

FACTUAL HISTORY

OWCP accepted that appellant, a 35-year-old clerk, filed a traumatic injury claim alleging that she sustained an injury to her back while carrying mail. Her claim was accepted for lumbar sprain and temporary aggravations of disc protrusions at the L4-5 and L5-S1 levels and OWCP paid appropriate compensation.

On March 18, 2005 appellant accepted a position as a modified clerk. The written job offer reflected restriction provided by appellant's treating physician, including lifting no more than 20 pounds; limited kneeling, squatting and repetitive work above shoulder level and occasional standing.

By decision dated September 21, 2005, OWCP determined that appellant's actual earnings fairly and reasonably represented her wage-earning capacity and reduced her compensation to zero based on her actual wages, which exceeded her date-of-injury wages. Appellant worked in her limited-duty job until April 26, 2010, when the employing establishment informed her that there was no productive work available for her.

On May 10, 2010 appellant filed a claim for a recurrence of disability based on the employing establishment's withdrawal of her limited-duty position effective April 28, 2010 as part of the National Reassessment Process (NRP). Appellant also filed claims for compensation commencing April 28, 2010.

In a June 21, 2010 statement, appellant requested that the original September 21, 2005 LWEC decision be set aside on the grounds that it was erroneous and that her condition had worsened since the decision was issued. She submitted treatment records from Dr. Mildred Rotzoll, Board-certified in family medicine, for the period January 14 through July 22, 2010, supporting her claim that her chronic back pain had worsened since February 2010. Appellant also contended that the limited-duty clerk position on which the original LWEC decision was based was makeshift in nature, as it was created to meet her particular needs and was not available to other employees.

In an August 17, 2010 decision, OWCP denied appellant's entitlement to compensation effective April 28, 2010. The claims examiner found that the modified clerk position on which the March 18, 2005 job offer was based was not makeshift in nature. OWCP concluded, therefore, that the September 21, 2005 LWEC decision was not issued in error. It further found that the evidence did not establish a worsening of appellant's condition.

On September 17, 2010 appellant, through her representative, requested an oral hearing. By decision dated October 20, 2010, an OWCP hearing representative denied the request as untimely, noting that, in its discretion, it had carefully considered the request and determined that the issue could equally well be addressed by requesting reconsideration from the district office.²

² The claims examiner analyzed the issues in this case under Board precedent, citing *A.J.*, Docket No. 10-619 (issued June 29, 2010) and *M.R.*, Docket No. 10-1407 (issued April 4, 2011).

LEGAL PRECEDENT -- ISSUE 1

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 -- ISSUE 1

The Board finds this case not in posture for decision. OWCP accepted appellant's claims for lumbar sprain and temporary aggravations of disc protrusions. Based upon the medical restrictions recommended by appellant's treating physician, the employing establishment offered her a modified clerk position, which she accepted on March 18, 2005. By decision dated September 21, 2005, OWCP found that appellant's actual earnings in the modified position fairly and reasonably represented her wage-earning capacity and reduced her compensation benefits to zero.

The record reflects that appellant worked in the full-time modified position until April 26, 2010, when the employing establishment informed her that there was no productive work available for her. She filed a claim for a recurrence of disability based on the withdrawal of her 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 her condition had worsened since the decision was issued.

In its August 17, 2010 decision, OWCP denied modification of the September 21, 2005 finding that the modified clerk position was not makeshift in nature and that the evidence did not establish a worsening of appellant's condition. The claims examiner 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, there are 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 09-05, OWCP did not discuss the medical evidence of record as it pertains to appellant's residuals due to the accepted back condition. The case will be remanded to OWCP to properly analyze the modification issue presented in accord

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

⁴ *Id.*

⁵ FECA Bulletin No. 09-05 (issued August 18, 2009).

with FECA Bulletin 09-05. After such further development as OWCP deems necessary, it should issue an appropriate decision.

The Board therefore 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 09-05 and issue an appropriate decision on appellant's claim.

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 August 17, 2010 is set aside and the case remanded for further action consistent with this decision of the Board.⁶

Issued: August 28, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

⁶ Due to the disposition of this case, the second issue, pertaining to the denial of appellant's hearing request, is rendered moot.