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<b>N.F., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 13-846</b>
	)	<b>Issued: July 3, 2013</b>
<b>U.S. POSTAL SERVICE, POST OFFICE,</b>	)	
<b>Paterson, NJ, Employer</b>	)	
	)	

*James D. Muirhead, Esq.*, for the appellant  
*Office of Solicitor*, for the Director

## DECISION AND ORDER

Before:

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

## ***JURISDICTION***

On February 26, 2013 appellant, through her attorney, filed a timely appeal from a September 6, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) denying modification of a wage-earning capacity determination and a December 11, 2012 nonmerit decision denying her request for reconsideration. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

## ISSUES

The issues are: (1) whether appellant established that the October 13, 2006 loss of wage-earning capacity determination should be modified; and (2) whether OWCP properly denied her request to reopen her case for further merit review under 5 U.S.C. § 8128(a).

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

OWCP accepted that on January 3, 2005 appellant, then a 47-year-old letter carrier, sustained lumbar sprain, in the performance of duty.<sup>2</sup> It previously accepted that she sustained lumbar strain under file number xxxxxx350, which it combined under the current file number.

On February 27, 2006 the employing establishment offered appellant a full-time position as a modified city carrier. The physical requirements included no lifting over 20 pounds and the duties consisted of filing, answering the telephone and delivering automobile parts.

By decision dated October 13, 2006, OWCP reduced appellant's compensation to zero based on its finding that her actual earnings as a modified city carrier effective March 11, 2006 fairly and reasonably represented her wage-earning capacity.

On January 5, 2010 the employing establishment offered appellant a modified assignment pending Phase 2 assessment under the National Reassessment Process (NRP). The duties including delivering Express Mail and parcel post and collecting mail for up to four hours a day. The employing establishment indicated that the position would be within appellant's work restrictions as set forth on December 8, 2009.<sup>3</sup>

On February 4, 2010 the employing establishment offered appellant a position as a modified city carrier standing up to six hours, operating a motor vehicle up to three hours, picking up mail and reaching above or at shoulder level for two hours per day and walking up to four hours per day. It noted that the position was an interim assignment offered pending Phase 2 reassessment under NRP and might result in fewer hours worked than indicated in the job offer. Appellant refused the position, noting that she had tried to deliver the route but had to return with the mail due to right shoulder and back pain.

In a statement dated April 18, 2010, appellant related that the employing establishment removed her limited-duty position and returned her to work as a letter carrier. She attempted to deliver her route on January 8, 2010 but her back hurt too much for her to complete her route.

On March 10, 2011 appellant filed a notice of recurrence of disability on January 8, 2010 causally related to her January 3, 2005 work injury. She related that the employing establishment took away her limited-duty employment under NRP and returned her to work as a

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<sup>2</sup> On January 21, 2005 appellant filed a notice of recurrence of disability on January 3, 2005 causally related to a May 18, 2001 employment injury. OWCP determined that she was alleging a new injury based on her description of the work factors that caused her condition.

<sup>3</sup> In a duty status report dated January 21, 2010, Dr. John Ambrose, a Board-certified orthopedic surgeon, diagnosed lumbar radiculitis and listed work restrictions of lifting and carrying 10 pounds up to four hours per day, sitting two hours per day, standing six hours per day and walking four hours per day. In a report dated July 19, 2010, he related that he had treated appellant for a back injury on May 18, 2001. Dr. Ambrose noted that she "returned to full duties as a letter carrier in January" but was unable to perform the employment due to her back. He stated, "Instead of a new injury, [appellant] undoubtedly experienced a recurrence of her back symptoms on the basis of the impairments and disabilities that proceeded from the 2001 accident at work." On April 11, 2011 Dr. Ambrose diagnosed a herniated disc at L3-4 with lumbar radiculitis and spondylosis. He attributed the condition to lifting incidents in May 2001 and January 2005.

letter carrier for four hours per day. Appellant asserted that she was unable to perform her letter carrier duties.

By letter dated April 27, 2011, appellant's supervisor related that she accepted a position within her physical restrictions. She began working in the new position on January 8, 2010 but stopped in the afternoon, citing back pain. Appellant refused a second offer made on February 4, 2010. Her supervisor stated that both job offers were within her physical limitations.

On June 12, 2012 Don L. Hill, a union president, related that the employing establishment provided appellant with a "makeshift job created due to her on-the-job injury."

By decision dated June 13, 2011, OWCP denied modification of the October 13, 2006 loss of wage-earning capacity determination.

On June 17, 2011 appellant, through her attorney, requested a telephone hearing before an OWCP hearing representative. At the telephone hearing, held on October 12, 2011, her attorney contended that the original loss of wage-earning capacity determination was in error as the position was makeshift in nature.

By decision dated December 30, 2011, OWCP's hearing representative affirmed the June 13, 2011 decision. She found that there was no evidence that the original determination was in error or that appellant's condition worsened such that she was unable to perform the modified position.

On June 13, 2012 appellant, through her attorney, requested reconsideration. In a decision dated September 6, 2012, OWCP denied modification of its December 30, 2011 decision.

On September 12, 2012 appellant, through her attorney, again requested reconsideration. He argued that the employing establishment failed to challenge Mr. Hill's contention that the original position was makeshift.

In a nonmerit decision dated December 11, 2012, OWCP denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant reopening the case for further merit review under section 8128.

On appeal appellant's attorney contends that the original loss of wage-earning capacity was erroneous as the offered position was makeshift in nature.

### **LEGAL PRECEDENT -- ISSUE 1**

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

FECA Bulletin No. 09-05 outlines very specific procedures for light-duty positions withdrawn pursuant to NRP. Regarding claims for total disability when a wage-earning capacity decision has been issued, OWCP should develop the evidence to determine whether a modification of that wage-earning capacity position is appropriate.<sup>6</sup>

### **ANALYSIS -- ISSUE 1**

OWCP issued an October 13, 2006 loss of wage-earning capacity determination based on appellant's actual work duties as a modified city carrier position effective March 11, 2006. She argued that the loss of wage-earning capacity determination should be modified as the position was makeshift and her work duties were eventually withdrawn under NRP on January 5, 2010. The employing establishment offered appellant alternative employment.

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.<sup>7</sup> 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.<sup>8</sup>

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 direct the employing establishment to review its files for contemporaneous evidence concerning the position.<sup>9</sup>

As OWCP failed to follow the guideline in FECA Bulletin No. 09-05, the Board will remand the case for further development.

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<sup>4</sup> *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Tamra McCauley*, 51 ECAB 375, 377 (2000).

<sup>5</sup> *Id.*

<sup>6</sup> FECA Bulletin No. 09-05 (issued August 18, 2009); *see also A.T.*, Docket No. 11-375 (issued September 19, 2012).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at § I.A. 1-2.

<sup>9</sup> *Id.* at § I.A.3.

**CONCLUSION**

The Board finds that the case is not in posture for decision.<sup>10</sup>

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 11 and September 6, 2012 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: July 3, 2013  
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

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<sup>10</sup> In view of the Board's disposition of the merits, the issue of whether OWCP properly denied appellant's request to reopen her case for further review under section 8128 is moot.