

FACTUAL HISTORY

OWCP accepted that on December 19, 2006 appellant, then a 52-year-old small parcel bundle sorter machine operator, sustained a fracture of the tarsal and metatarsal bones of the left foot as a result of her work duties. She stopped work on the date of injury.

In a June 5, 2007 disability certificate, Dr. Louis C. Rose, an attending Board-certified orthopedic surgeon, advised that appellant could return to light/limited-duty work with restrictions. Appellant could not stand or walk more than 30 minutes or lift, pull or push more than 10 pounds.

Appellant returned to work in a full-time modified manual clerk position effective June 11, 2007 based on physical restrictions set forth by Dr. Rose. The modified manual clerk position required sorting letters. The physical requirements included the ability to manually sort letters and box mail and no standing, walking more than 30 minutes and lifting, pulling or pushing more than 10 pounds.

On February 28, 2008 OWCP issued a decision finding that appellant's actual earnings in the full-time modified manual clerk position fairly and reasonably represented her loss of wage-earning capacity. It noted that she worked more than 60 days in the modified position. OWCP reduced appellant's compensation to zero as her actual earnings exceeded the current wages of her date-of-injury position.

On March 4, 2009 appellant accepted the employing establishment's job offer for a full-time modified clerk position which reflected a change in her physical restrictions. The position required her to box mail. The physical requirements of the position involved lifting letters weighing less than five pounds and sitting.

By letter dated May 27, 2010, the employing establishment advised appellant that it could no longer provide her with full-time limited-duty work within her restrictions pursuant to NRP. Appellant accepted a modified clerk position for six hours per day effective May 27, 2010. The position involved sorting and boxing mail.

On June 8 and 20 and July 5 and 19, 2010 appellant filed claims for partial wage-loss compensation (Form CA-7) for two hours a day from May 27 to July 17, 2010 as a result of a reduction in his work hours under NRP. In time analysis CA-7a forms dated June 16, July 9 and 25, and August 20, 2010 and signed by employing establishment officials, she claimed time loss from work during the stated period due to a reduction in her work hours under NRP.

By letter dated June 25, 2010, OWCP noted that appellant had filed a claim for wage-loss compensation due to the withdrawal of specified hours for her limited-duty position effective May 27, 2010. It informed her of the requirements for establishing modification of an established loss of wage-earning capacity determination and requested that she submit supporting evidence, including a rationalized medical opinion, within 30 days.

In a July 8, 2010 letter, appellant contended that OWCP's 2008 loss of wage-earning capacity determination was erroneous as her limited-duty position was not a part of the

employing establishment's authorized complement. It was a makeshift position created solely for her. Also, the position was never available for bid or application by any other employee.

On August 20, 2010 appellant filed a Form CA-7 for partial wage-loss compensation for two hours a day from July 20 through 23 and August 11 through 14, 2010. In a Form CA-7a of the same date and signed by an employing establishment official, she claimed time loss from work during the stated period due to a reduction in her work hours under NRP.

On September 10, 2010 appellant requested a review of the written record before an OWCP hearing representative regarding the February 28, 2008 loss of wage-earning capacity decision.

In a September 30, 2010 decision, OWCP's Branch of Hearings and Review denied appellant's request for a review of the written record on the grounds that it was not timely filed within 30 days of the February 28, 2008 decision.²

On October 12 and 25, 2010 appellant filed CA-7 forms for partial wage-loss compensation for two hours per day from September 28 through October 23, 2010 as a result of a reduction in her work hours under NRP. In a Form CA-7a dated October 25, 2010 and signed by an employing establishment official, she claimed time loss from work during the stated period due to a reduction in her work hours under NRP.

In a November 10, 2010 decision, OWCP denied appellant's claims for wage-loss compensation from May 25 to October 23, 2010. It found that she did not show that the original loss of wage-earning capacity determination was in error, that she had been vocationally rehabilitated or a material change in her accepted condition.

On December 6, 2010 appellant requested an oral hearing.

In a May 3, 2011 decision, OWCP's hearing representative affirmed the November 10, 2010 decision, finding that appellant failed to establish that modification of the February 28, 2008 loss of wage-earning capacity determination was warranted.

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.³ 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

² The Board notes that it appears that OWCP inadvertently stated in the September 30, 2010 decision that it was denying appellant's untimely request for an oral hearing rather than her untimely request for review of the written record as she clearly indicated with a checkmark on her appeal request form that she desired a review of the written record.

³ 5 U.S.C. § 8102(a).

the alternative employment fairly and reasonably represent the employee's wage-earning capacity.⁴

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.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

After OWCP issued its formal loss of wage-earning capacity decision, the employing establishment reassessed appellant's rated position under NRP, resulting in a reduction of work hours for her limited-duty position and claims for wage-loss compensation beginning May 27, 2010. It analyzed the case under the customary criteria for modifying a loss of 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.

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. 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.⁷

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 loss of wage-earning capacity determination was based was a *bona fide* position at the time of the rating and

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

⁵ *Daniel J. Boesen*, 38 ECAB 556 (1987).

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

⁷ *Id.* at §§ I.A.1-2.

to direct the employing establishment to review its files for contemporaneous evidence concerning the position.⁸

As OWCP failed to follow the guidelines in FECA Bulletin No. 09-05, the Board will set aside the May 3, 2011 decision and remand the case for further consideration. After proper compliance with FECA Bulletin No. 09-05 guidelines and such further development as OWCP deems necessary, it shall issue an appropriate decision on appellant's entitlement to wage-loss compensation beginning May 27, 2010.⁹

CONCLUSION

The Board finds that this case is not in posture for decision on whether modification of OWCP's February 28, 2008 loss of wage-earning capacity determination is warranted.

ORDER

IT IS HEREBY ORDERED THAT the May 3, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action.

Issued: September 24, 2012
Washington, DC

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

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

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

⁸ *Id.* at § I.A.3.

⁹ *See M.E.*, Docket No. 11-1416 (issued May 17, 2012).