

FACTUAL HISTORY

On February 12, 2003 appellant, then a 43-year-old letter carrier, filed a traumatic injury claim, alleging that he sustained injury to his back and right wrist from slipping on stairs and falling at work. OWCP accepted the claim for cervical, thoracic, lumbar and bilateral shoulder strains, as well as multiple contusions and a fracture of the right fourth metacarpal as a result of the work injury. It expanded acceptance of the claim in 2005 to include right shoulder impingement.

In a letter dated August 1, 2007, the employing establishment offered appellant a modified letter carrier position, with duties including answering telephones, scanning delivery confirmation, as well as delivering express mail, as needed. The physical requirements for the position were intermittent lifting and carrying less than 10 pounds, sitting, standing, walking and climbing for four hours, as well as simple grasping and fine manipulation for eight hours. The offer was effective August 11, 2007. The employing establishment did not indicate whether the job offer was permanent or temporary.

Appellant was offered a different limited-duty position as of November 5, 2007. The duties of the modified limited-duty assignment included, as needed, scanning delivery confirmation, carrier endorsement, delivering express mail and casing mail. The physical requirements included intermittently lifting and carrying less than 10 pounds for three hours, sitting, standing, walking and climbing for three hours, as well as simple grasping and fine manipulation for two hours. The effective date of the offer was November 5, 2007.

In an April 28, 2008 decision, OWCP found that appellant's modified letter carrier position, as described in the August 1, 2007 job offer letter, fairly and reasonably represented his wage-earning capacity.

Appellant filed a claim for wage loss beginning June 18, 2008. After development, OWCP denied his claim in an August 28, 2008 decision on the grounds that he failed to establish that the wage-earning capacity decision should be modified.

Appellant filed another claim for wage loss for the period beginning from September 17, 2009, when the employing establishment withdrew his work as part of the National Reassessment Process (NRP).

By decision dated December 29, 2009, OWCP denied modification of the wage-earning capacity determination.

Appellant disagreed with the decision and requested an oral hearing before the Branch of Hearings and Review. On July 13, 2010 OWCP's hearing representative affirmed the December 29, 2009 decision.

Appellant requested reconsideration on June 3, 2011. Along with the request, he submitted additional documentation.

A May 31, 1985 letter from the Labor Relations Department of the postal service stated that “it is the position of the [p]ostal [s]ervice that neither the delivery [nor] the transportation of Express Mail is exclusively letter carrier craft work.”

Appellant also submitted excerpts of the postal service regulations Handbook El-505, which was dated December 1995.

An excerpt of Handbook EL-312, dated September 2001, described the process by which the employees of the postal service were assigned to positions.

Appellant also submitted a document titled “Guidelines for City Letter Carriers in the United States Postal Service,” published in January 2005, which detailed the scope of duties for regular letter carriers.

In addition, appellant submitted medical reports dated June 23 and August 4, 2011 from Dr. Fred Naraghi, a Board-certified orthopedic surgeon. In the reports, Dr. Naraghi diagnosed appellant with L4-5 disc bulge, tarlov cyst with perineural sheath cyst, radiculopathy and right sacroiliitis. He also requested a new magnetic resonance imaging scan in order to further reassess appellant’s condition.

On September 7, 2011 OWCP denied modification of the loss of wage-earning capacity (LWEC) determination, finding that appellant did not establish that the April 28, 2008 LWEC decision was erroneous. The decision found that his limited-duty letter carrier position was not a makeshift position and the wages earned by him in the position fairly and reasonably represented his wage-earning capacity. The decision also noted that “while [appellant] provided new medical documentation, the argument made by [appellant’s] representative was that the decision was issued in error.”

LEGAL PRECEDENT

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 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 LWEC position is appropriate.

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

⁴ *Id.*

ANALYSIS

In the present case, OWCP issued an April 28, 2008 wage-earning capacity decision based on the modified letter carrier position appellant performed between August 11 and November 5, 2007. Appellant has argued the wage-earning capacity determination should be modified as the position was makeshift and his work duties were eventually withdrawn under NRP on September 17, 2009. The Board finds that the case is not in posture for decision.

When a loss of wage-earnings 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.⁵ FECA Bulletin No. 09-05 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.⁶

Further, FECA Bulletin No. 09-05 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 loss of wage-earning capacity determination was based was a *bona fide* position at the time of the rating and direct the employing establishment to review its files for contemporaneous evidence concerning the position.⁷

As OWCP failed to follow the guideline in FECA Bulletin No. 09-05, the Board will set aside the March 8, 2011 decision and remand the case for further consideration.

CONCLUSION

The Board finds that the case is not in posture for decision and will be remanded to OWCP for further development, to be followed by an appropriate decision.

⁵ *Id.*

⁶ *Id.* at § I.A.1-2.

⁷ *Id.* at § I.A.3.

ORDER

IT IS HEREBY ORDERED THAT the September 7, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: October 5, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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