

FACTUAL HISTORY

On August 26, 1993 appellant, then a 36-year-old letter carrier, sustained a right elbow injury in the performance of duty. His claim was accepted for right elbow traumatic synovitis and post-traumatic osteoarthritis.²

Appellant was treated by Dr. Ishwar Dass, an orthopedic surgeon, who released him to return to full-time modified duty on August 1, 1994. He was restricted from pushing, pulling, reaching, making repetitive movements or lifting more than five pounds.

On October 24, 1994 appellant accepted a full-time limited-duty assignment as a city carrier. The written job offer indicated that his duties would be limited to those within the restrictions provided by his treating physician. Accordingly, appellant would not be required to lift, push or pull more than five pounds; to reach; to drive right-handed vehicles; or to engage in repetitive movements with his right arm.

On December 15, 1994 OWCP issued a formal wage-earning capacity decision. It found that the wages of the modified position fairly and reasonably represented appellant's wage-earning capacity, and that, as his wages were equal to or greater than those he earned on the date of injury, he had no loss of wage-earning capacity.

Appellant worked in his limited-duty job until February 9, 2010, when the employing establishment informed him that, pursuant to the guidelines established under the National Reassessment Process (NRP), it was unable to identify enough available necessary tasks within his medical restrictions in order for him to complete a full day of work.

On April 21, 2010 appellant filed a claim for a recurrence of disability based on the employing establishment's withdrawal of his limited-duty position. He alleged that the employing establishment was unable to accommodate his medical condition. Appellant submitted numerous medical reports from his treating physician tracing his history of treatment.

In an April 26, 2010 decision, OWCP denied modification of the 1994 LWEC decision.

In a letter dated July 22, 2010, the employing establishment notified appellant of its determination that there was no operationally-necessary work available for him within his current medical restrictions.

On May 6, 2010 appellant requested a telephonic hearing, which was held on August 4, 2010. Counsel for appellant argued that the modified position on which the December 15, 1994 LWEC decision was based was "make work" and that, therefore, the initial decision was erroneous and should be set aside.

By decision dated October 22, 2010, an OWCP hearing representative affirmed the OWCP's April 26, 2010 decision denying modification of the December 15, 1994 LWEC

² OWCP accepted appellant's September 8, 1999 traumatic injury claim for left elbow strain and left elbow lateral and medial epicondylitis. (File No. xxxxxx544) On July 11, 2001 the files were consolidated, with File No. xxxxxx038 serving as the master file.

determination. He found that the limited-duty position was not makeshift, as it was not designed for appellant's particular needs and the duties described were considered normal duties performed by a clerk. The hearing representative further found that the medical evidence did not support any material change in appellant's work-related condition such that he could no longer perform the modified job.

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.³ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁴

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 not in posture for decision. OWCP accepted appellant's claims for right elbow traumatic synovitis and post-traumatic osteoarthritis. Based upon the medical restrictions recommended by appellant's treating physician, the employing establishment offered him a modified city carrier position, which he accepted on October 24, 1994. By decision dated December 15, 1994, 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 February 9, 2010, when the employing establishment informed him that there was no productive work available for him. 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 its April 26, 2010 decision, OWCP denied modification of the December 15, 1994 LWEC decision, finding that the modified carrier position was not makeshift in nature and that the evidence did not establish a worsening of appellant's condition. The hearing representative 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, FECA Bulletin No. 09-05

³ *Sue A. Sedgwick*, 45 ECAB 211 (1993).

⁴ *Id.*

provides specific guidelines for developing the issue of modification of a wage-earning capacity determination when the job has been withdrawn pursuant to NRP.⁵

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 right elbow condition. The case will be remanded to OWCP to properly analyze the modification issue 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 for benefits.

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 October 22, 2010 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: August 30, 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 FECA Bulletin No. 09-05 (issued August 18, 2009).