

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

P.P., Appellant

and

**U.S. POSTAL SERVICE, BULK MAIL
CENTER, Jacksonville, FL, Employer**

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**Docket No. 12-1163
Issued: December 13, 2012**

Appearances:

*Capp P. Taylor, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 28, 2012 appellant, through her attorney, filed a timely appeal of a November 15, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) determining her wage-earning capacity. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUE

The issue is whether appellant met her burden of proof to modify the September 30, 1997 loss of wage-earning capacity determination.

On appeal, counsel argued that appellant's hours were reduced under the National Reassessment Process (NRP) and that OWCP did not follow proper procedures.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On November 15, 1993 appellant, then a 37-year-old postal clerk, filed an occupational disease claim alleging that she developed carpal tunnel syndrome due to her federal employment. OWCP accepted her claim for right carpal tunnel syndrome on July 21, 1994. Appellant underwent right carpal tunnel surgical release on December 13, 1994. On June 26, 1995 OWCP accepted left carpal tunnel syndrome as due to her employment duties. In a decision dated November 9, 1995, it granted appellant a schedule award for 10 percent impairment of the right upper extremity.

The employing establishment offered appellant a permanent light-duty position on November 28, 1995 as a modified clerk lifting 10 pounds. In a telephone memorandum dated December 18, 1995, the employing establishment indicated that she was working reading manuals all day. Appellant's attending physician completed a report on March 11, 1996 and stated that based on appellant's functional capacity evaluation she could lift only 5 pounds and could not perform the offered position which required lifting 10 pounds.

By decision dated June 27, 1996, OWCP reduced appellant's compensation benefits to zero on the grounds that she returned to work on November 28, 1995 as a clerk and that this position fairly and reasonably represented her loss of wage-earning capacity.

Appellant requested an oral hearing before an OWCP hearing representative and testified at the oral hearing on June 25, 1997. She stated that she never performed the duties of the position offered on November 28, 1995. Appellant stated that she continued to read a postal manual until August 1996 at which time OWCP informed her that the offered position was suitable.

By decision dated September 30, 1997, the hearing representative found that the record contained a telephone memorandum from the employing establishment indicating that appellant was performing the offered position and was not required to lift more than five pounds. The hearing representative found that appellant was performing one of the functions of the offered position, writing up tags for containers, for eight hours a day and that her actual earnings writing up tags for containers fairly and reasonably represented her loss of wage-earning capacity.

Appellant filed a claim for compensation on August 14, 2007 requesting compensation for leave without pay from May 12 through June 24, 2007. On the reverse of the form, the employing establishment indicated that she returned to work in a rehabilitation job offer. In a letter dated August 23, 2007, OWCP requested additional factual and medical information from appellant, who submitted a report dated October 5, 2007 from Dr. Richard D. Curtis, a Board-certified surgeon, diagnosed fibromyalgia, cervical radiculopathy and bilateral hand pain.

Appellant filed a second claim for compensation requesting leave without pay compensation from July 21 through September 30, 2007.

In a decision dated December 7, 2007, OWCP denied appellant's claim for compensation for the period May 12 through June 24, 2007. By decision dated July 11, 2008, it denied her

claim for compensation for the period from July 12 through September 30, 2007 on the grounds that she had not submitted medical evidence supporting her disability for work.

In a report dated October 5, 2007, Dr. Curtis stated that appellant was totally disabled from June 21 through 24, 2007 to decrease the severe pain that she was experiencing.

Appellant requested a review of the written record before an OWCP hearing representative on December 22, 2008. By decision dated March 17, 2009, OWCP's Branch of Hearings and Review denied her request for an oral hearing on the grounds that it was not timely filed.

On September 27, 2010 appellant filed a claim for compensation requesting wage-loss compensation from September 23 through 26, 2010. On September 20, 2010 the employing establishment offered her a rehabilitation modified position working 1.5 hours a day until she was reassessed under NRP.

Appellant filed a notice of recurrence on September 29, 2010 alleging that on September 23, 2010 she lost time from work due to NRP. On September 23, 2010 the employing establishment provided her with a modified position working 1.5 hours a day.

On October 12, 2010 OWCP requested a current medical report from appellant to determine if she was entitled to compensation benefits.

By decision dated November 19, 2010, appellant's claim for compensation from September 23 through November 5, 2010 on the grounds that she did not submit the requested medical information. She requested an oral hearing on November 22, 2010. Appellant testified at the oral hearing on April 12, 2011.

By decision dated June 28, 2011, an OWCP hearing representative denied appellant's request for modification of the wage-earning capacity determination on the basis that there was no medical evidence to support that her current conditions were due to her accepted employment injury as the most recent medical report was October 5, 2007.

