



1996 appellant filed a claim for benefits after she sustained a twisting injury to her back. OWCP accepted the claim for parathoracic muscle strain. On July 2, 1998 appellant filed a Form CA-2a claim for benefits, alleging that she sustained a recurrence of disability causally related to her accepted conditions. OWCP accepted the claim for exacerbation of cervical, thoracic, and lumbar myofascitis, and aggravation of degenerative disc disease of the lumbar spine.

On March 25, 1999 appellant accepted a job as a modified letter carrier and began work on April 10, 1999. The position was tailored to her physical restrictions and allowed her to work for eight hours a day, with no pushing, pulling, or lifting over 25 pounds, and no repetitive climbing.<sup>2</sup>

By decision dated February 1, 2000, OWCP issued a wage-earning capacity decision finding that appellant had worked more than 60 days in the modified position and the actual wages she earned in the position of modified letter carrier, \$635.90 per week, fairly and reasonably represented her wage-earning capacity.

Appellant worked at her modified job until May 20, 2010, when the employing establishment transferred her to a temporary supervisory position. On May 20, 2011 the employing establishment withdrew the job under the National Reassessment Program (NRP). On July 18, 2011 appellant filed a Form CA-7, followed by other such forms, for a wage-loss compensation claim beginning July 2, 2011 and continuing until September 9, 2011. The employing establishment indicated on the forms that it no longer had work available for appellant within her medical restrictions.

By decision dated October 12, 2011, OWCP denied modification of the February 1, 2000 LWEC decision, finding that appellant failed to submit evidence sufficient to establish one of the three criteria required for modification. By decision dated April 16, 2012, an OWCP hearing representative affirmed the October 12, 2011 decision.

In a decision dated December 14, 2012,<sup>3</sup> the Board set aside the April 16, 2012 decision. It found that OWCP improperly analyzed the case under the customary criteria for modifying a loss of wage-earning capacity determination and did not acknowledge FECA Bulletin No. 09-05, which requires OWCP to develop the evidence to determine whether a modification of that decision is appropriate when modified-duty positions are withdrawn pursuant to NRP.<sup>4</sup> The

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<sup>2</sup> The job description stated: "Assigned to the South Euclid Station to case letter and flat mail on routes; check A-Z mail against printouts; Delivery Confirmation Scanner A.M. list; DSIS volume input; DSIS hour transfers; balance hours on carrier report; deliver late arriving express mail; deliver hold mail; complete accounting period drive out forms; AIS Red Books; Mark-over mail; second notices and returns; AVUS; AL ADVANCE; All Quality Assurance Audits; Delivery Confirmation Scanner -- option two review against A.M. list and input of any missing numbers; P.M. Express or Priority Scanning, updating route books; answering telephones; Aviation Security Audit; man the caller window for customer pickup of certified, insured, customs, c.o.d.s, parcels and hold mail; check in carriers at cage; weekly gas report. Assist manager with the new OSHA 200 Log requirements."

<sup>3</sup> Docket No. 12-1295 (issued December 14, 2012).

<sup>4</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 the employing establishment to 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 a review of its files for contemporaneous evidence concerning the position.

Board found that OWCP was required to review whether a current medical report supported work-related disability and to further develop the evidence from appellant and the employing establishment if the case lacked current medical evidence. It therefore remanded the case for OWCP to further consider the case in conformance with FECA Bulletin No. 09-05 guidelines and to issue a *de novo* decision on appellant's entitlement to wage-loss compensation beginning July 2, 2011. The complete facts of this case are set forth in the Board's December 14, 2012 decision and are herein incorporated by reference.

In an August 2010 report, received by OWCP on January 22, 2013, Dr. David Hochman, Board-certified in internal medicine, stated that appellant was experiencing low back pain which radiated into the left lower extremity. He stated that appellant was reassigned to a letter carrier 204B supervisor in August 2010 and that, apparently, her job duties as a 204B supervisor required her to push cages, push up tubs of mail, twist, and bend on a regular basis. This caused an exacerbation of her condition. Dr. Hochman diagnosed a permanent aggravation of the lumbar/thoracic degenerative disc disease stemming from her work activities, which remained symptomatic. He advised that appellant underwent a magnetic resonance imaging (MRI) scan in May 2011, which showed facet pathology at the L3-5 levels. Dr. Hochman opined that, within a reasonable degree of medical probability, there was a permanent aggravation of lumbar/thoracic degenerative disc disease as a result of her work activities while working as a 204B supervisor.

