

**United States Department of Labor
Employees' Compensation Appeals Board**

M.A., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Kahului, HI, Employer**

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**Docket No. 12-316
Issued: July 24, 2012**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 28, 2011 appellant, through her attorney, filed a timely appeal from the October 25, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP), which denied modification of its wage-earning capacity (WEC) determination. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether modification of OWCP's October 27, 2006 WEC determination is warranted.

FACTUAL HISTORY

On February 1, 2005 appellant, a 33-year-old mail carrier, filed an occupational disease claim alleging that her carpal tunnel syndrome, right rotator cuff syndrome and neck and low

¹ 5 U.S.C. § 8101 *et seq.*

back pain were the result of performing the duties of her position. OWCP accepted her claim for right supraspinatus tendinitis, right carpal tunnel syndrome and cervical, thoracic and lumbosacral subluxations.

On October 27, 2006 OWCP determined that appellant's actual earnings as a rehabilitation clerk, effective July 22, 2006, fairly and reasonably represented her WEC. As she was earning at least as much as the current pay of her date-of-injury job, it found that she was no longer entitled to compensation for wage loss.

Appellant claimed compensation for total or near-total disability from November 13, 2010 to January 2011.² She would explain that she received notification in September that her rehabilitation clerk assignment was being reassessed under the national reassessment process (NRP) and that she was offered a new limited-duty assignment as a sales, service distribution associate. Appellant underwent nonjob-related surgery on October 6, 2010, requiring four weeks of recuperation. She began the new limited-duty assignment on November 6, 2010. On November 12, 2010, however, the postmaster advised that he had no work available for appellant within her restrictions.

Appellant accepted a part-time limited-duty assignment effective January 28, 2011 and claimed compensation for partial disability.

In an April 15, 2011 decision, OWCP denied appellant's claim for wage-loss compensation beginning November 13, 2010. It noted that the medical evidence established no material change in the nature and extent of the injury-related condition. OWCP also noted that the reason for the loss of work hours was the NRP, which it likened to a reduction-in-force or downsizing. As the unavailability of full-time work due to the NRP was not one of the criteria for modifying a formal WEC determination, it denied modification of its 2006 decision.

Before an OWCP hearing representative, appellant's attorney argued that the NRP withdrawal of limited duty met the definition of recurrence under 20 C.F.R. § 10.5(x) and therefore OWCP's WEC decision was defective on its face. He also argued that the job was makeshift and not real work, that her date-of-injury job was a classified position with collective bargaining rights, layoff rights and a variety of other rights that did not come with her limited duty.

Appellant testified that she did not bid on the rehabilitation clerk job; it was assigned to her. She explained that she was given a new part-time job that was not open for bid. Counsel argued that both the rehabilitation clerk job and the new part-time job were temporary because they could be eliminated, not from a reduction-in-force, not with the closing of the employing establishment and not in accordance with seniority. He also argued that appellant's new limited-duty job was part time, which was never reflective of full-time work. Counsel added that the case was "on all fours" with the Board's decision in *R.J.*, Docket No. 10-2114 (issued June 15, 2011).

² Form CA-7a shows intermittent fractional hours worked.

In an October 25, 2011 decision, OWCP's hearing representative affirmed the denial of modification. She found that appellant presented no reliable evidence that the rated position was makeshift, temporary or part time. The position was classified as a clerk. The offer outlined the requirements and specific duties to be performed, which were in line with the clerk craft and furthered the mission of the employing establishment. The hearing representative explained that the limited-duty job appellant was assigned subsequent to the rating had no bearing on the validity of the original determination.

In addition, OWCP's hearing representative observed that current medical evidence did not support a material change in the accepted medical conditions. Indeed, appellant denied any significant change in symptoms. The hearing representative concluded that appellant met none of the criteria warranting modification of OWCP's 2006 WEC determination.

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.³ When an employee cannot return to the date-of-injury job because of disability due to work-related injury or disease, but does return to alternative employment with an actual wage loss, OWCP must determine whether the earnings in the alternative employment fairly and reasonably represent the employee's WEC.⁴

Once WEC 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. These are the customary criteria for modification, and the burden of proof is on the party attempting to show that modification of the determination is warranted.⁵

FECA Bulletin No. 09-05, however, outlines OWCP procedures when limited-duty positions are withdrawn pursuant to the NRP. If, as in the present case, a formal WEC decision has been issued, OWCP must develop the evidence to determine whether a modification of that decision is appropriate.⁶

ANALYSIS

After OWCP issued its formal WEC decision, the employing establishment reassessed appellant's rated position under the NRP, resulting in a withdrawal of limited duty and a claim for wage-loss compensation beginning November 13, 2010. OWCP analyzed the case under the customary criteria for modifying a WEC determination, but did not acknowledge FECA Bulletin

³ 5 U.S.C. § 8102(a).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (October 2009).

⁵ *Daniel J. Boesen*, 38 ECAB 556 (1987).

⁶ FECA Bulletin No. 09-05 (issued August 18, 2009).

No. 09-05 or fully follow the procedures outlined therein for claims, such as this, in which limited-duty positions are withdrawn pursuant to the NRP.

When a WEC 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. It thereby shifts the burden onto OWCP to review the WEC decision to determine whether it was based on an actual *bona fide* position. To this end, the Bulletin asks OWCP to confirm that the file contain 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, and 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 that the employing establishment address in writing whether the position on which the WEC determination was based was a *bona fide* position at the time of the rating, and to direct the employing establishment to review its files for contemporaneous evidence concerning the position.

If, after development and review by OWCP, the evidence establishes that the WEC decision was proper and none of the customary criteria for modifying the determination were met, then OWCP may issue a decision denying modification of the WEC determination.⁷

As OWCP failed to follow the guidelines in FECA Bulletin No. 09-05, the Board will set aside the October 25, 2011 decision and remand the case for further consideration. After proper compliance with FECA Bulletin No. 09-05 guidelines, OWCP shall issue an appropriate *de novo* decision on appellant's entitlement to wage-loss compensation beginning November 13, 2010.⁸

CONCLUSION

The Board finds that this case is not in posture for determination on whether modification of OWCP's October 27, 2006 WEC determination is appropriate. Further action by OWCP is warranted.

⁷ *Id.* at (Section I.A.1-4).

⁸ *See M.E.*, Docket No. 11-1416 (issued May 17, 2012).

ORDER

IT IS HEREBY ORDERED THAT the October 25, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action.

Issued: July 24, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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