United States Department of Labor
Employees' Compensation Appeals Board

R.S., Appellant	)	
and	)	**Docket No. 12-1315**
	)	**Issued: November 21, 2012**
U.S. POSTAL SERVICE, POST OFFICE, Millersville, MD, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 31, 2012 appellant filed a timely appeal from the December 27, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for modification of a wage-earning capacity determination. Pursuant to the Federal Employees' Compensation Act[1] (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 met his burden of proof to establish that modification of OWCP's July 24, 1998 wage-earning capacity decision was warranted.

FACTUAL HISTORY

OWCP accepted that on June 12, 1989 appellant, then a 35-year-old rural letter carrier sustained an aggravation of lumbosacral strain and herniated discs at L4-5 and L5-S1. In

[1] 5 U.S.C. §§ 8101-8193.

August 1989, he underwent revision lumbar laminectomy surgery at L4-5 and L5-S1. The procedure was authorized by OWCP. On May 23, 1998 appellant began working as a modified flat sorter machine operator.

In a July 24, 1998 decision, OWCP reduced appellant's wage-loss compensation to zero effective May 23, 1998 based on its determination that his actual earnings in the limited-duty position of modified flat sorter machine operator fairly and reasonably represented his wage-earning capacity.

Effective November 20, 2010, specific hours of appellant's limited-duty position were withdrawn under the National Reassessment Process (NRP).[2]

On December 16, 2010 appellant filed a Claim for Compensation (Form CA-7) for intermittent hours of partial wage loss from November 20 to December 3, 2010, as limited-duty work had been partially withdrawn. He submitted additional Forms CA-7 claiming partial leave without pay hours through March 11, 2011.

In a March 17, 2011 letter, OWCP advised appellant of the three grounds for which modification of an established loss of wage-earning capacity determination would be warranted. Specifically, one of the following criteria had to be met: (1) the original rating was in error; (2) the claimant had been retrained or vocationally rehabilitated, or (3) the claimant's medical condition had materially changed. Appellant was provided 30 days to submit the required information.

In an April 28, 2011 decision, OWCP denied appellant's claim on the grounds that he did not meet his burden of proof to establish that modification of its July 24, 1998 wage-earning capacity determination was warranted.[3]

Appellant requested a telephonic hearing with an OWCP hearing representative regarding his claim. During the October 12, 2011 hearing, he argued that the partial withdraw of his limited-duty position in November 2010 warranted modification of OWCP's July 24, 1998 wage-earning capacity determination. Appellant noted that the duties of his limited-duty position changed in 2002 but that he did not sustain any loss of work hours or wages at that time. He returned to working 40 hours per week in July 2011.

In a December 27, 2011 decision, an OWCP hearing representative affirmed OWCP's April 28, 2011 decision noting that appellant had not met any of the three criteria for modifying OWCP's wage-earning capacity determination.[4]

[2] Appellant's work hours were reduced from 40 hours per week to 36 hours per week.

[3] OWCP incorrectly indicated that appellant requested that its wage-earning capacity determination be modified beginning December 27, 2010. Appellant actually requested that the determination be modified beginning November 20, 2010.

[4] An OWCP hearing representative modified OWCP's April 28, 2011 decision to reflect that appellant requested that OWCP's July 24, 1998 wage-earning capacity determination be modified beginning November 20, 2010, rather than beginning December 27, 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.[5] Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn and not on actual wages lost.[6] Compensation payments are based on the wage-earning capacity determination, which remains undisturbed until properly modified.[7]

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 erroneous.[8] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[9]

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.[10]

ANALYSIS

OWCP accepted that on June 12, 1989 appellant sustained an aggravation of lumbosacral strain and herniated discs at L4-5 and L5-S1 and it authorized lumbar surgery in August 1989. In a July 24, 1998 decision, it reduced his compensation to zero effective May 23, 1998 based on its determination that his actual earnings in the limited-duty position of modified flat sorter machine operator fairly and reasonably represented his wage-earning capacity. Effective November 20, 2010, specific hours of appellant's limited-duty position were withdrawn under NRP and appellant sought modification of OWCP's July 24, 1998 wage-earning capacity determination.

OWCP analyzed this 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

[5] 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).

[6] *K.R., id.; Roy Matthew Lyon*, 27 ECAB 186, 190 (1975). *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

[7] *See Sharon C. Clement*, 55 ECAB 552, 557 (2004).

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

[9] *Selden H. Swartz*, 55 ECAB 272, 278 (2004).

[10] FECA Bulletin No. 09-05 (issued August 18, 2009).

follow the procedures outlined therein for claims, such as this, in which specific hours of limited-duty positions are withdrawn pursuant to NRP.[11]

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.[12] FECA Bulletin No. 09-05 instructs 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.[13]

Further 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 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.[14]

If, after development and review by OWCP, the evidence establishes that the wage-earning capacity decision was proper and none of the customary criteria for modifying the determination were met, then OWCP may issue a decision denying modification of the wage-earning capacity determination.[15]

As OWCP failed to follow the guidelines in FECA Bulletin No. 09-05, the Board will set aside the December 27, 2011 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 November 20, 2010.[16]

CONCLUSION

The Board finds that this case is not in posture for determination on whether modification of OWCP's July 24, 1998 loss of wage-earning capacity determination is appropriate. Further action by OWCP is warranted.

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

[12] FECA Bulletin No. 09-05, *supra* note 10.

[13] *Id.* at §§ I.A.1-2.

[14] *Id.* at § I.A.3.

[15] *Id*. at § I.A.4.

[16] *See M.A., supra* note 11; *M.E.*, Docket No. 11-1416 (issued May 17, 2012).

ORDER

IT IS HEREBY ORDERED THAT the December 27, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action.

Issued: November 21, 2012
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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