

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

P.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
White River Junction, VT, Employer**

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**Docket No. 12-799
Issued: December 11, 2012**

Appearances:
Katherine Smith, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 28, 2012 appellant, through her attorney, filed an appeal of a November 14, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) denying modification of the May 5, 1998 wage-earning capacity determination. Pursuant to the Federal Employees' Compensation Act¹ (FECA) 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 that OWCP's May 5, 1998 wage-earning capacity determination should be modified.

FACTUAL HISTORY

On April 25, 1995 appellant, then a 35-year-old clerk, filed an occupational disease claim alleging that her right wrist condition was due to factors of her federal employment. OWCP

¹ 5 U.S.C. §§ 8101-8193.

accepted her claim for an aggravation of right Keinbock's disease. On November 20, 1995 appellant underwent a right proximal row carpectomy and, on August 1, 1996, she underwent a resection of the radical styloid and pisiform right wrist. OWCP authorized the surgeries. Appellant returned to work on March 5, 1997 and worked several limited-duty positions.²

On October 16, 1997 appellant started a limited-duty position as a clerk for eight hours per day. The position provided that she verify trays, answer telephone and perform letter case distribution for 20 minutes only every two hours. Appellant was medically restricted to a 10-pound weight limit with no keyboarding and no constant repetitive use of upper extremities.

By decision dated May 5, 1998, OWCP determined that appellant's actual earnings in her job as a clerk fairly and reasonably represented her wage-earning capacity and reduced her compensation to zero.

On June 18, 1998 appellant accepted a June 4, 1998 limited-duty clerk position, which was the same as that offered in the October 1997 job but also included additional tasks as needed. On August 4, 1998 she received a schedule award for 23 percent permanent impairment to the right arm.

On November 5, 1999 appellant accepted a modified transportation clerk position, which constituted a reassignment under the employing establishment rehabilitation program. She worked as a modified transportation clerk until injured in a work-related motor vehicle accident on October 14, 2005.³ Appellant returned to work on January 23, 2006 in a different modified position for four hours per day and received wage-loss compensation based on partial disability under the October 14, 2005 injury claim. Following her recovery from her October 14, 2005 work-related motor vehicle accident, she intermittently performed general clerical work.⁴ Appellant also filed Forms CA-7, claims for compensation, for the period July 10 through August 25, 2006, claiming four hours per day wage loss. OWCP adjudicated the claim as a modification of the May 5, 1998 loss of wage-earning capacity (LWEC) and denied the claim in decisions dated June 14, 2007, May 15, 2008 and August 12, 2009.

The employing establishment continued to offer appellant several positions, which she either refused or her physician rejected. On October 24, 2007 appellant was separated from the employing establishment as it could no longer accommodate her medical restrictions due to her accepted work-related injury.

² Appellant's first limited-duty position of March 5, 1997 was for four hours per day, a second limited-duty position of May 6, 1997 was for four hours per day and a third limited-duty position of August 4, 1997 was for six hours per day.

³ The October 14, 2005 injury, assigned case number xxxxxx511, was accepted for multiple contusions, neck sprain, right elbow sprain, right hand sprain and torn ulnar collateral ligament of the right hand, for which appellant underwent surgical repair on November 4, 2005. Appellant eventually recovered from these injuries.

⁴ On August 28, 2006 appellant started a two-week full-time job performing general clerk work within her medical restrictions. In an August 31, 2006 letter, MDO Raymond Fields noted the job was temporary until they could come up with another job offer for duties that met appellant's medical restrictions.

On February 19, 2008 appellant filed a claim of recurrence, which covered the period of work stoppage effective October 24, 2007. In an April 17, 2009 letter, John T. Godlewski, Jr., human resources manager, advised that the limited-duty job offer of October 16, 1997, which the LWEC was based on, was a modified position uniquely created to meet appellant's medical limitations. He noted the title of modified clerk was created in order to designate appellant's craft affiliation and the duties listed in the limited-duty job was gathered from other employee tasks as well as within the administrative duties that a supervisor would normally perform. Mr. Godlewski noted that appellant was given a new offer on October 25, 1999 as a modified transportation clerk, meeting the same criteria indicated above, due to medical documentation from her physician stating that she could not perform part of the work assigned on the October 16, 1997 offer. He further stated that the employing establishment withdrew the October 25, 1999 position under the National Reassessment Process (NRP). Mr. Godlewski stated that it was the employing establishment position that the action taken as part of NRP met the definition of a valid recurrence claim under OWCP's procedures.

No action was taken on the recurrence claim until 2010. On June 1, 2010 appellant reformed OWCP of her recurrence claim filed on February 19, 2008. She contended that the May 5, 1996 LWEC decision was in error.

In a November 10, 2010 letter, OWCP noted that appellant's recurrence claim revolved around the withdrawal of her light-duty assignment effective October 24, 2007 as part of NRP process. It informed her that her wage-loss claim must be treated as a claim for modification of the previously established LWEC decision and that the evidence of file did not establish that the LWEC determination was improperly issued. Appellant was provided 30 days to submit additional evidence and argument.

In a January 3, 2011 letter, appellant's attorney argued the May 5, 1998 decision was issued in error based on the fact that she had not been working in a regular clerk's position for over 90 days.

