United States Department of Labor
Employees' Compensation Appeals Board

H.N., Appellant	)	
and	)	**Docket No. 11-155**
	)	**Issued: September 24, 2012**
U.S. POSTAL SERVICE, POST OFFICE, Minneapolis, MN, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On October 26, 2010 appellant filed a timely appeal from the September 29, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP), which denied modification of its loss of wage-earning capacity determination. Pursuant to the Federal Employees' Compensation Act[1] (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 OWCP properly denied modification of its May 31, 2001 loss of wage-earning capacity determination.

FACTUAL HISTORY

On July 26, 1999 appellant, a 40-year-old mail clerk, sustained an injury in the performance of duty when she lifted a heavy tub of mail from a hamper. OWCP accepted her

[1] 5 U.S.C. § 8101 *et seq.*

claim for left wrist tendinitis, bilateral shoulder tendinitis and a consequential right shoulder impingement.

Appellant accepted a series of limited-duty/modified job offers. From August 30, 1999 through January 9, 2001 she accepted nine such offers.

On November 30, 2000 appellant's doctor, Dr. Jonathan P. Asp, released her to return to work with permanent restrictions: she could lift up to 10 pounds and occasionally reach above shoulder level. On January 9, 2001 appellant accepted her ninth limited-duty/modified job offer. The position was available on November 30, 2000 and would continue until her restrictions changed or her limited-duty assignment changed. The position was full time, and the duties included working the 150 manual letter operation, the flats recovery operation "and other duties as assigned within her restrictions until further notice." No operation number or labor distribution code was provided.[2]

On May 31, 2001 after the employing establishment confirmed that the job was permanent, OWCP reduced appellant's compensation for wage loss to zero on the grounds that her retained earnings as a modified mail clerk fairly and reasonably represented her wage-earning capacity in the open labor market.

Thereafter, appellant accepted a dozen other limited-duty/modified job offers.

On May 19, 2010 the employing establishment notified appellant that, following the guidelines established by the National Reassessment Process (NRP), a search in all crafts and on all tours within her facility and throughout the local commuting area failed to identify any available necessary tasks within her medical restrictions. It explained that, when no necessary work is available, an employee can elect to file a claim for compensation from OWCP or use leave.[3]

Appellant claimed a recurrence of disability beginning May 19, 2010 due to the withdrawal of her limited-duty assignment under NRP. In a statement dated September 14, 2010, she argued that OWCP's May 31, 2001 loss of wage-earning capacity determination was in error:

> "The limited (light) duty job in which I was working when the LWEC was performed was not a duty assignment and not part of the authorized complement. It was created solely for me, would not exist except for the Postal Service's

[2] The offer noted: "if performing 'productive' work, must transact into a productive #, LDC [labor distribution code] 68 [limited duty] or OPN [operation] 959 [limited duty] not authorized."

[3] The employing establishment informed appellant that the Postal Service's NRP was focused on reviewing all rehabilitation assignments, task by task, to ensure that all assignments contained only necessary tasks: "As our operations become more automated, both in the plant and in customer services, it is becoming more difficult to provide productive and necessary tasks to employees within their medical restrictions.... As our staffing needs continue to change, we are increasingly experiencing situations where sufficient productive or necessary assignments to accommodate injured employees are more difficult to find. We take our responsibility to all employees very seriously and will work to ensure they are afforded all rights under FECA."

> obligation to provide me with medically suitable employment, and would disappear as soon as I left it. It was never available for bid or application by any other employee. Therefore, it was an odd lot or make-shift job as defined by a number of ECAB decisions, and any LWEC determination based on this assignment would be in error."

