

FACTUAL HISTORY

OWCP accepted that on July 11, 2005 appellant, then a 48-year-old rural carrier, sustained a right elbow contusion, right elbow/forearm sprain, neck strain and right shoulder sprain/strain when a heavy box fell on her right arm and elbow.² On November 29, 2007 appellant filed an occupational disease claim which was accepted for right carpal tunnel syndrome.

Appellant stopped work for various periods and received disability compensation. On November 5, 2009 she returned to full-time work at the employing establishment as a permanent modified clerk. The position was consistent with appellant's work restrictions of not lifting more than five pounds.³

In a February 19, 2010 decision, OWCP found that the actual wages of the permanent modified clerk position appellant started on November 5, 2009 fairly and reasonably represented her wage-earning capacity. It stated, "Your actual earnings meet or exceed the current wages of the job held when injured. Therefore, according to the provisions of 5 U.S.C. § 8106 and 5 U.S.C. § 8115 your entitlement to compensation for wage loss ended the date you were reemployed with no loss in earning capacity, and your compensation payments have been terminated." OWCP indicated that the decision did affect coverage of her medical benefits.

On January 27, 2011 appellant filed a Form CA-7 (Claim for Compensation) for wage loss beginning January 19, 2011. The employing establishment had made a determination that no work was available for her as part of the National Reassessment Process.

In a February 24, 2011 letter, OWCP advised appellant of the deficiencies of her claim for compensation. Appellant was informed that in order to be entitled to compensation, her wage-loss claim effective January 19, 2011 must be treated as a claim for modification of the previously established wage-earning capacity decision. He was generally advised of the three criteria necessary for modifying such decisions and afforded 30 days to provide evidence substantiating that she had met any of the criteria.

Appellant submitted a Form CA-7 covering the period February 28 to March 11, 2011, a functional requirement list and several progress notes from early 2011 which contained illegible signatures. In a March 17, 2011 letter, Mike Watson, appellant's representative at the time, asserted that the February 19, 2010 wage-earning capacity decision was based on "make[-]shift work." He claimed that the make-shift nature of the permanent modified clerk position was supported by the fact that appellant later received several limited-duty job offers. Mr. Watson stated that as part of the National Reassessment Process appellant's limited-duty job offer assignments had been withdrawn and eliminated.

² On August 3, 2004 filed an occupational disease claim which was later accepted for neck and right shoulder sprains. On September 1, 2004 appellant was released to regular duty.

³ In early 2010, appellant's lifting restriction was raised to 10 pounds.

In an April 18, 2011 decision, OWCP denied appellant's request for modification of its February 18, 2010 wage-earning capacity determination.

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 and it remains undisturbed until properly modified.⁴ OWCP's procedure manual provides 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 [claims examiner] will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity."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 The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁷

In addition, Chapter 2.814.11 of OWCP's procedure manual contains provisions regarding the modification of a formal loss of wage-earning capacity. 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 changed; or (3) the claimant has been vocationally rehabilitated. OWCP procedures further provide that the party seeking modification of a formal loss of wage-earning capacity decision has the burden to prove that one of these criteria has been met. If it is seeking modification, it must establish that the original rating was in error, that the injury-related condition has improved or that the claimant has been vocationally rehabilitated.⁸

Section 8115(a) of FECA provides that the "wage-earning capacity of an employee is determined by her actual earnings if her actual earnings fairly and reasonably represent her wage-earning capacity."⁹ The Board has stated, "Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted

⁴ *Katherine T. Kreger*, 55 ECAB 633 (2004).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

⁶ *Stanley B. Plotkin*, 51 ECAB 700 (2000).

⁷ *Id.*

⁸ See Federal (FECA) Procedure Manual, *supra* note 5 at Chapter 2.814.11 (June 1996).