Following the Board's decision, the employing establishment submitted several documents to OWCP. These included: a Postal Service Form 50, effective April 10, 1999, which reassigned appellant from a carrier technician job to a modified rehabilitation job offer; a February 23, 1999 rehabilitation job offer, signed by appellant on March 25, 1999; limited-duty job offers dated November 23, 2007 and April 10, 2009; an assignment order, Postal Service Form 1723, temporary assignment order, starting May 24, 2010 and ending December 31, 2010; assignment orders, Postal Service Form 1723, starting May 27, 2010 ending December 31, 2011.

The employing establishment indicated on the form that the rehabilitation job offer appellant signed on March 25, 1999 was in fact a *bona fide* position at the time of the LWEC rating. It stated that the temporary assignment order forms (Postal Service 1723 forms) were used as a written agreement between management and employees when an employee performed duties other than those in employee's official job description, including higher level and training assignments.

In order to determine appellant's current condition, OWCP referred the case to Dr. Manhal Ghanma, Board-certified in orthopedic surgery. In a March 8, 2013 report, after reviewing the medical history and statement of accepted facts and stating findings on examination, he opined that the record indicated that she did not develop any radiculopathy as a result of her work injuries, as evidenced by the multiple records presented in her medical file. Dr. Ghanma advised that the imaging studies did not reveal any evidence of nerve root compression to support radiculopathy based on her work injuries. He stated that, while appellant had continued complaints of global left leg and foot numbness, these symptoms were attributable to nonaccepted conditions and not to her work injuries. Dr. Ghanma opined that the objective evidence in the file did not support evidence of radiculopathy either in the upper or the lower extremities. He advised that, in light of the lack of objective evidence to support radiculopathy, with her imaging studies revealing no evidence of nerve root compression, there was nothing in

the record which supported a diagnosis of radiculopathy. Dr. Ghanma further advised that none of her accepted conditions would have resulted in radiculopathy, including cervical sprain, thoracic sprain, occipital contusion, parathoracic muscle strain, cervical, thoracic, and lumbar myofascitis, or aggravation of degenerative disc disease of the lumbar spine.

In a decision dated April 16, 2013, OWCP denied modification of the original February 1, 2000 LWEC decision, finding that appellant had failed to establish any of the three elements required for modification; *i.e.*, that the original LWEC rating was in error, that her accepted employment-related medical condition had materially changed, or that she had been retrained or otherwise been vocationally rehabilitated. It also reviewed the evidence of record in accordance with the procedures outlined in FECA Bulletin No. 09-05. OWCP stated that the evidence submitted by the employing establishment, consisting of the rehabilitation job offer and the Postal Service Form 50, Notice of Personnel Action form, clearly documented that at the time the rehabilitation job offer was issued and accepted on March 25, 1999, all parties involved understood that the job offer was a permanent, *bona fide* job offer and that it was not make shift nor odd lot. OWCP stated that this understanding was clearly supported by the fact that the employing establishment issued a Postal Service Form 50, Notice of Personnel Action, documenting that she was formally reassigned from the Carrier Tech Level-05 with routes to the modified rehabilitation job offer, effective April 10, 1999.

OWCP further found that appellant had not submitted sufficient medical evidence to indicate or support a material change in her accepted conditions, as she had failed to provide any current medical evidence supporting that her accepted work-related condition had materially changed to the extent that she was unable to perform any work, either full time or part time, with or without restrictions. It found that there was no medical evidence from her treating physician addressing and explaining whether any residuals continued to disable her from her date-of-injury position. OWCP stated that it had referred her to Dr. Ghanma, whose March 8, 2013 report indicated that she did not develop any radiculopathy as a result of her work injuries, that the imaging studies did not reveal any evidence of nerve root compression to support radiculopathy based on her work injuries. It advised that, while appellant had continued complaints of left leg and foot numbness, Dr. Ghanma found that these symptoms were attributable to nonaccepted conditions and not to her accepted employment conditions, including cervical sprain, thoracic sprain, occipital contusion, parathoracic muscle strain, cervical, thoracic, and lumbar myofascitis, or aggravation of degenerative disc disease of the lumbar spine. Lastly, OWCP found that there was no evidence that she had been retrained or had otherwise been vocationally rehabilitated.

By letter dated April 18, 2013, appellant, through her attorney, requested an oral hearing, which was held on August 14, 2013. At the hearing, appellant's attorney argued that the LWEC decision was incorrect for two reasons, contending that appellant was not working in the job that was used for the 2000 LWEC decision when her job was withdrawn and that the job used for the LWEC decision was not a *bona fide* job offer. He asserted that since there was no hiring or firing hierarchy involved with that job, by definition, it could not be considered *bona fide*. Appellant stated that she was not working in that job when her position was withdrawn in May 2011. Counsel advised that she had been working in a supervisory capacity for a year after leaving her modified letter carrier, light-duty position. He noted that the supervisory job was not a light-duty position, but appeared to be within the claimant's physical restrictions; however, due

to NRP, the supervisory job was withdrawn. Counsel noted that when appellant tried to return to work in her prior light-duty position, there was no job available for her, as the position had been filled. He stated that appellant therefore filed for retirement, effective September 2, 2011.

