



hip replacement on November 16, 1993 and right hip replacement on April 23, 1996. OWCP accepted appellant's claim for aggravation of bilateral hip osteoarthritis.<sup>2</sup>

OWCP referred appellant for a second opinion examination to Dr. Bharat V. Mehta, a Board-certified orthopedic surgeon. In a report dated October 28, 1998, Dr. Mehta examined appellant and observed well-healed bilateral thigh incisions and diminished bilateral hip flexion, internal rotation and external rotation. X-rays exhibited excellent prosthetic positioning without complications and a neurological evaluation was unremarkable. Based on his findings and a review of the medical file, Dr. Mehta opined that appellant could not stand for a prolonged period, lift items weighing above five pounds, bend, squat, kneel or operate a vehicle that had limited legroom or required greater than 90 degrees of hip flexion in a seated position. He specified in an October 28, 1998 work capacity evaluation form that appellant could walk, stand and drive for two hours each and lift items weighing up to five pounds, but must refrain from twisting, pushing, pulling, squatting, kneeling and climbing. Dr. Mehta recommended sedentary duty.

On October 13, 1998 the employing establishment offered appellant the full-time position of rehabilitation clerk at a base salary of \$37,831.00. Duties included filing and retrieving documents, typing and preparing reports, bookkeeping, photocopying, answering telephone calls, using a laser scanner weighing less than a pound, assisting customers and occasionally sorting mail while utilizing an adjustable rest bar. The job did not require squatting, stooping, bending over, prolonged standing, repetitive stair-climbing or driving. Appellant accepted the offer and returned to work on October 24, 1998. In a November 23, 1998 report, Dr. Mehta confirmed that the position of rehabilitation clerk was suitable in view of appellant's employment injury.

By decision dated December 28, 1998, OWCP found that the position of rehabilitation clerk fairly and reasonably represented appellant's wage-earning capacity. Because appellant's current salary met or exceeded the salary of the job he held at the time of injury,<sup>3</sup> OWCP determined that he was not entitled to wage-loss compensation.

The employing establishment informed appellant in a December 29, 2010 letter that work was no longer available within his medical restrictions pursuant to the National Reassessment Process (NRP). Appellant was placed on administrative leave through January 15, 2011 and leave without pay thereafter. He subsequently filed a claim for disability compensation on February 18, 2011.<sup>4</sup>

OWCP advised appellant in a March 8, 2011 letter that a formal LWEC decision was previously issued and additional evidence was needed to establish modification. It gave him 30 days to submit evidence showing that the original LWEC rating was erroneous or that he sustained a change in the nature and extent of his injury-related condition. Appellant furnished May 11, 2010 and April 19, 2011 duty status reports from Dr. Henry A. Finn, a Board-certified

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<sup>2</sup> By decision dated August 2, 2001, OWCP granted a schedule award for 37 percent permanent impairment of the left lower extremity and 37 percent permanent impairment of the right lower extremity.

<sup>3</sup> The case record indicates that appellant earned \$35,271.00 annually as a letter carrier at the time of injury.

<sup>4</sup> The case record contains multiple compensation claims.

orthopedic surgeon, both of which placed him on permanent partial disability and recommended sedentary work.

By decision dated April 26, 2011, OWCP denied appellant's claim for compensation beginning January 18, 2011, finding the evidence insufficient to establish modification of the December 18, 1998 LWEC determination.

An April 19, 2011 x-ray obtained by Dr. Stephanie R. Rosania, a Board-certified diagnostic radiologist, showed bilateral total hip arthroplasties in anatomic alignment and a preexisting left femoral diaphyseal fracture.

Appellant requested an oral hearing, which was held on October 11, 2011. He testified that he experienced left hip pain and deterioration, but did not contest the validity of the original LWEC rating.

On December 28, 2011 an OWCP hearing representative affirmed denial of modification. The Branch of Hearings and Review amended and reissued this decision on April 17, 2012.<sup>5</sup>

### **LEGAL PRECEDENT**

A wage-earning capacity determination is a finding that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages and remains undisturbed until properly modified. Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn, not on actual wages lost.<sup>6</sup>

Once the wage-earning capacity of an injured employee is established, a modification is not warranted unless: (1) there is a material change in the nature and extent of the injury-related condition; (2) the employee has been retrained or otherwise vocationally rehabilitated; or (3) the original determination was, in fact, erroneous.<sup>7</sup> Either the claimant or OWCP may seek to modify a formal loss of wage-earning capacity determination: the burden of proof is on the party attempting to show modification.<sup>8</sup>

FECA Bulletin No. 09-05 outlines OWCP's procedures when a limited-duty position is withdrawn pursuant to NRP. If, as in the present case, a formal LWEC decision has been issued, OWCP must develop the evidence to determine whether a modification of that decision is appropriate.<sup>9</sup>

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<sup>5</sup> The cover sheet of the December 28, 2011 decision improperly stated that the case was remanded. The April 17, 2010 decision corrected this error.

<sup>6</sup> *K.R.*, Docket No. 09-415 (issued February 24, 2010).

<sup>7</sup> See also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11 (October 2009). *T.M.*, Docket No. 08-975 (issued February 6, 2009).

<sup>8</sup> *W.W.*, Docket No. 09-1934 (issued February 24, 2010).

<sup>9</sup> FECA Bulletin No. 09-05 (issued August 18, 2009).

## ANALYSIS

The Board finds that the case is not in posture for decision.

After OWCP issued its formal LWEC decision, the employing establishment reassessed appellant's rated position under NRP, resulting in the withdrawal of limited duty and multiple claims for wage-loss compensation. It analyzed the case under the customary criteria for modifying an LWEC determination, but did not acknowledge FECA Bulletin No. 09-05 or follow the procedures outlined therein for claims, such as this, in which limited-duty positions are withdrawn pursuant to NRP.

When an LWEC decision has been issued, FECA Bulletin No. 09-05 requires OWCP to develop the evidence to determine whether a modification of the decision is appropriate. To this end, the Bulletin asks OWCP to confirm that the file contains documentary evidence supporting that the position was an actual *bona fide* position. It requires OWCP to review whether a current medical report supports work-related disability and establishes that the current need for limited duty or medical treatment is a result of injury-related residuals as well as to further develop the evidence from both the claimant and the employing establishment if the case lacks current medical evidence.

Further, the Bulletin 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 LWEC determination was based was a *bona fide* position at the time of the rating and to review its files for contemporaneous evidence concerning the position.

Since OWCP failed to address all of the guidelines in FECA Bulletin No. 09-05, the Board will set aside the April 17, 2012 decision and remand the case for further consideration. After proper compliance with the Bulletin, OWCP shall issue an appropriate *de novo* decision on appellant's entitlement to wage-loss compensation.<sup>10</sup>

## CONCLUSION

The Board finds that the case is not in posture for decision.

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<sup>10</sup> See *M.E.*, Docket No. 11-1416 (issued May 17, 2012).

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 17, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action.

Issued: December 11, 2012  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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