By decision dated March 25, 2011, OWCP denied modification of its May 5, 1998 LWEC decision.

On April 8, 2011 appellant requested an oral hearing, which was held telephonically on August 12, 2011. She testified regarding her modified employment duties as a transportation clerk and stated that the job was created under the employing establishment's NRP process and that she was sent home as a result. Appellant stated that she had been involved in a work-related motor vehicle accident and that, when she returned to work, she was told no work was available. She stated that she had recovered from the motor vehicle accident and that her restrictions had not changed. Appellant stated that she was released to full duty in January 2011 and that she returned to full-duty work on June 4, 2011. She indicated that she had part-time employment during the period 2007 to June 2011.

In a September 10, 2011 post-hearing brief, appellant's attorney contended that appellant's limited-duty job was withdrawn on October 24, 2007 and that she was seeking wage loss only until her return to full duty. Appellant noted that she had worked two part-time jobs during the period in question and made substantially less money than her federal employment.

She argued that the modified job was tailored specifically for her and was changed from a general clerk to a transportation clerk. Appellant also argued that the position was make-shift. Copies of her W-2 forms for the period in question were submitted.

By decision dated November 14, 2011, an OWCP hearing representative affirmed the March 25, 2011 decision finding that appellant had not met the criteria for modifying the LWEC decision. It found that the employing establishment's withdrawal of her limited duty on October 24, 2007 was immaterial and the position upon which the wage-earning capacity decision was based was not makeshift.

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁵ When an employee cannot return to the date-of-injury job because of disability due to work-related injury or disease, but does return to alternative employment with an actual wage loss, OWCP must determine whether the earnings in the alternative employment fairly and reasonably represent the employee's wage-earning capacity.⁶

Once wage-earning capacity 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. These are the customary criteria for modification and the burden of proof is on the party attempting to show that modification of the determination is warranted.⁷

FECA Bulletin No. 09-05, however, outlines OWCP's procedures when limited-duty positions are withdrawn pursuant to NRP. If, as in the present case, a formal wage-earning capacity decision has been issued, OWCP must develop the evidence to determine whether a modification of that decision is appropriate.⁸

ANALYSIS

After OWCP issued its formal wage-earning capacity decision, the employing establishment reassessed appellant's rated position under NRP, resulting in a withdrawal of limited duty and a claim for wage-loss compensation beginning October 24, 2007. It analyzed the case under the customary criteria for modifying a wage-earning capacity determination, but did not acknowledge FECA Bulletin No. 09-05 or fully follow the procedures outlined therein for claims, such as this, in which limited-duty positions are withdrawn pursuant to NRP.

⁵ 5 U.S.C. § 8102(a).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (October 2009).

⁷ *Daniel J. Boesen*, 38 ECAB 556 (1987).

⁸ FECA Bulletin No. 09-05 (issued August 18, 2009).

When a wage-earning capacity decision has been issued, FECA Bulletin No. 09-05 requires OWCP to develop the evidence to determine whether a modification of the decision is appropriate. To this end, FECA Bulletin No. 09-05 asks OWCP to confirm that the file contain documentary evidence supporting that the position was an actual bona fide position. It requires OWCP to review whether a current medical report supports work-related disability and establishes that the current need for limited duty or medical treatment is a result of injury-related residuals and to further develop the evidence from both the claimant and the employing establishment if the case lacks current medical evidence.

Further, FECA Bulletin No. 09-05 states that OWCP, in an effort to proactively manage these types of cases, may undertake further nonmedical development, such as requiring that the employing establishment address in writing whether the position on which the wage-earning capacity determination was based was a bona fide position at the time of the rating and to direct the employing establishment to review its files for contemporaneous evidence concerning the position.

Counsel for appellant has argued before OWCP and on appeal that the wage-earning capacity determination should be modified as the position was withdrawn in October 2007 as an early part of NRP and the original determination was erroneous as it was based on a temporary, limited-duty position consisting of *ad hoc* clerical duties, as needed, within her restrictions and not available on the open market. Counsel added that the case is analogous to the Board's decision in *A.J.*, Docket No. 10-619 (issued June 29, 2010). Counsel also noted that appellant denied any significant change in symptoms. The Board notes that OWCP analyzed the case under the customary criteria for modifying a wage-earning capacity determination, but did not acknowledge FECA Bulletin No. 09-05 or fully follow the procedures outlined therein for claims, such as this, in which limited-duty positions are withdrawn pursuant to NRP. In view of the Board's findings, the issue of whether the wage-earning capacity decision was erroneous will not be addressed.

As OWCP failed to follow the guidelines in FECA Bulletin No. 09-05, the Board will set aside the November 14, 2011 decision and remand the case for further consideration. After proper compliance with FECA Bulletin No. 09-05 guidelines, OWCP shall issue an appropriate *de novo* decision on appellant's entitlement to wage-loss compensation beginning October 24, 2007.⁹

CONCLUSION

The Board finds that this case is not in posture for determination on whether modification of OWCP's May 5, 1998 wage-earning capacity determination is appropriate. Further action by OWCP is warranted.

⁹ *M.A.*, Docket No. 12-316 (issued July 24, 2012); *see M.E.*, Docket No. 11-1416 (issued May 17, 2012).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated November 14, 2011 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: December 11, 2012
Washington, DC

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

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

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