

² Docket No. 11-1136 (issued September 5, 2012).

compensation to zero on the grounds that his actual earnings fairly and reasonably represented his wage-earning capacity. Appellant filed a claim for a recurrence of disability commencing February 17, 2010. The record indicated that the modified-duty position had been withdrawn pursuant to the National Reassessment Process (NRP). The Board remanded the case to OWCP on the grounds that they did not follow the procedures outlined in FECA Bulletin No. 09-05³ with respect to claims for compensation when a light job was withdrawn and a wage-earning capacity determination was in effect. The history of the case as provided in the Board's prior decision is incorporated herein by reference.

On remand, OWCP sent an October 12, 2012 letter to the employing establishment requesting a response as to whether the position on which the wage-earning capacity determination was based was a bona fide position at the time of the rating. On October 18, 2012 it received a copy of a December 8, 2003 job offer that was previously of record, as well as a November 14, 2005 job offer. On November 14, 2012 the employing establishment submitted a copy of a "current modified assignment/position worksheet" dated January 13, 2009. It also submitted a copy of a mail handler job description, an SF-50 notification of personnel action effective February 6, 2012 and a CA-17 form from an orthopedic surgeon dated February 23, 2012.

By decision dated January 3, 2013, OWCP denied modification of the wage-earning capacity determination. It found the evidence was insufficient to warrant modification.

Appellant requested a hearing before an OWCP hearing representative, which was held on April 15, 2013. By decision dated June 28, 2013, the hearing representative denied modification of the wage-earning capacity determination. The hearing representative found that appellant had not met his burden of proof.

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

ANALYSIS

In the prior appeal, the Board remanded the case to OWCP to follow the procedures outlined in FECA Bulletin No. 09-05 with respect to claims for compensation when a light job was withdrawn pursuant to NRP and a wage-earning capacity determination was in effect. The Board specifically noted that FECA Bulletin No. 09-05 required that the record should contain

³ Issued August 18, 2009.

⁴ *Sue A. Sedgwick*, 45 ECAB 211 (1993).

⁵ *Id.*

documentary evidence that the position performed was a bona fide position. In addition, the Board noted that FECA Bulletin No. 09-05 provided that further development of the evidence may require 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 to direct the employing establishment to review its files for contemporaneous evidence concerning the position.”

On remand, OWCP sent an October 12, 2012 letter to the employing establishment requesting a response as to whether the position on which the wage-earning capacity determination was based was a bona fide position at the time of the rating, but the response from the employing establishment did not address the issue presented. On October 18, 2012 it received a copy of a December 8, 2003 job offer that was previously of record, as well as a November 14, 2005 job offer. On November 14, 2012 the employing establishment submitted a copy of a “current modified assignment/position worksheet” dated January 13, 2009.

The employing establishment did not provide any new and relevant information with respect to the issue presented. Moreover, OWCP did not provide adequate findings on the issue. The January 3 and June 28, 2013 decisions did not discuss the limited-duty job performed in 2004, or the relevant factors that are considered in determining whether a job was “makeshift” or otherwise inappropriate for a wage-earning capacity determination under Board precedent and relevant authority.⁶

To properly follow the guidelines of FECA Bulletin No. 09-05, OWCP needs to secure relevant evidence from the employing establishment as to the job that was the basis for the wage-earning capacity determination -- the modified mail handler job appellant was performing from April 2004. Once it has the relevant information, it should make a proper finding as to whether the job was makeshift or otherwise inappropriate for a wage-earning capacity determination. The case will be remanded to OWCP for proper findings on the issue. After such further development as is deemed necessary, it should issue an appropriate decision.

CONCLUSION

The Board finds the case is not in posture for decision and is remanded to OWCP for proper development of the modification of the wage-earning capacity issue.

⁶ See *A.J.*, Docket No. 10-619 (issued June 29, 2010). See also 20 C.F.R. § 10.510.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 28, 2013 is set aside and the case remanded for further action consistent with this decision of the Board.⁷

Issued: June 12, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

⁷ Richard J. Daschbach participated in the preparation of the decision but was no longer a member of the Board after May 16, 2014.