⁹ 5 U.S.C. § 8115(a).

as such measure.”¹⁰ However, wage-earning capacity may not be based on an odd-lot or make-shift position designed for an employee’s particular needs or a position that is seasonal in an area where year-round employment is available.¹¹ Wage-earning capacity may only be based on a temporary or part-time position if the position held by the employee at the time of injury was a temporary or part-time position.¹²

OWCP procedures direct that a wage-earning capacity determination based on actual wages be made following 60 days of employment.¹³ The procedures provide for a retroactive determination where an employee has worked for at least 60 days, the employment fairly and reasonably represents the claimant’s wage-earning capacity and work stoppage did not occur due to any change in the claimant’s injury-related condition.¹⁴

ANALYSIS

In its February 19, 2010 decision, OWCP based appellant’s loss of wage-earning capacity on a determination that her actual earnings as a permanent modified clerk beginning November 5, 2009 represented her wage-earning capacity. This determination was consistent with section 8115(a) of FECA which provides that the wage-earning capacity of an employee is determined by her actual earnings if her actual earnings fairly and reasonably represent her wage-earning capacity.¹⁵ OWCP properly noted that appellant had received actual earnings as a permanent modified clerk for more than 60 days in that she had been working in the position since November 5, 2009 when OWCP issued its February 19, 2010 decision and there is no evidence that appellant’s earnings in this position did not fairly and reasonably represent her wage-earning capacity.

Before OWCP and on appeal, appellant claimed that the permanent modified clerk did not fairly and reasonably represent her wage-earning capacity because it was a make-shift

¹⁰ *Floyd A. Gervais*, 40 ECAB 1045, 1048 (1989); *Clyde Price*, 32 ECAB 1932, 1934 (1981). Disability is defined in the implementing federal regulations as “the incapacity, because of an employment injury, to earn the wages the employee was receiving *at the time of injury*.” (Emphasis added.) 20 C.F.R. § 10.5(f). Once it is determined that the actual wages of a given position represent a employee’s wage-earning capacity, OWCP applies the principles enunciated in *Albert C. Shadrick*, 5 ECAB 376 (1953), in order to calculate the adjustment in the employee’s compensation.

¹¹ See *James D. Champlain*, 44 ECAB 438, 440-41 (1993); *supra* note 5 at Chapter 2.814.7a(1) (July 1997). In *Jeffery T. Hunter*, 52 ECAB 503 (2001), the Board found that the duties of “regular” employment are covered by a specific job classification and such duties would have been performed by another employee if the employee did not perform them. The test is not whether the tasks that the employee performs would have been done by someone else, but instead whether he occupied a regular position that would have been performed by another employee. *Id.* In determining whether a given job is makeshift, the Board has looked to such factors as whether the job has detailed work duties and a set schedule. See *A.J.*, Docket No. 10-619 (issued June 29, 2010).

¹² *Supra* note 5 at Chapter 2.814.7a(1), (3) (July 1997).

¹³ See *supra* note 5 at Chapter 2.814.7c (December 1993).

¹⁴ *Id.* at Chapter 2.814.7e (December 1993).

¹⁵ See *supra* note 9 and accompanying text.

position designed for her particular needs.¹⁶ However, appellant has not established this claim as the permanent modified clerk position had detailed work duties and a set schedule. Appellant asserted that the make-shift nature of the permanent modified clerk position was supported by the fact that she later received several limited-duty job offers and by the fact that the National Reassessment Process eliminated her limited-duty job offer assignments. However, appellant did not adequately explain how these circumstances, which occurred well after she had been working as a permanent modified clerk for 60 days, showed that the position was make-shift in nature.

The evidence established that appellant's actual earnings as a permanent modified clerk fairly and reasonably represented her wage-earning capacity. OWCP properly adjusted her compensation based on this wage-earning capacity determination.¹⁷ For these reasons, appellant has not shown that OWCP's original determination with regard to her wage-earning capacity was erroneous.

Appellant suggested that there was a material change in the nature and extent of her employment-related condition. However, she did not submit medical evidence with a rationalized medical opinion explaining why an employment-related condition prevented her from performing the permanent modified clerk position or otherwise establish that OWCP improperly determined her wage-earning capacity.¹⁸ Moreover, appellant has not been retrained or otherwise vocationally rehabilitated such that her work as a permanent modified clerk would not be representative of her wage-earning capacity.

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 did not meet her burden of proof to establish that modification of OWCP's February 19, 2010 wage-earning capacity decision was warranted.

¹⁶ See *supra* note 11 and accompanying text.

¹⁷ OWCP properly applied the principles enunciated in *Albert C. Shadrick*, *supra* note 10, in order to calculate the adjustment in appellant's compensation.

¹⁸ See *Norman F. Bligh*, 41 ECAB 230, 237-38 (1989). Appellant submitted several progress notes from early 2011 which contained illegible signatures. Even if these documents are actually signed by physicians and constitute medical evidence, they do not show a material change in appellant's injury-related condition.

ORDER

IT IS HEREBY ORDERED THAT the April 18, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 23, 2012
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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