Appellant testified that the supervisory job she held was a 204B position. She stated that before she worked as a supervisor, she had been working as a modified letter carrier from 1999 to 2010; this was a clerical job, the duties of which included sitting down, answering the telephone, changing addresses, casing mail for about an hour in the morning, and doing anything else her superiors asked her to do. Appellant asserted that, after about a year after she began working this job, her condition worsened. She stated that she stopped casing mail because it was aggravating her symptoms and that her manager at the time told her to stop this activity if it hurt, although she continued to do the other clerical work in this position and continued to perform the modified job for about 10 years, before becoming a supervisor in 2010.

Appellant stated that a co-worker at a higher level noticed that many of her assigned duties were consistent with supervisory activities, and that she performed these duties well. As a result, management sent her to another station to work as a supervisor. Appellant advised that the job duties of the supervisory position were generally within her restrictions although it required a little more lifting, bending, and standing. She stated that she performed this position until a manager called her at home and told her the supervisory position was no longer available to her. Appellant tried to return to her regular-duty station and perform her old position there, but the position had been filled. She stated that her last day of work was May 7, 2011 and that she remained in a pay status through May 20, 2011, due to vacation time. When she returned to work from her vacation, appellant received NRP paperwork and was told she no longer had a job. She filed a union grievance, which she won, and in an August 6, 2012 prearbitration settlement it was stipulated that she was entitled to back wages for all time lost between May 20, 2011 through the date of her retirement.

Appellant submitted a copy of the August 6, 2012 settlement agreement which indicated that she had won her grievance against management when it failed to provide her with eight hours of work as of May 20, 2011. The agreement awarded her all lost wages and benefits from May 20, 2011 to the date of her retirement that she would have otherwise received as if she had worked an eight-hour day, including all wages, annual leave, sick leave, and retirement benefits.

In a decision dated March 25, 2014, an OWCP hearing representative affirmed the April 16, 2013 decision.

### **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. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.<sup>5</sup> Section 8115(a) of FECA provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his or her actual earnings if his or her actual earnings fairly and reasonably

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<sup>5</sup> See *Katherine T. Kreger*, 55 ECAB 633 (2004). See 5 U.S.C. § 8115 (determination of wage-earning capacity).

represent his or her wage-earning capacity.<sup>6</sup> Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.<sup>7</sup>

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>8</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>9</sup>

FECA's procedure manual states that when the employing establishment has withdrawn a light-duty position which accommodated the claimant's work restrictions and a formal wage-earning capacity decision has been issued, the wage-earning capacity decision will remain in place.<sup>10</sup> The claims examiner should, however, consult FECA Bulletin No. 09-05 (United States Postal National Reassessment Program Guidance) issued August 18, 2009 if the circumstances in the case indicate that the position in question may have been withdrawn (in whole or in part) as a result of NRP.<sup>11</sup>

### ANALYSIS

In its April 16, 2013 and March 25, 2014 decisions, OWCP denied modification of the February 1, 2000 LWEC determination. It found that the duties of the modified city letter carrier fairly and reasonably represented the claimant's wage-earning capacity, and that appellant had no loss in wage-earning capacity. OWCP stated that she had worked in this full-time position over 60 days and had demonstrated her ability to perform the duties of the position. The record shows that appellant returned to work as a modified city letter carrier on or around April 10, 1999 and worked at this position until May 24, 2010, when she was granted a temporary assignment as a 204B supervisor. Appellant worked in that position until May 2011, when the employing establishment advised her that there was no work available to her as a 204B supervisor and the job was withdrawn under NRP.

Appellant subsequently filed a Form CA-2a notice of recurrence on May 20, 2011, requesting compensation for wage loss as of the date when the employing establishment advised her that there was no work available within her restrictions. OWCP properly found that appellant was not entitled to wage-loss compensation when she stopped work, as her wage-earning capacity had previously been established. As noted above, when the employing establishment has withdrawn a light-duty assignment, which accommodated appellant's work

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<sup>6</sup> See *id.* at § 8115.

<sup>7</sup> *Id.* at § 8115(a); *Loni J. Cleveland*, 52 ECAB 171 (2000).

<sup>8</sup> *Sharon C. Clement*, 55 ECAB 552 (2004).

<sup>9</sup> *T.M.*, Docket No. 08-975 (issued February 6, 2009); *Tamra McCauley*, 51 ECAB 375, 377 (2000).

<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity Decisions*, Chapter 2.1501.7 (June 2013).

