

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

M.R., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Baldwin Park, CA, Employer**

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 11-57
Issued: September 18, 2012**

Appearances:
Steven E. Brown, Esq., for the appellant
No appearance, for the Director

Oral Argument October 4, 2011

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 12, 2010 appellant, through her attorney, filed a timely appeal from a June 8, 2010 decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met her burden of proof to establish that a June 6, 2007 wage-earning capacity decision should be modified.

On appeal appellant's attorney asserts that the wage-earning capacity decision should be modified because it was based on a position that was tailored to appellant's special needs, that it required duties outside her medical restrictions and it was not generally available in the local labor market.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

Appellant, then a 42-year-old letter carrier, injured her left knee on October 4, 2005 when she tripped and fell on a sidewalk while delivering mail. OWCP accepted a left knee contusion, left knee chondromalacia patella and reflex sympathetic dystrophy.

Dr. Mark Ganjianpour, Board-certified in orthopedic surgery, performed left knee surgery on February 28, 2006. In a duty status report dated November 29, 2006, he advised that appellant could return to work with lifting limited to 10 pounds, standing to four hours, walking to two hours, sitting limited to one hour continuous and eight hours intermittent, and no kneeling, twisting, bending or driving.

Appellant returned to a modified position on February 3, 2007. The full-time offer indicated that she would case mail, accept and review passport applications, input voyager cards into a computer, answer telephones and prepare collection mail for dispatch.² The physical restrictions were those provided by Dr. Ganjianpour. In a March 16, 2007 report, a vocational rehabilitation counselor noted follow-ups with appellant from February 9 to March 6, 2007. She advised that appellant successfully continued her full-time modified position.

By decision dated June 6, 2007, OWCP found that appellant's actual earnings in the modified carrier position fairly and reasonably represented her wage-earning capacity with zero loss. On August 13, 2007 appellant was granted a schedule award for a 43 percent impairment of the leg. The award was for 123.84 weeks, to run from June 22, 2007 to November 4, 2009.

On April 15, 2009 the employing establishment informed appellant, that in accordance with the National Reassessment Process (NRP), her hours would be reduced. Appellant accepted a job offer on April 15, 2009 reflecting this change and filed claims for compensation, beginning on November 4, 2009, when her schedule award expired.

In a January 13, 2010 decision, OWCP denied modification of the June 6, 2007 wage-earning capacity determination.

Appellant timely requested a hearing that was held on April 15, 2010. At the hearing she and two coworkers testified that, while she cased mail daily, her additional job duties varied and consisted of miscellaneous chores. Appellant's attorney argued that the modified position was "make-work" and the June 6, 2007 wage-earning capacity determination was in error.

By decision dated June 8, 2010, an OWCP hearing representative affirmed the January 13, 2010 decision.

² Each duty was specifically described. For example, the duty of mail casing indicated that the task could be performed in a sitting position and would require the use of both hands to properly place letters into designated bins in the letter case. While sorting mail into shelving with vertical slots or separations, appellant would hold a handful of mail at a time weighing no more than three pounds and place a single piece of mail into slots on the shelving, reaching from waist to above the shoulder height with the right arm.

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 OWCP procedures when limited-duty positions are withdrawn pursuant to NRP. If 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.⁵

ANALYSIS

The Board finds this case is not in posture for decision. OWCP accepted that appellant sustained a left knee contusion, left knee chondromalacia patella and reflex sympathetic dystrophy of the left lower extremity on October 4, 2005 when she tripped and fell on a sidewalk while delivering mail. Appellant underwent left knee surgery on February 28, 2006 and returned to a modified position on February 3, 2007. By decision dated June 6, 2007, OWCP found that her modified carrier position fairly and reasonably represented her wage-earning capacity.

The employing establishment reassessed appellant's rated position under NRP, resulting in a reduction in her work hours for which she filed claims for wage-loss compensation beginning April 15, 2009. 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 follow the procedures outlined therein for claims, such as this, in which limited-duty positions are withdrawn or work hours are reduced 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.⁶ FECA Bulletin No. 09-05 asks OWCP to confirm that the file contained 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.⁷

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

³ *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Tamra McCauley*, 51 ECAB 375, 377 (2000).

⁴ *Id.*

⁵ FECA Bulletin No. 09-05 (issued August 18, 2009).

⁶ *Id.*

⁷ *Id.* at § I.A.1-2

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 to direct the employing establishment to review its files for contemporaneous evidence concerning the position.⁸

As OWCP failed to follow FECA Bulletin No. 09-05, the Board will set aside the June 8, 2010 decision and remand the case for further adjudication. 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 April 15, 2009.⁹

CONCLUSION

The Board finds this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the June 8, 2010 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: September 18, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

⁸ *Id.* at § I.A.3.

⁹ *See M.E.*, Docket No. 11-1416 (issued May 17, 2012).