Appellant requested reconsideration on October 5, 2011 and stated that she had ongoing medical restrictions due to her accepted condition. In a report dated August 31, 2011, Dr. Alpa Patel, a Board-certified family practitioner, stated that appellant continued to experience residuals of her accepted bilateral carpal tunnel syndrome. He stated that her restrictions from September 29, 2000 were still in effect and that her condition had not improved.

By decision dated November 15, 2011, OWCP reviewed the merits of appellant's claim and denied modification of the June 28, 2011 decision. It noted that a formal loss of wage-earning capacity decision was in place and that the employing establishment withdrew her light-duty assignment. OWCP noted that appellant filed a recurrence of disability and claim for compensation on September 23, 2010 due to NRP. It denied her claim on November 19, 2010 because the medical evidence did not support a worsening of her bilateral carpal tunnel syndrome. OWCP found no evidence that the original loss of wage-earning capacity determination was in error noting that the September 30, 1997 decision found that the modified position was not make-shift as appellant was classified as a full-time parcel post distribution

machine clerk. It further found that she had not established that her employment-related condition had worsened.

LEGAL PRECEDENT

Once a loss of wage-earning capacity is determined, a modification of such a determination is not warranted unless there is a material change in the nature and extent of the employment-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was in fact erroneous.² The burden of proof is on the party attempting to show the award should be modified.³

OWCP's procedures direct that a wage-earning capacity determination based on actual wages be made following 60 days of employment.⁴ 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.⁵

ANALYSIS

By decision dated June 27, 1996, OWCP reduced appellant's compensation benefits on the grounds that she had actual earnings as a modified clerk and had worked in the position since November 28, 1995. OWCP's hearing representative modified this decision on September 30, 1997 to reflect that she had not worked as a modified clerk since November 28, 1995, but had performed one of the duties of the modified clerk position, writing up tags for over 60 days. He found that appellant's actual earnings writing up tags for containers fairly and reasonably represented her wage-earning capacity.

Appellant filed claims requesting wage-loss compensation as her light-duty work was limited to 1.5 hours a day beginning September 23, 2010 under NRP.

With respect to the withdrawal of appellant's light-duty position on September 23, 2010, OWCP's FECA Bulletin No. 09-05 set forth the guidelines by which a claim for compensation should be evaluated if an employee's position is withdrawn pursuant to NRP.⁶ The Board finds that this case is not in posture for decision as OWCP did not make findings pursuant to FECA Bulletin No. 09-05 in this case.

² K.S., Docket No. 08-2105 (issued February 11, 2009); *George W. Coleman*, 38 ECAB 782, 788 (1987).

³ *Id.*

⁴ Federal (FECA) Procedure Manual, Part -- 2 Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7c (October 2009).

⁵ *Id.* at Chapter 2.814.7e (October 2009).

⁶ *See also H.S.*, Docket No. 11-734 (issued August 28, 2012); FECA Bulletin No. 09-05 (issued August 18, 2009).

If a formal loss of wage-earning capacity decision has been issued, the claims examiner must develop the evidence to determine whether modification of that decision is appropriate. All postal service cases where claims for compensation are received that involve loss of wage-earning capacity ratings based on actual positions should be reviewed to confirm that the file contains evidence that the rating was based on an actual *bona fide* position.⁷ This evidence may include a job offer, an SF-50, a classified position, a form position description or other documentary evidence of file.⁸ The present record does not contain a copy of the position that appellant was actually performing at the time of the hearing representative's September 30, 1997 decision. FECA Bulletin No. 09-05 advises that in an effort to proactively manage these types of cases, OWCP may also undertake further nonmedical development. OWCP may request the postal service to address in writing whether the position on which the wage-earning capacity rating was based was a *bona fide* position at the time of the rating.⁹ It shall thereafter make new findings as to whether appellant's position as of September 30, 1997 was a makeshift position.

Pursuant to FECA Bulletin No. 09-05, OWCP should also review the file to determine whether there is a current medical report regarding employment-related residuals. If there is no current medical evidence then OWCP should request appellant to submit a narrative medical report as to the nature and extent of employment-related residuals. The employing establishment should also be requested to submit relevant medical evidence in its possession. Such requests are essential where employees may not have been requested to provide recent medical evidence because they have zero wage-earning capacity rating.¹⁰

The case will be remanded to OWCP to properly analyze the modification issue presented in accord with FECA Bulletin No. 09-05. After such further development as OWCP deems necessary, it should issue an appropriate decision.

CONCLUSION

The Board finds that the case is not in posture for a decision regarding modification of the loss of wage-earning capacity determination and will remand the case to OWCP for further development.

⁷ *Id.* at § I.A.1.

⁸ *Id.*

⁹ *Id.* at § I.A.3.

¹⁰ *Id.* at § I.A.2.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated November 15, 2011 is set aside and the case remanded for further development consistent with this opinion of the Board.

Issued: December 13, 2012
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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