

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

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**J.W., Appellant**

**and**

**U.S. POSTAL SERVICE, DALLAS  
PERFORMANCE CLUSTER, Coppell, TX,  
Employer**

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**Docket No. 12-711  
Issued: November 26, 2012**

*Appearances:*  
*Tim Egbuchunam, for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**ORDER REMANDING CASE**

Before:

PATRICIA HOWARD FITZGERALD, Judge  
ALEC J. KOROMILAS, Alternate Judge  
MICHAEL E. GROOM, Alternate Judge

On February 13, 2012 appellant timely filed an application for review from the November 18, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). The Board assigned Docket No. 12-711.

In July 2005, OWCP accepted that appellant sustained bilateral carpal tunnel syndrome and bilateral ulnar nerve lesions. On February 8, 2007, Dr. Robert Holladay, a Board-certified orthopedic surgeon and an impartial medical specialist, advised that appellant could return to work with restrictions.

On August 27, 2007 the employing establishment offered appellant a full-time job as a dock worker within certain restrictions. Appellant accepted the job and returned to work on September 4, 2007. In a November 15, 2007 decision, OWCP determined that appellant's actual wages as a dock worker fairly and reasonably represented his wage-earning capacity.

In November 2010, appellant submitted a Form CA-7 claiming wage-loss compensation beginning October 24, 2010 and requested modification of OWCP's November 15, 2007 wage-earning capacity determination. The employing establishment had withdrawn appellant's job effective October 24, 2010 under the National Reassessment Process (NRP).

In a January 5, 2011 decision, OWCP denied modification of its November 15, 2007 wage-earning capacity determination.

Appellant submitted additional medical evidence, which indicated that his work-related upper extremity condition had worsened. In a June 14, 2011 decision, OWCP affirmed its January 5, 2011 decision. Appellant requested reconsideration and submitted chart notes from the New Help Clinic. In a November 18, 2011 decision, OWCP affirmed its June 4, 2011 decision. It stated that the medical evidence did not show that the work-related injury had worsened, but it did not address particular medical documents submitted by appellant.

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages.<sup>1</sup> Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn and not on actual wages lost.<sup>2</sup> Compensation payments are based on the wage-earning capacity determination, which remains undisturbed until properly modified.<sup>3</sup> Modification of a standing wage-earning capacity 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 erroneous.<sup>4</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>5</sup>

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

OWCP analyzed this case under the customary criteria for modifying a loss of wage-earning capacity determination. It did not acknowledge FECA Bulletin No. 09-05 or fully follow the procedures outlined therein for claims, such as this, in which limited-duty positions are withdrawn pursuant to NRP.<sup>7</sup> When a loss of wage-earning capacity 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.<sup>8</sup> 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

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<sup>1</sup> 5 U.S.C. § 8115(a); *K.R.*, Docket No. 09-415 (issued February 24, 2010); *Lee R. Sires*, 23 ECAB 12, 14 (1971) (the Board held that actual wages earned must be accepted as the measure of a wage-earning capacity in the absence of evidence showing they do not fairly and reasonably represent the employee's wage-earning capacity).

<sup>2</sup> *K.R.*, *supra* note 1; *Roy Matthew Lyon*, 27 ECAB 186, 190 (1975). *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

<sup>3</sup> *See Sharon C. Clement*, 55 ECAB 552, 557 (2004).

<sup>4</sup> *Sue A. Sedgwick*, 45 ECAB 211, 215-16 (1993); *Elmer Strong*, 17 ECAB 226, 228 (1965).

<sup>5</sup> *Selden H. Swartz*, 55 ECAB 272, 278 (2004).

<sup>6</sup> FECA Bulletin No. 09-05 (issued August 18, 2009).

<sup>7</sup> *See M.A.*, Docket No. 12-316 (issued July 24, 2012).

<sup>8</sup> FECA Bulletin No. 09-05, *supra* note 6.

evidence from both the claimant and the employing establishment if the case lacks current medical evidence.<sup>9</sup>

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 wage-earning capacity 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.<sup>10</sup>

As OWCP failed to follow the guidelines in FECA Bulletin No. 09-05, the Board will set aside the November 18, 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 October 24, 2010.<sup>11</sup>

**IT IS HEREBY ORDERED THAT** the November 18, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for further proceedings consistent with this order of the Board.

Issued: November 26, 2012  
Washington, DC

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

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

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<sup>9</sup> *Id.* at §§ I.A.1-2.

<sup>10</sup> *Id.* at § I.A.3.

<sup>11</sup> *See M.A., supra* note 7; *M.E.*, Docket No. 11-1416 (issued May 17, 2012).