

OWCP accepted the claim for left shoulder strain. She also sustained right shoulder strain and thoracic strain due to an August 18, 2001 work injury under another file number.

In a report dated September 10, 2001, Dr. Steve Danahey, a surgeon, diagnosed right thoracic sprain and strain and a new left shoulder sprain and strain. He recommended increased work restrictions.

On September 10, 2001 the employing establishment offered appellant a limited-duty assignment in the manual unit. The position required no repetitive lifting over five pounds. The duties were described as working in the manual unit “[c]asing mail one piece at a time. [Appellant] will not work out of her limitations. [She] will not case mail above her shoulder. [Appellant] will case mail into the correct mail slot one at a time.” The job offered instructed her to work within her restrictions in a safe manner and noted that her assigned duties and schedule might change depending on mail volume.

In an April 22, 2002 work restriction evaluation, Dr. Danahey found that appellant could work eight hours per day with restrictions that included lifting intermittently up to 10 pounds, pushing and pulling up to 20 pounds, no reaching above the shoulder and avoiding repetitive motion on machines.

On September 5, 2003 OWCP requested that the employing establishment submit a copy of appellant’s current limited-duty position and the permanent job offer. In a September 23, 2003 response, the employing establishment related that she was working as a modified distribution clerk in a permanent classified position. It indicated that appellant began work on September 10, 2001 and provided salary information.

By decision dated March 3, 2004, OWCP reduced appellant’s compensation to zero based on its finding that her actual earnings as a modified distribution clerk effective September 10, 2001 fairly and reasonably represented her wage-earning capacity.

On March 6, 2008 appellant accepted a modified assignment as a clerk.² The duties included lifting under 20 pounds and no reaching above the shoulder. On January 23, 2009 appellant accepted another position as a modified clerk with similar work restrictions.

On February 10, 2010 appellant filed a notice of recurrence of disability beginning February 2, 2010 causally related to her September 8, 2001 employment injury. She attributed her recurrence of disability to the withdrawal of her limited-duty assignment under the National Reassessment Process (NRP). On February 12, 2010 appellant filed a claim for compensation beginning February 2, 2010.

In duty status reports dated February 8 and 12, 2010, Dr. Joseph J. Soler, Board-certified in emergency medicine, diagnosed bilateral shoulder strain and found that appellant could work with restrictions on continually lifting up to 10 pounds for two hours per day or intermittently

² By decision dated February 8, 2006, OWCP granted appellant a schedule award for a 15 percent left upper extremity impairment.

lifting up to 20 pounds for two hours per day. He further found that she could push or pull for four hours per day and bend and twist for one hour per day but could not reach over her shoulder.

By decision dated March 15, 2010, OWCP denied appellant's claim for compensation after finding that she did not establish modification of the established wage-earning capacity determination.³

On appeal, appellant's attorney contends that the original wage-earning capacity determination was in error as the job offered was in a makeshift position. He notes that she had performed a series of limited-duty assignments beginning in 2001 at the time OWCP issued its wage-earning capacity decision. Counsel cites *A.J.*⁴ in support of his allegation that the position was designed for appellant's specific needs. He further contends that the position was not classified or permanent and noted that she was subsequently assigned to work other positions. Counsel asserts that noncompetitive employment cannot represent an employee's wage-earning capacity.

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.⁵ Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.⁶

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.⁷ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁸

When a formal loss of wage-earning capacity determination is in place and light duty is withdrawn, the proper standard of review is not whether appellant sustained a recurrence of disability, but whether OWCP should modify its decision according to the established criteria for modifying a formal loss of wage-earning capacity determination.⁹ OWCP's procedures provide

³ In a decision dated March 3, 2011, OWCP denied modification of its March 15, 2010 decision. The Board and OWCP may not have concurrent jurisdiction over the same issue in a case. Consequently, any decision by OWCP on an issue pending before the Board is null and void. *Douglas E. Billings*, 41 ECAB 880 (1990). As the March 3, 2011 decision was issued after appellant's appeal to the Board on September 10, 2010 and is on the same issue on appeal, it is null and void.

⁴ Docket No. 10-619 (issued June 29, 2010).

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

⁶ *Sharon C. Clement*, 55 ECAB 552 (2004).

⁷ *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Tamra McCauley*, 51 ECAB 375, 377 (2000).

⁸ *Id.*

⁹ *Id.*

that when the employing establishment has withdrawn a light-duty assignment, which accommodated the appellant's work restrictions and a formal wage-earning capacity decision has been issued, the decision will remain in place, unless one of the three accepted reasons for modification applies.¹⁰

ANALYSIS

OWCP accepted that appellant sustained right shoulder strain and thoracic strain due to an August 18, 2001 injury and left shoulder strain due to a September 8, 2001 injury. On March 3, 2004 it found that her actual earnings as a modified distribution clerk effective September 10, 2001 fairly and reasonably represented her wage-earning capacity and reduced her compensation to zero. On February 10, 2010 appellant filed a recurrence of disability beginning February 2, 2010 due to the withdrawal of her limited-duty assignment as part of the NRP.

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.¹¹ Appellant did not contend that she experienced a material change in the nature and extent of her injury-related condition. Instead she argued that her actual earnings in the position upon which the original loss of wage-earning capacity was based did not fairly and reasonably represent her wage-earning capacity as the position was makeshift in nature.

The employing establishment offered appellant a limited-duty assignment on September 10, 2001 working in the manual unit. The duties of the assignment included casing mail one piece at a time without overhead reaching. The job assignment letter advised appellant to work within her restrictions and indicated that her assigned duties and schedule might change depending on mail volume. At the time the employing establishment offered her the assignment, it did not have a specific job title. On September 23, 2003 in response to an OWCP inquiry, the employing establishment related that appellant was working as a modified distribution clerk in a permanent classified position.

In *A.J.*, the Board discussed the factors that render a position makeshift.¹² The Board found that OWCP improperly determined that the position of modified clerk fairly and reasonably represented the claimant's wage-earning capacity as there was no detailed job description or set schedule for the position and as the claimant's medical limitations precluded many clerical duties.

The Board finds that the duties described in the September 10, 2001 limited-duty assignment offer were makeshift in nature and designed to fit appellant's particular needs. The

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.7(a)(5) (October 2005).

¹¹ *See supra* note 6.

¹² Docket No. 10-619 (issued June 29, 2010).

position required appellant to case mail one piece at a time and lift five pounds or less. The job offer indicated only that she should work within her limitations and in a safe manner. The limited-duty assignment offer did not contain a formal job title or position description and the assignment provided that appellant might work other duties and a different schedule depending on mail volume. Even though the employing establishment subsequently noted that the title of the position was modified distribution clerk, it did not provide a more detailed description of the position. The Board finds that the modified assignment upon which OWCP based its March 3, 2004 wage-earning determination was makeshift in nature and thus did not fairly and reasonably represented appellant's wage-earning capacity. Accordingly, appellant has established that the March 3, 2004 wage-earning capacity determination should be modified as the original determination was erroneous.

CONCLUSION

The Board finds that appellant has established that OWCP's wage-earning capacity determination should be modified.

ORDER

IT IS HEREBY ORDERED THAT the March 15, 2010 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 19, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board