

FACTUAL HISTORY

On April 8, 1994 appellant, then a 45-year-old part-time flexible (PTF) clerk, filed a claim for traumatic injury, claiming right shoulder, arm and hand strain as a result of her federal employment. She explained that she slipped on a patch of ice and fell while walking to work. OWCP accepted the claim for right shoulder strain and appellant underwent authorized right shoulder arthroscopic surgeries for labral repair on October 5, 1994 and for debridement with acromioplasty on June 30, 1995.

On November 30, 1995 appellant was offered a rehabilitation position as a modified PTF clerk. Her duties included sorting box mail, computer input, recordkeeping such as volume reports and claims and express mail delivery, as needed. Pursuant to appellant's medical restrictions, the job offer provided that she was not to reach above her shoulder level, was to sort with equal frequency with either hand and lift no more than 20 pounds. She accepted the position on December 5, 1995.

In an April 1, 1996 decision, OWCP found that the modified clerk position was suitable and fairly and reasonably represented the claimant's wage-earning capacity.

On November 24, 2009 appellant filed a notice of recurrence claiming wage loss due to work stoppage on that date. The record establishes that her work stoppage was due to the withdrawal of her limited-duty rehabilitation assignment under the National Reassessment Program (NRP).

In a January 27, 2010 report, appellant's treating physician, Dr. Claude E. Nichols, III, confirmed that appellant's right shoulder continued to have limited range of motion and that her status was unchanged and permanent.

OWCP initially accepted appellant's recurrence claim on February 4, 2010. However, on February 8, 2010 appellant was notified that the acceptance decision had been issued in error because there was a formal wage-earning capacity determination in place.

OWCP issued a letter on February 8, 2010 advising appellant of the grounds for modification of the April 1, 1996 LWEC determination. Appellant was given 30 days to submit the required information. In response, in a March 12, 2010 letter, appellant's attorney argued that the position was makeshift as it was created specifically for her, thus the original LWEC decision was issued in error.

As of February 16, 2010, appellant filed a series of CA-7 forms, claiming wage-loss compensation.

By decision dated June 15, 2010, OWCP formally rescinded the February 4, 2010 acceptance letter and denied the claim for recurrence, effective November 24, 2009, because the evidence did not establish that the criteria had been met to support modification of the previous wage-earning capacity determination.

Appellant disagreed with this decision and requested a telephonic hearing. The hearing was held on October 5, 2010. Appellant's attorney argued that because the makeshift nature of

appellant's work, the original LWEC decision was erroneous on its face. He asserted that if inquiries were completed, it would be shown that appellant was working a nonbid position and that the position was temporary and was done specifically to accommodate the claimant's disabilities. During appellant's own testimony, she confirmed that the modified clerk position was not a bid position and was within the medical restrictions she supplied. Appellant also acknowledged that the modified clerk position had different duties from a regular clerk. In addition, appellant also noted that the removal of her position was not in accordance with seniority pursuant to the collective bargaining agreement.

In a December 22, 2010 decision, the hearing representative affirmed the June 15, 2010 OWCP decision, rescinding the acceptance of appellant's recurrence of disability and denying modification of the established wage-earning capacity determination.

LEGAL PRECEDENT -- ISSUE 1

Section 8128 of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application.² The Board has upheld OWCP's authority to reopen a claim at any time on its own motion under section 8128 of FECA and where supported by the evidence, set aside or modify a prior decision and issue a new decision.³ The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.⁴

Once OWCP accepts a claim, it has the burden of justifying the termination or modification of compensation benefits. This holds true where, as here, it later decides that it erroneously accepted a claim. In establishing that its prior acceptance was erroneous, OWCP is required to provide a clear explanation of the rationale for rescission.⁵

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly rescinded acceptance of appellant's recurrence of disability, effective November 24, 2009.

When a formal LWEC determination is in place, the proper standard of review is not whether appellant sustained a recurrence of disability, but whether OWCP should modify its wage-earning capacity decision according to the customary criteria for modifying a formal LWEC determination.⁶ As OWCP properly explained the rationale for the rescission of the acceptance of appellant's recurrence claim, the Board finds that it met its burden of proof to rescind.

² 5 U.S.C. § 8128.

³ *John W. Graves*, 52 ECAB 160 (2000).

⁴ *Id.*

⁵ *John W. Graves*, *supra* note 3.

⁶ *D.S.*, 58 ECAB 392 (2007).

LEGAL PRECEDENT -- ISSUE 2

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.⁷ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁸

ANALYSIS -- ISSUE 2

In the present case, OWCP issued an April 1, 1996 wage-earning capacity decision based on the rehabilitation job offer appellant had been performing since approximately December 5, 1995. Appellant has argued that the wage-earning capacity determination should be modified as the position was withdrawn on November 24, 2009, pursuant to NRP, and the position was in fact a makeshift position.

With respect to the withdrawal of the position on November 24, 2009, OWCP's FECA Bulletin No. 09-05 sets forth the guidelines by which a claim for compensation should be evaluated if an employee's position is withdrawn pursuant to the NRP.⁹ The Board finds that this case is not in posture for decision as OWCP did not make findings pursuant to FECA Bulletin No. 09-05 in this case.

If a formal LWEC decision has been issued, the claims examiner must develop the evidence to determine whether a modification of that LWEC is appropriate. All postal service cases where CA-7's are received that involve LWEC ratings based on actual positions should be reviewed to confirm that the file contains evidence that the LWEC rating was based on an actual *bona fide* position. This evidence may include a job offer, an SF-50, a classified position, a formal position description or other documentary evidence of file. The present record does contain a copy of a November 30, 1995 rehabilitation job offer. Appellant argues that this was not a permanent position because it was a rehabilitation position and was a nonbid position. FECA Bulletin No. 09-05 advises that in an effort to proactively manage these types of cases, OWCP may also undertake further nonmedical development. OWCP may request the postal service to address in writing whether the position on which the LWEC rating was based was a *bona fide* position at the time of the LWEC rating. OWCP shall thereafter make new findings as to whether appellant's rehabilitation position was a makeshift position.

Pursuant to FECA Bulletin No. 09-05, OWCP should also review the file to determine whether there is a current medical report regarding employment-related residuals. If there is no current medical evidence then OWCP should request appellant to submit a narrative medical report as to the nature and extent of employment-related residuals. The employing establishment should also be requested to submit relevant medical evidence in its possession. Such requests are

⁷ *T.M.*, Docket No. 08-975 (issued February 6, 2009); *Tamra McCauley*, 51 ECAB 375, 377 (2000).

⁸ *Id.*

⁹ FECA Bulletin No. 09-05 (issued August 18, 2009).

“essential where employees may not have been requested to provide recent medical evidence because they have a zero LWEC rating...”¹⁰

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.

CONCLUSION

The Board concludes that OWCP met its burden of proof to rescind appellant’s November 24, 2009 notice of recurrence of disability. The Board also finds that the case is not in posture for decision regarding modification of the wage-earning capacity determination and will be remanded to OWCP for further development.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers’ Compensation Programs decision dated December 22, 2010 is affirmed in part and set aside in part.

Issued: August 28, 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

¹⁰ *Id.*