⁴ Docket No. 11-0098 (issued September 30, 2011).

¹⁵ *Id.*

ANALYSIS

OWCP accepted that on September 14, 2005 appellant sustained brachial neuritis/radiculitis, thoracic/lumbar neuritis/radiculitis, and cervical sprain. In an October 28, 2008 decision, it reduced her compensation based on its determination that her actual earnings in the modified part-time position of customer service representative fairly and reasonably represented her wage-earning capacity. Appellant continued to work in the modified position until November 4, 2015 when she stopped work on the advice of Dr. Bruno, her attending neurosurgeon.

By decision dated July 1, 2015, OWCP denied modification of the October 28, 2008 loss of wage-earning capacity decision. It found that the special weight of the medical evidence rested with the opinion of Dr. Simon, the referee examiner, who had determined that appellant's employment injury had resolved without residuals and that she could return to her modified part-time work, with regard to the accepted conditions.

OWCP procedures that were in effect at the time of OWCP's original wage-earning capacity determination prohibited a loss of wage-earning capacity determination based on part-time reemployment where the claim, as here, was a full-time worker at the time of injury.¹⁶ Its procedures were changed effective June 4, 2013, to allow that, in some circumstances, a loss of wage-earning capacity determination could be based on actual earnings in a part-time position, even if the date-of-injury position was full time. OWCP did not specify that the new procedures contemplated retroactive application.¹⁷ Chapter 2.815.5c(1)(b)(ii) of the new procedures provides that OWCP's policy change is consistent with the statutory purpose of section 8115 of FECA, which anticipates loss of wage-earning capacity determination for partial disability based on actual earnings where those earnings fairly and reasonably represent the injured employee's wage-earning capacity.¹⁸ Since OWCP did not clearly indicate its intention to retroactively apply the new procedures, the Board finds that these procedures do not apply to appellant's wage-earning capacity in the case at hand.¹⁹

A basis for modifying a loss of wage-earning capacity decision is to establish that the original decision was in error.²⁰ The Board finds that, under the facts of this case, appellant was a full-time worker on the day of injury, it was error for OWCP to determine on October 28, 2008 that a part-time modified position fairly and reasonably represented her wage-earning capacity. The Board finds, therefore, that OWCP abused its discretion in determining appellant's loss of

¹⁶ See *supra* note 10 at Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7a (July 1997).

¹⁷ *Id.* at Chapter 2.815.5.c(1)(b)(2) (June 2013); see FECA Transmittal 13-09 (issued June 4, 2013).

¹⁸ *Id.*

¹⁹ See *R.R.*, Docket No. 15-0129 (issued December 28, 2015).

²⁰ *Supra* note 10 at Chapter 2.1501.4 (June 2013).

wage-earning capacity based on a part-time position.²¹ The Board will reverse OWCP's July 1, 2015 decision.²²

CONCLUSION

The Board finds that OWCP abused its discretion when it found that appellant's actual earnings in part-time reemployment fairly and reasonably represented her wage-earning capacity.

ORDER

IT IS HEREBY ORDERED THAT the July 1, 2015 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 25, 2017
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

²¹ See *O.V.*, Docket No. 11-98 (issued September 30, 2011).

²² Based on the Board's posture in this decision, appellant's additional arguments on appeal need not be addressed.