

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

R.S., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Cleveland, OH, Employer**

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**Docket No. 12-1295
Issued: December 14, 2012**

Appearances:

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 29, 2012 appellant, through her attorney, filed a timely appeal from an Office of Workers' Compensation Programs' (OWCP) decision dated April 16, 2012. 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 established that OWCP's October 12, 2011 loss of wage-earning capacity (LWEC) determination should be modified.

FACTUAL HISTORY

Appellant, a 41-year-old letter carrier, slipped on a patch of ice on January 5, 1994 and injured her neck and back. OWCP accepted her claim for cervical and thoracic sprains and an occipital contusion. On August 27, 1996 appellant filed a claim for benefits after twisting her

¹ 5 U.S.C. § 8101 *et seq.*

back. OWCP accepted the claim for parathoracic muscle strain. On July 2, 1998 appellant filed a Form CA-2a claim for benefits, alleging a recurrence of disability causally related to her accepted conditions. OWCP accepted an exacerbation of cervical, thoracic and lumbar myofascitis and aggravation of degenerative disc disease of the lumbar spine.

On March 25, 1999 appellant accepted a job as a modified letter carrier and began work on April 10, 1999. The position was tailored to her physical restrictions and allowed her to work for eight hours a day, with no pushing, pulling or lifting over 25 pounds and no repetitive climbing.

By decision dated February 1, 2000, OWCP issued a wage-earning capacity decision. It found that appellant worked more than 60 days in the modified position and the actual wages she earned in the position of modified letter carrier, \$635.90 per week, fairly and reasonably represented her wage-earning capacity.

Appellant worked at her modified job until July 2, 2011, when the employing establishment withdrew the job under the National Reassessment Program (NRP). On July 18, 2011 she filed CA-7 forms for a wage-loss compensation claim beginning that date. The employing establishment indicated on the form that it no longer had work available for appellant within her medical restrictions.

By letter dated July 26, 2011, OWCP advised appellant that she could either appeal the LWEC decision or submit evidence sufficient to warrant modification of the decision.

By decision dated October 12, 2011, OWCP denied modification of the February 1, 2000 LWEC decision. It found that appellant failed to submit evidence sufficient to establish one of the three criteria required for modification.

By letter dated November 4, 2011, appellant's attorney requested a hearing, which was held on February 7, 2012.

By decision dated April 16, 2012, an OWCP hearing representative affirmed the October 12, 2011 decision.

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.² 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 loss of wage-earning capacity.³

² 5 U.S.C. § 8102(a).

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (October 2009).

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.⁴ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁵

FECA Bulletin No. 09-05, however, outlines OWCP 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.⁶

ANALYSIS

OWCP accepted that appellant sustained the conditions of cervical and thoracic sprain, occipital contusion, parathoracic muscle strain and lumbar myofascitis. On February 1, 2000 it found that her actual earnings as a modified letter carrier fairly and reasonably represented her wage-earning capacity and reduced her wage-loss compensation to zero. On July 18, 2011 appellant filed a claim for wage loss beginning July 2, 2011 due to the withdrawal of her modified-duty assignment as part of NRP.

OWCP issued a formal wage-earning capacity decision on October 12, 2011. 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 July 2, 2011. OWCP analyzed the case under the customary criteria for modifying a loss of wage-earning capacity determination. It's decision did not acknowledge FECA Bulletin No. 09-05 or fully follow the procedures outlined therein for claims, such as this, in which modified-duty positions are withdrawn pursuant to NRP.

When a loss of 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.⁷ 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 it to review whether a current medical report supports work-related disability and to further develop the evidence from both the claimant and the employing establishment if the case lacks current medical evidence.⁸

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 the employing

⁴ *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Tamra McCauley*, 51 ECAB 375 (2000).

⁵ *Id.*

⁶ FECA Bulletin No. 09-05 (issued August 18, 2009).

⁷ A position that is makeshift in nature is not appropriate for a wage-earning capacity determination. *See Selden H. Swartz*, 55 ECAB 272 (2004).

⁸ *Id.* at §§ I.A.1-2

establishment to address in writing whether the position on which the loss of wage-earning capacity determination was based was a *bona fide* position at the time of the rating and to direct a review of its files for contemporaneous evidence concerning the position.⁹

As OWCP failed to follow the guidelines in FECA Bulletin No. 09-05, the Board will set aside the April 16, 2012 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 July 2, 2011.¹⁰

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the April 16, 2012 decision of the Office of Workers Compensation Programs is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: December 14, 2012
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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

⁹ *Id.* at § I.A.3.

¹⁰ *See M.E.*, Docket No. 11-1416 (issued May 17, 2012).