<sup>11</sup>*Id.*

restrictions and a formal wage-earning capacity decision has been issued, the decision will remain in place, 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.<sup>12</sup>

Appellant argued that the LWEC decision should be set aside because it was based on a position that was not *bona fide* and was therefore not suitable for an LWEC determination, pursuant to FECA Bulletin No. 09-05. This bulletin provides that the determination of whether a loss of wage-earning capacity was based on an actual *bona fide* position may be evinced by a job offer, SF-50, a classified position or formal position description, or the documentary evidence.<sup>13</sup> Based on these guidelines, OWCP properly found that the modified letter carrier job was *bona fide* and not a makeshift or odd-lot position. The March 25, 1999 job offer which appellant accepted contained a clear position description, identified the title of the job, a set schedule, and the duties of the position. The duties of the modified letter carrier were clearly outlined in the job offer. It was not a temporary position, as indicated on an SF-50 that officially reassigned appellant to work as a modified letter carrier as a permanent position. Appellant has provided no evidence that there was insufficient work for her to perform. There is no indication that she needed assistance from her supervisor or her coworkers to fulfill the assigned duties of her position, or that she worked in a self-directed manner or schedule. Appellant testified at the hearing that she performed the duties of modified letter carrier job for approximately 10 years, before she accepted a job as a 204B temporary supervisor. Although she testified that her manager allowed her to cease casing mail when she complained that particular activity aggravated her lower back, she provided no evidence to support this assertion and did not attempt to switch jobs until management offered her a supervisory position after 10 years. She continued to work in the same position until 2000, when the LWEC decision was put in place, and she continued to work in this position until 2010, when she accepted the assignment as a 204B supervisor. OWCP has established that the position was a *bona fide* position. As the position had been filled after appellant left the position for the supervisory position, this evidence further corroborates that it was a *bona fide* position.

Further, appellant has not provided sufficient medical evidence to establish that her condition worsened such that the LWEC should be modified. As noted above, she demonstrated the physical ability to perform the functions of the modified letter carrier position for 10 years. Appellant also demonstrated the ability to perform the duties of a temporary supervisory position for one year. The medical evidence in the record consists of reports from Dr. Ghanma and Dr. Hochman.

Dr. Ghanma indicated in his March 8, 2013 report that appellant had not developed any radiculopathy as a result of her work injuries and opined that imaging studies failed to demonstrate nerve root compression to support radiculopathy based on her work injuries. He found that her symptoms of left leg and foot numbness were attributable to nonaccepted conditions, including cervical sprain, thoracic sprain, occipital contusion, parathoracic muscle

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<sup>12</sup> See *supra* note 8.

<sup>13</sup> See also *P.P.*, Docket No. 14-656 (issued December 18, 2014); *T.P.*, Docket No. 14-1207 (issued November 7, 2014).

strain, cervical, thoracic, and lumbar myofascitis, or aggravation of degenerative disc disease of the lumbar spine.

In his August 2010 report, Dr. Hochman stated that appellant's job duties as a 204B supervisor required her to push cages, push up tubs of mail, twist, and bend on a regular basis. This caused an exacerbation of her low back condition. He stated that a May 2011 MRI scan showed facet pathology at the L3-5 levels and opined that appellant sustained a permanent aggravation of lumbar/thoracic degenerative disc disease as a result of her work activities while working as a 204B supervisor. Dr. Hochman's opinion on causal relationship is of limited probative value in that he did not provide adequate medical rationale in support of his conclusions.<sup>14</sup> He did not describe how appellant's work duties as a supervisor would have been competent to cause the alleged aggravation of her low back conditions. It is unclear if Dr. Hochman had an accurate history as he did not indicate an awareness that appellant had stopped working in that supervisory position as a result of NRP.<sup>15</sup> Appellant therefore failed to show that she sustained a material change in her accepted work-related conditions and, as noted above, the evidence does not support that her May 2010 transfer to supervisor or her May 2011 work stoppage was due to a worsening of her physical condition or an increase of disability related to an accepted work-related condition.

Accordingly, the Board finds that modification of the February 1, 2000 LWEC decision is not warranted. The evidence of record fails to support that the LWEC was in error, the claimant was vocationally rehabilitated, or that there was material change in the nature and extent of an accepted, work-related condition. Appellant is not entitled to wage-loss compensation effective May 20, 2011, or thereafter, when the employing establishment withdrew her job. For these reasons, she has not shown that OWCP's February 1, 2000 wage-earning capacity determination should be modified.

### **CONCLUSION**

The Board finds that appellant did not meet her burden of proof to modify OWCP's February 1, 2000 wage-earning capacity determination.

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<sup>14</sup> *William C. Thomas*, 45 ECAB 591 (1994).

<sup>15</sup> *See Geraldine H. Johnson*, 44 ECAB 745 (1993).

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 25, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 20, 2015  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board