

FACTUAL HISTORY

OWCP accepted that on October 5, 2000 appellant, then a 35-year-old mail processor, sustained left hand/wrist tenosynovitis due to lifting mail from a tub to a ledge at work.² After her October 5, 2000 injury, she worked for various periods in limited-duty positions for 40 hours per week.

OWCP accepted that on October 12, 2004 appellant sustained lumbar, thoracic and left shoulder and upper arm sprains due to lifting mail at work. It also accepted that on October 10, 2005 she sustained a left sacroiliac sprain and permanent degeneration of lumbar degenerative disc disease due to bending her body, lifting magazine mail and putting it in a mail container.³ Appellant continued to work in limited-duty positions for 40 hours per week.

On September 29, 2007 appellant began working as a modified mail processing clerk on a full-time basis.

In a December 7, 2007 decision, OWCP reduced appellant's compensation to zero effective September 29, 2007 based on its determination that her actual earnings as a modified mail processing clerk fairly and reasonably represented her wage-earning capacity. It noted that her actual wages exceeded the current wages of the position she held when injured.⁴

Effective February 25, 2010, appellant's limited-duty work was withdrawn under the National Reassessment Process (NRP) and she stopped work on the date.⁵

Beginning on February 26, 2010, appellant filed claims for compensation in connection with the file for her October 10, 2005 injury alleging entitlement to disability compensation for February 25, 2010 and continuing. She claimed that she lost time due to the withdrawal of her limited-duty work under NRP and asserted that OWCP's December 7, 2007 wage-earning capacity determination should be modified. Appellant submitted medical evidence in support of her case.

In an April 22, 2010 decision, OWCP found that appellant did not meet her burden of proof to modify OWCP's December 7, 2007 wage-earning capacity determination. On January 12, 2011 an OWCP hearing representative affirmed OWCP's April 22, 2010 decision.⁶

² Appellant's claim was later expanded to include acceptance of left carpal tunnel syndrome.

³ The October 12, 2004 and October 10, 2005 injuries were developed under files that were separate from the file for the October 5, 2000 injury.

⁴ OWCP's wage-earning determination was issued under the file for the October 10, 2005 injury but it took into consideration all of appellant's work injuries.

⁵ Appellant was offered a limited-duty job as a modified mail processing clerk for 15 hours per week, but she did not work again until July 2011 when she began working in a part-time position.

⁶ In decisions dated November 17, 2011 and March 9, 2012, OWCP again found that appellant did not meet her burden of proof to modify OWCP's December 7, 2007 wage-earning capacity determination.

Beginning on August 2011, appellant filed claims for compensation in connection with the file for her October 5, 2000 injury for the period July 30, 2011 and continuing. OWCP denied her case in decisions dated January 10 and 26, March 12, April 23 and June 15, 2012.

In an August 9, 2012 decision, an OWCP hearing representative remanded the case to OWCP for consideration of whether, in the context of the withdrawal of limited-duty work under NRP, OWCP's December 7, 2007 wage-earning capacity determination should be modified.⁷

In a May 18, 2012 decision, OWCP denied appellant's claim on the grounds that she did not meet her burden of proof to modify OWCP's December 7, 2007 wage-earning capacity determination.⁸ It found that she had not shown that the original wage-earning capacity determination was erroneous or that she had suffered a material change in the nature and extent of her injury-related condition. OWCP determined that appellant was not entitled to receive disability compensation on or after February 25, 2010, the date that her limited-duty work was withdrawn under NRP.

In a November 15, 2012 decision, OWCP denied appellant's claim on the grounds that she did not meet her burden of proof to modify OWCP's December 7, 2007 wage-earning capacity determination.⁹ It determined that she was not entitled to receive disability compensation on or after February 25, 2010.

LEGAL PRECEDENT

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages.¹⁰ Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn and not on actual wages lost.¹¹ Compensation payments are based on the wage-earning capacity determination, which remains undisturbed until properly modified.¹²

Modification of a standing wage-earning capacity 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

⁷ This decision was issued in connection with the file for appellant's October 5, 2000 injury.

⁸ This decision was issued under the file for appellant's October 10, 2005 injury.

⁹ This decision was issued under the file for appellant's October 5, 2000 injury. OWCP indicated that the position in which appellant was rated was not a makeshift or odd-lot position.

¹⁰ 5 U.S.C. § 8115(a); *K.R.*, Docket No. 09-415 (issued February 24, 2010); *Lee R. Sires*, 23 ECAB 12, 14 (1971) (the Board held that actual wages earned must be accepted as the measure of a wage-earning capacity in the absence of evidence showing they do not fairly and reasonably represent the employee's wage-earning capacity).

¹¹ *K.R.*, *supra* note 10; *Roy Matthew Lyon*, 27 ECAB 186, 190 (1975). *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

¹² *See Sharon C. Clement*, 55 ECAB 552, 557 (2004).

erroneous.¹³ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.¹⁴

FECA Bulletin No. 09-05 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.¹⁵

ANALYSIS

OWCP analyzed this case under the customary criteria for modifying a loss of wage-earning capacity determination. It did not fully follow the procedures outlined in FECA Bulletin No. 09-05 for claims, such as this, in which limited-duty positions are withdrawn pursuant to NRP.¹⁶

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.¹⁷ To this end, the Bulletin asks OWCP to confirm that the file contains 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.¹⁸

The Bulletin 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.¹⁹

As OWCP failed to follow the guidelines in FECA Bulletin No. 09-05, the Board will set aside OWCP's May 18 and November 15, 2012 decisions and remand the case for further consideration. After proper compliance with FECA Bulletin No. 09-05 guidelines, OWCP shall

¹³ *Sue A. Sedgwick*, 45 ECAB 211, 215-16 (1993); *Elmer Strong*, 17 ECAB 226, 228 (1965).

¹⁴ *Selden H. Swartz*, 55 ECAB 272, 278 (2004).

¹⁵ FECA Bulletin No. 09-05 (issued August 18, 2009).

¹⁶ *See M.A.*, Docket No. 12-316 (issued July 24, 2012).

¹⁷ FECA Bulletin No. 09-05, *supra* note 15.

¹⁸ *Id.* at §§ I.A.1-2.

¹⁹ *Id.* at § I.A.3.

issue an appropriate *de novo* decision on appellant's entitlement to wage-loss compensation beginning February 25, 2010.

CONCLUSION

The Board finds that this case is not in posture for determination on whether modification of OWCP's December 7, 2007 wage-earning capacity determination is appropriate. Further action by OWCP is warranted.

ORDER

IT IS HEREBY ORDERED THAT the November 15 and May 18, 2012 decisions of the Office of Workers' Compensation Programs are set aside and the case remanded for further action.

Issued: March 14, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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