

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

J.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Troy, MI, Employer**

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**Docket No. 11-2036
Issued: August 29, 2012**

Appearances:

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 13, 2011 appellant, by counsel, filed a timely appeal of a July 8, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) denying modification of a loss of wage-earning capacity (LWEC) determination. 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 OWCP properly denied modification of the July 10, 2006 wage-earning capacity determination.

FACTUAL HISTORY

On February 10, 2005 appellant, then a 41-year-old mail processing clerk, filed an occupational disease claim alleging that he developed a back condition as a result of federal

¹ 5 U.S.C. § 8101 *et seq.*

employment activities. OWCP accepted his claim for lumbosacral degenerative intervertebral disc disease and spondylolisthesis and approved L4-5 spinal fusion, which occurred on March 18, 2005. On December 13, 2005 appellant's treating physician, Dr. David M. Montgomery, a Board-certified orthopedic surgeon, released him to return to work with restrictions, including no lifting above 10 pounds, no repetitive bending and a "sit/stand" option.

On May 4, 2006 appellant accepted a position as a modified clerk, which conformed to restrictions provided by Dr. Montgomery. The written job offer outlined appellant's duties of manually sorting and casing mail and indicated that he was restricted from lifting more than 10 pounds, bending, truncal twisting, reaching, reaching above shoulder level, pushing, pulling, squatting, kneeling, bending, stooping or climbing.

By decision dated July 10, 2006, OWCP issued a formal wage-earning capacity decision, finding that the wages appellant actually earned in the modified position fairly and reasonably represented his wage-earning capacity.

Appellant worked in his limited-duty job until September 28, 2010, when the employing establishment informed him that, pursuant to the guidelines established by the National Reassessment Process (NRP), it could find no necessary tasks for him to perform that were within his restrictions. On September 29, 2010 he filed a notice of recurrence of disability, based on the employing establishment's withdrawal of his limited-duty position pursuant to the NRP.

In a letter dated October 14, 2010, OWCP advised appellant that it was treating his compensation claim as a request to modify the July 10, 2006 LWEC decision. Appellant was asked whether he was alleging a change in the nature and extent of his injury-related condition, that he was rehabilitated or retrained, or that the original LWEC decision was erroneous.

In a letter dated October 19, 2010, appellant contended that the July 10, 2006 LWEC decision was erroneous because it was based on a makeshift position that was not available in the community at large. He alleged that the position was created for him based upon his medical restrictions and was designed to disappear when he left the employing establishment. Appellant further contended that the position consisted of various sub-jobs and was temporary in nature, as evidenced by the fact that it had been eliminated because its ascribed duties were no longer necessary.

In a December 29, 2010 decision, OWCP denied modification of the July 10, 2006 LWEC determination. It found that the limited-duty position was not makeshift, as the duties that comprised the modified position were *bona fide* postal activities that are required in the day to day business of the postal service.

Appellant requested an oral hearing, which was conducted on April 18, 2011. He testified that the duties he performed in the modified position were not those of a regular postal employee and reiterated his contention that the rehabilitation position was an odd-lot job.

By decision dated July 8, 2011, an OWCP hearing representative found that the light-duty position on which the July 10, 2006 LWEC determination was based, fairly and reasonably represented appellant's wage-earning capacity and was not makeshift in nature and that the medical evidence was insufficient to establish a material worsening of his accepted condition.

LEGAL PRECEDENT

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.² The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.³

FECA Bulletin No. 09-05 outlines very specific procedures for light-duty positions withdrawn pursuant to the 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 loss of wage-earning capacity position is appropriate.

ANALYSIS

The Board finds this case is not in posture for decision. OWCP accepted appellant's claims for lumbosacral degenerative intervertebral disc disease and spondylolisthesis and approved L4-5 spinal fusion. Based upon the medical restrictions recommended by appellant's treating physician, the employing establishment offered him a modified clerk position, which he accepted on May 4, 2006. By decision dated July 10, 2006, OWCP found that appellant's actual earnings in the modified position fairly and reasonably represented his wage-earning capacity and reduced his compensation benefits to zero.

The record reflects that appellant worked in the full-time modified position until September 28, 2010, when the employing establishment informed him that there was no productive work available for him within his restrictions. He filed a claim for a recurrence of disability based on the withdrawal of his job offer under the NRP. Appellant argued that the original LWEC decision was erroneous because the position on which it was based was makeshift in nature and that his condition had worsened since the decision was issued.

In his July 8, 2011 decision, the hearing representative affirmed OWCP's decision denying modification of the original LWEC decision, finding that the modified clerk position was not makeshift in nature and that the evidence did not establish a worsening of appellant's condition. The claims examiner did not, however, acknowledge that the original modified position was withdrawn pursuant to the NRP or make any relevant findings on the issue. In this regard, there are specific guidelines for developing the issue of modification of a wage-earning capacity determination when the job has been withdrawn pursuant to NRP.⁴

In light of the requirements of FECA Bulletin No. 09-05, OWCP did not discuss the medical evidence of record as it pertains to appellant's residuals due to the accepted back condition. The case will be remanded to OWCP to properly analyze the modification issue

² *Sue A. Sedgwick*, 45 ECAB 211 (1993).

³ *Id.*

⁴ FECA Bulletin No. 09-05 (issued August 18, 2009).

presented in accord with FECA Bulletin No. 09-05. After such further development as OWCP deems necessary, it should issue an appropriate decision.

The Board finds the case is not in posture for decision and will be remanded to OWCP. On remand, OWCP should follow the procedures found in FECA Bulletin No. 09-05 and issue an appropriate decision on appellant's claim.

CONCLUSION

The Board finds that the case is not in posture for decision and will be remanded to OWCP for further development.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 8, 2011 is set aside and the case remanded for further action consistent with this decision of the Board.⁵

Issued: August 29, 2012
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

⁵ Due to the disposition of this case, the second issue, pertaining to the denial of appellant's hearing request, is rendered moot.