

embolization therapy.² It accepted appellant's claims for recurrences of disability beginning August 24, 1995 and May 8 and August 4, 2003. Appellant returned to limited-duty work on September 5, 1995. On July 17, 2003 she stopped work to undergo embolization, returned to limited-duty work on August 8, 2003 and stopped on August 26, 2003.

Appellant returned to limited-duty part-time work on January 12, 2004, which was increased to eight hours per day on January 19, 2005.³ On January 19, 2005 the employing establishment offered her a modified position as full-time regular (FTR) city letter carrier at the Northwestern Station with hours of 10:00 a.m. to 6:30 p.m. with rotating days off. The duties of the modified position offered on January 19, 2005 required appellant to sit while performing duties of completing nixie mail processing, computerized forwarding system (CFS) mail processing, clearing carriers within the cage and completing collection of mail.

By decision dated December 21, 2005, OWCP issued a loss of wage-earning capacity determination based upon appellant's actual earnings as modified city carrier working eight hours per day beginning February 22, 2005 and earning a weekly salary of \$893.46. It found no wage loss and that the position fairly and reasonably represented her wage-earning capacity.

By decision dated February 21, 2006, OWCP accepted appellant's claim for a recurrence of disability beginning January 20, 2006. It found that the employing establishment had instructed her to accept a position which violated her work restrictions and that prior to January 2006 her restrictions had been accommodated by a sedentary job.

On February 24, 2006 the employing establishment withdrew appellant's limited-duty job it had offered in January 20, 2006 as it was unable to accommodate her work restrictions. It noted that instead of a rehabilitated job she would be provided with limited-duty work within her restrictions.

On March 4, 2006 the employing establishment changed appellant's modified job hours to 7:00 a.m. to 3:00 p.m. at the Northwestern Station. Appellant's duties were listed as answering the telephone, addressing searches, completing nixie mail process, CFS mail processing and collection mail sorting and other duties within her restrictions.

On June 9, 2008 appellant accepted a limited-duty job offer as a city carrier. The hours were 7:30 a.m. to 4:00 p.m. with duties listed as dispatching mail collection, processing CFS/postal automated redirection system mail, handling CFS inquiries, processing nixie mail and address search.

On October 9, 2009 the employing establishment offered appellant a limited-duty job as city carrier with hours of 8:15 a.m. to 9:45 a.m., which was effective November 7, 2009.

Appellant filed a recurrence claim beginning November 7, 2009 as well as claims for wage-loss compensation (Form CA-7) beginning that day due to lack of work within her

² On February 5, 2002 OWCP granted appellant a schedule award for a one percent left leg permanent impairment, which was affirmed by an OWCP hearing representative in a May 7, 2003 decision.

³ Appellant retired from the employing establishment effective May 31, 2010.

restrictions. This lack of work was due to the employing establishment's National Reassessment Program (NRP).

OWCP accepted appellant's claim for intermittent disability and paid wage-loss compensation for the period December 8, 2009 to February 9, 2010 due to the lack of work available for her within her restrictions.

By letter dated April 23, 2010, OWCP noted receipt of appellant's claim for wage-loss compensation and informed her of the requirements for modifying a loss of wage-earning capacity.

By decision dated January 19, 2011, OWCP denied modification of the December 21, 2005 loss of wage-earning capacity decision.

On January 27, 2011 appellant requested a telephonic hearing before an OWCP hearing representative, which was held on May 31, 2011.

By decision dated August 24, 2011, an OWCP hearing representative affirmed OWCP's January 19, 2011 decision.

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁴ 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 wage-earning capacity.⁵

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.⁶ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁷

FECA Bulletin No. 09-05, however, outlines OWCP procedures when limited-duty positions are withdrawn pursuant to 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.⁸

⁴ 5 U.S.C. § 8102(a).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (October 2009).

⁶ *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Tamra McCauley*, 51 ECAB 375 (2000).

⁷ *Id.*

⁸ FECA Bulletin No. 09-05 (issued August 18, 2009).

ANALYSIS

In its August 24, 2011 decision, an OWCP hearing representative affirmed the January 19, 2011 decision denying modification of the December 21, 2005 loss of wage-earning capacity determination. He found that the duties of the modified position that was the subject of the original loss of wage-earning capacity decision fairly and reasonably represented appellant's wage-earning capacity.

On appeal, appellant's counsel contends that the December 21, 2005 loss of wage-earning capacity decision was erroneous as it was based on "makeshift" work and was not a real position.

As noted above, OWCP issued a formal wage-earning capacity decision on December 21, 2005. The employing establishment reassessed appellant's rated position under NRP, resulting in a withdrawal of limited duty and a claim for wage-loss compensation beginning November 7, 2009 filed by appellant. OWCP analyzed the case under the customary criteria for modifying a loss of wage-earning capacity determination, but 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.

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.⁹ 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.¹⁰

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 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.¹¹

As OWCP failed to follow the guidelines in FECA Bulletin No. 09-05, the Board will set aside the August 24, 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 7, 2009.¹²

⁹ *Id.*

¹⁰ *Id.* at § I.A.1-2

¹¹ *Id.* at § I.A.3.

¹² *See M.E.*, Docket No. 11-1416 (issued May 17, 2012).

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 24, 2011 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: October 16, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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