Appellant added that the limited-duty assignment was created to meet her particular needs and was not available to other employees. She explained that a "duty assignment" in the Postal Service is a "funded" or classified position. It has a set of duties and responsibilities regularly scheduled during specific hours of duty. These individually identified and numbered duty assignments, she explained, make up the "authorized complement" of any Postal Service installation. To seek assignment to one of these specific duty assignments, an employee must submit a written request by either bid or application. Appellant argued that her medically suitable assignment did not constitute an actual, *bona fide*, established duty assignment available to other employees. It consisted, instead, of *ad hoc* unclassified duties. Appellant cited Board precedent for the proposition that a make shift job is one designed for an employee's particular needs and, therefore, does not constitute an identifiable, regular position of a type readily available on the general labor market.[4]

In a decision dated September 29, 2010, OWCP denied appellant's claim for wage-loss compensation. It found that she had not met one of the three criteria for modifying the May 31, 2001 loss of wage-earning capacity determination. OWCP reviewed the submitted medical evidence and addressed appellant's September 14, 2010 statement as follows: "Your statement has been reviewed and acknowledged."

On appeal, appellant repeats the argument she made to OWCP that the assignment upon which OWCP based its loss of wage-earning capacity determination was odd lot or make shift and not regularly and continuously available under normal employment conditions, citing Larson's treatise on workers' compensation law. She also points out that the fact that her work was not considered "necessary" underlined the make shift nature of the work she was performing:

> "It would be inequitable and inconsistent with general principles of injury compensation if the Postal Service was permitted to offer an employee medically suitable employment, wait 60 days for the formal LWEC determination of 0% loss of earning capacity, and then tell the injured employee that the job on which the LWEC was performed is being withdrawn because the work is no longer 'necessary.' Then OWCP denies wage loss compensation based on 0% LWEC, and the Postal Service has now neatly shed the financial burden of compensation cost for these employees."

[4] *Jack L. Woolever*, 29 ECAB 111 (1977) (noting in part that OWCP did not ascertain whether the assignment in question was make shift work designed for the claimant's particular needs or whether the duties constituted an identifiable, regular position of a type readily available on the general labor market in his commuting area and that he was qualified to perform).

LEGAL PRECEDENT

FECA provides that the wage-earning capacity of an employee is determined by her actual earnings if her actual earnings fairly and reasonably represent her wage-earning capacity.[5] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[6] The Board has long held that actual wages earned in the open labor market more accurately represent an employee's earning capacity and constitute a more reliable gauge than a secondary method such as an opinion of a vocational rehabilitation specialist.[7] While wages actually earned are generally the best measure of an injured worker's capacity for employment, such wages may not be based on make shift or sheltered employment.[8]

Once the loss of wage-earning capacity 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.[9] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[10]

FECA Bulletin No. 09-05 outlines very specific procedures for light-duty positions withdrawn pursuant to NRP. If, as in the present case, a wage-earning capacity decision has been issued and the employee claims compensation for total disability, OWCP must develop the evidence to determine whether a modification of that decision is appropriate.[11]

ANALYSIS

OWCP issued a formal loss of wage-earning capacity decision on May 31, 2001. After the employing establishment withdrew her limited-duty position pursuant to NRP, appellant claimed a recurrence of total disability beginning May 19, 2010.

OWCP adjudicated appellant's recurrence claim under the customary criteria for modifying a loss of wage-earning capacity determination. It did not acknowledge FECA Bulletin No. 09-05 or fully follow the procedures outlined therein for claim such as this, in which limited-duty positions are withdrawn pursuant to NRP.

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[5] 5 U.S.C. § 8115(a).

[6] *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

[7] *Billie S. Miller*, 15 ECAB 168 (1963).

[8] *A.J.*, Docket No. 10-619 (issued June 29, 2010); *Connie L. Potratz-Watson*, 56 ECAB 316 (2005).

[9] *Daniel J. Boesen*, 38 ECAB 556 (1987).

[10] *Sue A. Sedgwick*, 45 ECAB 211 (1993).

[11] FECA Bulletin No. 09-05 (issued August 18, 2009).

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.[12] 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.[13]

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 to direct the employing establishment to review its files for contemporaneous evidence concerning the position.[14]

As OWCP failed to follow the guidelines in FECA Bulletin No. 09-05, the Board will set aside OWCP's September 29, 2010 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 May 19, 2010.[15]

CONCLUSION

The Board finds that this case is not in posture for decision. Further action is warranted.

[12] *Id.*

[13] *Id.* at §§ I.A.1-2

[14] *Id.* at § I.A.3.

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

ORDER

IT IS HEREBY ORDERED THAT the September 29, 2010 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action.

Issued: September 24, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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