

**United States Department of Labor
Employees' Compensation Appeals Board**

R.J., Appellant

and

**U.S. POSTAL SERVICE, J.J. BUCHANAN
POST OFFICE, Chicago, IL, Employer**

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**Docket No. 10-2114
Issued: June 15, 2011**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 17, 2010 appellant, through her attorney, filed a timely appeal from April 26 and July 23, 2010 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established modification of the established wage-earning capacity determination.

FACTUAL HISTORY

On December 17, 2004 appellant, then a 26-year-old rehabilitation carrier, filed a claim alleging that she sustained an injury to her left knee and ankle on that date when she slipped and fell on ice. OWCP accepted the claim for a fracture of the left fibula. It paid appellant compensation for total disability beginning February 26, 2005.

¹ 5 U.S.C. § 8101 *et seq.*

On February 21, 2007 appellant accepted a rehabilitation job offer from the employing establishment working as a full-time modified carrier.² The position required casing mail three to five hours per day, answering telephones and correspondence for two to three hours per day, doing reports and using scanners one to three hours per day and assisting carriers for two hours per day. The physical requirements consisted of driving a vehicle for one hour, sitting and simple grasping for eight hours, reaching above the shoulder for six to eight hours and no lifting, standing, walking, kneeling, climbing or twisting.

OWCP paid appellant compensation for intermittent wage loss because no limited-duty work was available at the employing establishment beginning November 10, 2008.

In a February 11, 2009 telephone call, the employing establishment related that it had not been able to provide a job for appellant as of November 2008 but that it should be able to provide a permanent job within 30 days.

By letter dated June 18, 2009, OWCP noted that appellant had returned to full-time limited duty on June 6, 2009. It requested that the employing establishment forward a copy of the job offer and its duties.

On September 3, 2009 appellant telephoned OWCP and related that she had not yet received a job offer. The employing establishment advised OWCP by telephone that she continued to work in the February 21, 2007 position and provided salary information.

By decision dated September 4, 2009, OWCP reduced appellant's compensation to zero based on its finding that her actual earnings as a modified letter carrier effective February 21, 2007 fairly and reasonably represented her wage-earning capacity and established that she had no loss of earnings.

In a duty status report dated February 22, 2010, Dr. Jay M. Brooker, a Board-certified orthopedic surgeon, found that appellant was unable to work. In an office visit note of the same date, he related that x-rays of the ankle showed "severe degenerative changes" and found that she should be off work.

On February 26, 2010 appellant filed a recurrence of disability on February 13, 2010 causally related to her December 17, 2004 employment injury. She related that she worked limited duty but had flare ups of her chronic ankle condition.

On March 1, 2010 appellant filed a claim for compensation for intermittent time lost from work from February 13 to 26, 2010.

By letter dated March 11, 2010, OWCP noted that appellant had filed a claim for disability, from February 13 to 26, 2010. It informed her of the requirements for establishing modification of an established wage-earning capacity determination and requested that she submit supporting evidence, including a rationalized medical opinion, within 30 days.

² By decision dated April 19, 2007, the Office granted appellant a schedule award for a 15 percent permanent impairment of the left upper extremity.

On March 17, 2010 appellant filed claims for intermittent wage loss beginning February 27, 2010. In duty status reports dated March 2 and 8, 2010, a physician found that she could work with restrictions.

On April 14, 2010 Dr. Brooker related:

“This is in response to a letter given to [appellant] that her limited duty has been withdrawn as a result of the national reassessment process. [She] has an ongoing case and injury that can flare up from time to time and I have stated that numerous times in my past letters and dictations. I am not really su[r]e how this arbitrary rule can supersede the fact that she had an injury that unfortunately has led to severe arthritis and can flare up from time to time and can be simply treated and return her to a previous status.”

Dr. Brooker related that when he last treated appellant he released her to return to her usual light duty following an exacerbation of degenerative arthritis of the ankle due to past injuries. He questioned why her job had been removed as she had any injury “and then she recovered only to the point where she could do light duty.”

