

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

N.T., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Palatine, IL, Employer**

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**Docket No. 12-408
Issued: October 17, 2012**

Appearances:
Ron Watson, for the appellant
Miriam D. Ozur, Esq., for the Director

Case Submitted on the Record

**ORDER GRANTING REMAND AND
CANCELLING ORAL ARGUMENT**

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

On December 19, 2011 appellant, through her representative, filed a timely application for review of a September 1, 2011 decision of the Office of Workers' Compensation Programs (OWCP). By that decision, OWCP found that appellant did not meet her burden of proof to establish that modification of her loss of wage-earning capacity determination was warranted and she did not establish a recurrence of disability commencing October 28, 2009 and October 22, 2010.¹ Appellant requested oral argument, which was scheduled to be held before the Board on October 23, 2012.

The Director of OWCP filed a motion on September 28, 2012, requesting that the Board set aside OWCP's September 1, 2011 decision, cancel oral argument and remand the case for further specified development. In this regard, the Director noted that on August 30, 2004 OWCP

¹ OWCP hearing representative found that, as appellant had not established that the loss of wage-earning capacity determination warranted modification, OWCP correctly denied compensation effective October 28, 2009. However, the hearing representative pointed out that following a grievance filed by appellant, the employing establishment returned appellant to work on October 6, 2010 and paid her back wages from October 27, 2009 through her return to work. Subsequently, following the employing establishment's determination that no work was available once again under the National Reassessment Program (NRP) effective October 22, 2010, appellant filed another claim for a recurrence of disability beginning that date.

determined appellant's wage-earning capacity based on her actual wages, effective June 7, 2004, in the limited-duty position of a full-time regular unassigned letter carrier. The Director further noted that the employing establishment withdrew the limited-duty position under NRP, resulting in appellant filing a claim for lost wages. The Director acknowledged that, although OWCP denied appellant's claim "based on the fact that appellant did not establish one of the three customary criteria for modifying a formal loss of wage-earning capacity determination," it did not follow the guidelines as set forth in FECA Bulletin No. 09-05 regarding situations where a formal loss of wage-earning capacity determination has been issued and the limited-duty position is withdrawn pursuant to NRP.² On remand, the Director stated that, following "proper compliance" with FECA Bulletin No. 09-05 and any necessary further development, OWCP will issue an appropriate *de novo* decision regarding appellant's entitlement to wage-loss compensation beginning October 22, 2010.³

On September 28, 2012 the Clerk of the Board served appellant and her representative with a copy of the Director's motion to remand and cancel oral argument. In a response dated and received by the Board on October 11, 2012, appellant's representative replied that he and appellant opposed the Director's motion. Her representative provided three reasons for appellant's opposition. First, the evidence of record establishes that the original loss of wage-earning capacity determination is erroneous as the position represented "temporary and sheltered employment." Second, OWCP has already sent a developmental letter, dated June 18, 2010, to the employing establishment consistent with the tenets of FECA Bulletin No. 09-05 and thus a remand to duplicate this process is not warranted. Last, for the sake of judicial economy the oral argument should proceed as the issue is ripe to adjudicate and saves time and effort from remanding the case to OWCP to have appellant to appeal again to this Board.

The Board has duly considered the matter and concludes that, as the Director has acknowledged that OWCP did not apply FECA Bulletin No. 09-05 to appellant's situation where a loss of wage-earning capacity is in place and the employing establishment withdraws the light-duty assignment under NRP when denying her claim for wage-loss compensation, and, as on remand OWCP will properly apply it and issue a *de novo* decision following any necessary further development, the motion should be granted. Accordingly,

² FECA Bulletin No. 09-05 (issued August 18, 2009).

³ *See supra* note 1.

IT IS HEREBY ORDERED THAT the motion to remand and cancel oral argument filed by the Director of the Office of Workers' Compensation Programs is granted. The decision of OWCP dated September 1, 2011 is set aside; and the case is remanded for further proceedings consistent with this order of the Board. Oral argument scheduled for October 23, 2012 is canceled.

Issued: October 17, 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