

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

L.L., Appellant

and

**U.S. POSTAL SERVICE, DES PERES BRANCH
POST OFFICE, St. Louis, MO, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 12-587
Issued: October 11, 2012**

Appearances:
Michael David, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 23, 2012 appellant, through his representative, filed a timely appeal of a September 20, 2011 decision of the Office of Workers' Compensation Programs (OWCP) denying further merit review. Because over 180 days elapsed between the most recent merit decision of February 22, 2011, to the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's case, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration on the merits pursuant to 5 U.S.C. § 8128(a).

On appeal, appellant's representative stated that the employing establishment rescinded appellant's job after 13 years. He stated that work was still available, but management refused to allow appellant to perform his job duties.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On March 1, 1993 appellant, then a 43-year-old letter carrier, injured his head, back and left leg when his delivery vehicle was rear ended. OWCP accepted his claim for low back strain and left shin contusion. It entered appellant on the periodic rolls on February 8, 1994. Appellant underwent a left L4-5 and L5-S1 lumbar microdiscectomy on May 16, 1994. He underwent a second L4-5 microdiscectomy on February 15, 1995. Appellant received a third-party settlement. On December 28, 1995 the employing establishment offered him a modified city carrier position which he accepted on December 29, 1995. In a decision dated March 20, 1996, OWCP determined that appellant's actual earnings as a modified city carrier beginning January 6, 1996 fairly and reasonably represented his wage-earning capacity.

On May 21, 2010 appellant filed a claim for compensation requesting wage-loss compensation from May 14 to 21, 2010. He stated that he worked between two and four hours a day. In a letter dated June 8, 2010, OWCP noted that appellant's limited-duty assignment had been withdrawn effective May 18, 2010 as part of the National Reassessment Process (NRP). It noted that, as a formal loss of wage-earning capacity determination had been issued, he was obliged to establish that a modification of that decision was appropriate in order to receive compensation benefits. Appellant submitted a limited-duty position working two hours a day which he accepted on May 18, 2010. He also submitted a report dated June 29, 2010 from Dr. Charles Mannis, a Board-certified orthopedic surgeon, who diagnosed degenerative disc disease in the lumbar spine and degenerative arthritis in the left knee. Dr. Mannis noted that appellant had permanent work restrictions and completed a work capacity evaluation finding that appellant could work four hours a day.

Appellant filed a notice of recurrence of disability on July 14, 2010 alleging that on May 18, 2010 the employing establishment withdrew his limited-duty job offer and provided him with a partial day job offer.

By decision dated August 12, 2010, OWCP denied his claim for compensation beginning May 18, 2010.

Appellant requested an oral hearing before an OWCP hearing representative. In a letter to OWCP dated October 6, 2010, the employing establishment stated that the position performed by appellant since May 18, 2010 consisted of odd-lot duties raising the appearance that the loss of wage-earning capacity determination was made in error and should be modified.

Appellant testified at the oral hearing on January 12, 2011. He stated that he was capable of performing the position on which his loss of wage-earning capacity determination was made, but that the position was withdrawn. Appellant also argued that Dr. Mannis had increased his lifting restrictions due to his accepted employment injury.

By decision dated February 22, 2011, an OWCP hearing representative found that appellant failed to establish that modification of the 1996 wage-earning capacity determination was warranted.

Appellant requested reconsideration on August 9, 2011. He submitted a narrative statement noting his injury on March 1, 1993 and his return to a rehabilitation job as well as the duties entailed. Appellant stated that work was available at the employing establishment performing his job functions, but that the employing establishment refused to allow him to work. On November 24, 1997 the employing establishment had provided him with a modified city carrier position tailored to meet his physical needs effective December 6, 1997. Appellant accepted this position on December 3, 1997. The employing establishment offered him a limited-duty city carrier position on May 18, 2010 working two hours a day which he accepted on that date.

By decision dated September 20, 2011, OWCP declined to reopen appellant's claim for consideration of the merits on the grounds that he failed to submit any new or relevant evidence or argument in support of his reconsideration request.

LEGAL PRECEDENT

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.² Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn and not on actual wages lost.³ Compensation payments are based on the wage-earning capacity determination, which remains undisturbed until properly modified.⁴

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.⁵ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁶

FECA Bulletin No. 09-05, however, outlines OWCP's procedures when limited-duty positions are withdrawn pursuant to NRP. If, as in the present case, a formal loss of wage-earning capacity decision has been issued, OWCP must develop the evidence to determine whether a modification of that decision is appropriate.⁷

² 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).

³ *K.R.*, *id.*; *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984); *Roy Matthew Lyon*, 27 ECAB 186, 190 (1975).

⁴ *See Sharon C. Clement*, 55 ECAB 552, 557 (2004).

⁵ *Sue A. Sedgwick*, 45 ECAB 211, 215-16 (1993); *Elmer Strong*, 17 ECAB 226, 228 (1965).

⁶ *Selden H. Swartz*, 55 ECAB 272, 278 (2004).

⁷ FECA Bulletin No. 09-05 (issued August 18, 2009).

ANALYSIS

The issue is whether appellant met his burden of proof to establish that the March 20, 1996 loss of wage-earning capacity determination should be modified. After OWCP issued its formal loss of wage-earning capacity decision, the employing establishment reassessed his rated position under NRP, resulting in a withdrawal of limited duty and a claim for wage-loss compensation beginning May 14, 2010. It 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 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. To this end, 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.⁸

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 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.⁹

The Board notes that, while appellant used the term reconsideration in his August 9, 2011 correspondence, he asserted that his wage-earning capacity determination was in error. Appellant submitted a narrative statement alleging that work was available at the employing establishment but was not provided a full-time position. He also provided documentation of the light-duty positions offered him. This includes an October 6, 2010 letter from the employing establishment to OWCP stating that the duties to which appellant was assigned were odd-lot. The Board finds that OWCP should have adjudicated the issue of modification of loss of wage-earning capacity determination rather than treating appellant's correspondence as a request for reconsideration.¹⁰ The Board will therefore remand the case to OWCP for proper adjudication, to be followed by an appropriate merit decision to preserve his appeal rights.

⁸ *Id.* at §§ I.A.1-2.

⁹ *Id.* at § I.A.3.

¹⁰ *C.R.*, Docket No. 12-577 (issued July 26, 2012).

CONCLUSION

The Board finds that OWCP improperly adjudicated appellant's request for reconsideration. On remand, OWCP should properly evaluate his claim, as a request for modification of his loss of wage-earning capacity and in accordance with FECA Bulletin No. 09-05 and issue an appropriate merit decision.

ORDER

IT IS HEREBY ORDERED THAT the September 20, 2011 decision of the Office of Workers' Compensation Programs is set aside and remanded for further development consistent with this decision of the Board.

Issued: October 11, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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