By decision dated April 26, 2010, the Office denied appellant’s claim for compensation beginning February 13, 2010 on the grounds that she failed to establish modification of the established loss of wage-earning capacity determination. It noted that the employing establishment found that no work was available for her under the National Reassessment Process.

On April 21, 2010 appellant requested reconsideration. She asserted that she was claiming compensation for time lost from work due to a flare up of her condition. Appellant stated, “These flare ups have been going on since I [have] been back to work. They have been coming once or twice out of the year since I [have] been back.”

By decision dated July 23, 2010, the Office denied modification of its September 4, 2009 wage-earning capacity determination. It determined that the medical evidence showed that she was experiencing flare-ups due to a condition that it had not accepted as employment related.

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.³ Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.⁴

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

³ See 5 U.S.C. § 8115 (determination of wage-earning capacity).

⁴ *Sharon C. Clement*, 55 ECAB 552 (2004).

rehabilitated or the original determination was, in fact, erroneous.⁵ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁶

ANALYSIS

OWCP accepted that appellant sustained a fracture of the left fibula on December 17, 2004. Appellant received compensation for total disability until February 21, 2007, when she returned to a rehabilitation job with the employing establishment as a full-time modified carrier. She worked in this position until November 2008, when the employing establishment began sending her home because there was no work available. On February 11, 2009 the employing establishment related that it did not have a permanent position for appellant as of November 2008 but that it was anticipating providing a permanent job within 30 days. Appellant returned to work full time on June 6, 2009. In September 2009, she notified OWCP that she had not received a job offer. The employing establishment informed OWCP by telephone that appellant was working in the position offered February 21, 2007. By decision dated September 4, 2009, OWCP reduced her compensation after finding that her actual earnings as a modified letter carrier beginning February 21, 2007 fairly and reasonably represented her wage-earning capacity. Appellant submitted a claim for compensation for intermittent time lost from work beginning February 13, 2010. She also filed a recurrence of disability on February 13, 2010, alleging that she was experiencing flare ups of her ankle condition. OWCP denied her claim for intermittent wage loss based on its finding that she had not established modification of the established wage-earning capacity determination. It further determined that her alleged recurrence of disability was a request for modification of the wage-earning capacity decision, and found that she had not submitted evidence sufficient to warrant modification.

Once a wage-earning capacity is in place, it can only be modified if appellant can show that her condition has materially worsened or if there is sufficient evidence to find that the original determination was in error.⁷ OWCP based its wage-earning capacity determination on the February 21, 2007 offered position of modified carrier. This position, however, was not permanent as evidenced by the fact that the employing establishment did not have full-time work for appellant in the offered position beginning November 2008 and informed OWCP that it was looking for a permanent position. While appellant returned to work as a modified carrier in June 2009, there is no evidence supporting that it was a permanent position. OWCP procedures are clear. When determining whether earnings in alternative employment fairly and reasonably represent the employee's wage-earning capacity, OWCP may not consider the work suitable when the job is temporary and the employee's previous job was permanent.⁸ It does not appear that appellant's date-of-injury position was temporary and there is no evidence that the February 2007 limited-duty assignment was formally classified as a permanent position.⁹ Consequently, she has established that the September 4, 2009 wage-earning capacity should be

⁵ *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Tamra McCauley*, 51 ECAB 375, 377 (2000).

⁶ *Id.*

⁷ *Id.*

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (July 1997).

⁹ At the time of her injury, appellant was working as a rehabilitation letter carrier effective July 24, 2004.

modified. Upon return of the case record, OWCP should consider whether appellant was working in a permanent position at the time of her work injury. It should further adjudicate her claim for disability beginning February 13, 2010 and determine whether she sustained a recurrence of disability.

CONCLUSION

The Board finds that appellant has established modification of the established wage-earning capacity determination.

ORDER

IT IS HEREBY ORDERED THAT the July 23 and April 26, 2010 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: June 15, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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