

FACTUAL HISTORY

On August 15, 2013 appellant, then a 74-year-old bulk mail technician, filed a traumatic injury claim (Form CA-1) alleging that she sustained an injury in the performance of duty on August 14, 2013 as a result of her attempt to catch a large, heavy parcel before it fell on the floor. OWCP accepted the claim for complete right rotator cuff rupture and authorized a July 17, 2014 right shoulder surgery. OWCP paid appellant disability compensation.

In an August 29, 2014 report, Dr. Robert J. Morgan, a Board-certified orthopedic surgeon, released appellant to work that day with restrictions of no lifting above shoulder level with the right upper extremity; no lifting more than one pound waist to shoulder with the right upper extremity; no lifting floor to waist with the right upper extremity; and no ladder use.

On October 29, 2014 Dr. Morgan updated appellant's work restrictions to no lifting over one pound above shoulder level with the right upper extremity; no lifting more than 5 pounds waist to shoulder with the right upper extremity; and no lifting more than 10 pounds floor to waist with the right upper extremity.

Effective November 10, 2014, appellant returned to work full-time as a modified bulk mail clerk, without wage loss. The duties included boxing mail, answering the door, answering telephones, processing nixie mail, and scanning and distributing accountable mail. The physical requirements included standing for three-and-a-half hours per day, reaching and fine manipulation for six hours per day, sitting for five hours per day, and lifting 10 pounds or less within appellant's right arm restrictions for six hours per day.

On March 21, 2016 the employing establishment confirmed that appellant was still working the same modified assignment and advised that it was not a temporary position.

By decision dated April 12, 2017, OWCP found that appellant's earnings as a modified bulk mail clerk fairly and reasonably represented her wage-earning capacity. It noted that appellant had demonstrated her ability to perform the assigned duties of the job for 60 days or more and; therefore, the modified bulk mail clerk position was considered suitable to the limitations of her partial disability. Because appellant's actual weekly earnings as a modified bulk mail clerk met or exceeded the current wages of her date-of-injury position, OWCP determined that appellant had no loss of wage-earning capacity (LWEC).³

LEGAL PRECEDENT

An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.⁴ An employee's actual earnings generally best reflect his or her wage-earning capacity.⁵ Absent evidence that actual

³ Appellant's weekly pay rate as a modified bulk mail clerk was \$1,104.69, whereas her weekly pay rate on the date of injury was \$1,057.83.

⁴ 5 U.S.C. § 8115(a); 20 C.F.R. §§ 10.402, 10.403; *see Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

⁵ *Hayden C. Ross*, 55 ECAB 455, 460 (2004).

earnings do not fairly and reasonably represent the employee's wage-earning capacity, such earnings must be accepted as representative of the individual's wage-earning capacity.⁶ Compensation payments are based on the wage-earning capacity determination, and OWCP's finding remains undisturbed until properly modified.⁷

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.⁸ 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.⁹

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 he or she has successfully performed the required duties for at least 60 days.¹⁰ Modification of a wage-earning capacity determination is unwarranted 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 erroneous.¹¹ The burden of proof is on the party seeking modification of the wage-earning capacity determination.¹²

ANALYSIS

The Board finds that appellant's actual earnings as a modified bulk mail clerk fairly and reasonably represented her wage-earning capacity.

On November 10, 2014 the employing establishment offered appellant a position as a modified bulk mail clerk. The position description outlined various duties which included boxing mail, answering telephones, and processing, scanning, and distributing mail. The job offer acknowledged that appellant had right arm lifting restrictions. Accordingly, the physical requirements of the modified job offer included lifting 10 pounds or less within appellant's right arm restrictions for six hours per day. Appellant successfully performed these from November 10,

⁶ *Id.*

⁷ See *Katherine T. Kreger*, 55 ECAB 633, 635 (2004).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7a (October 2009).

⁹ *A.J.*, Docket No. 10-0619 (issued June 29, 2010) (a makeshift/odd-lot position generally lacks a position description with specific duties, physical requirements, and a work schedule).

¹⁰ *Supra* note 8 at Chapter 2.814.7c(1).

¹¹ *Tamra McCauley*, 51 ECAB 375, 377 (2000).

¹² *Id.*

2014 to March 21, 2016, which is an indication that the position fairly and reasonably represented her wage-earning capacity.

While the employing establishment's November 10, 2014 job offer sought to accommodate appellant's injury-related limitations, the written job offer included details regarding which duties appellant was expected to perform and specific details regarding pay rate, tour of duty, location, and start date. The Board thus finds that the November 10, 2014 offer was not for a makeshift/odd-lot position.¹³ Appellant successfully performed the modified bulk mail clerk for at least 60 days, and the wages appellant earned beginning November 10, 2014 met or exceeded the current wages of her date-of-injury job. Accordingly, the Board finds that OWCP properly determined that appellant had no LWEC.

CONCLUSION

The Board finds that appellant's actual earnings as a modified bulk mail clerk fairly and reasonably represented her wage-earning capacity.

ORDER

IT IS HEREBY ORDERED THAT the April 12, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 6, 2018
Washington, DC

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

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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

¹³ See *A.J.*, *supra* note 9.