

FACTUAL HISTORY

On June 9, 2003 appellant, then a 33-year-old mail carrier, had right foot pain while delivering mail. The claim was accepted for bilateral plantar fasciitis and tarsal tunnel syndrome. Dr. John Ambrosino, a podiatrist, performed right lower extremity decompressive surgery on June 10, 2004 and right foot plantar fascial release on October 28, 2004. Appellant returned to modified duty for five hours daily on July 27, 2005 and began working eight hours of modified-duty daily on July 21, 2007.² He missed intermittent periods thereafter.

In duty status reports dated March 10 and April 4, 2008, Dr. Ambrosino advised that appellant could return to work on March 1, 2008 and provided restrictions to his physical activity. Appellant accepted a modified assignment and returned to full-time duty on April 2, 2008.³ On July 22, 2008 the employing establishment offered him a position casing mail for eight hours daily, to sit and stand as needed, using hands. The position description indicated that appellant was to case mail for four hours intermittently, process undeliverable mail for three hours intermittently and deliver mail for one hour intermittently. Appellant was physically restricted to standing, bending, pushing and pulling intermittently for 1.5 hours, walking intermittently for 1 hour, climbing intermittently for 1.5 hour and driving and operating machinery intermittently for 4 hours. A second July 22, 2008 job offer, signed by a supervisor that day, indicated that he was to case mail as assigned, with sitting and standing as needed using hands, for three hours daily and was to sit for five hours. Appellant accepted the revised job description but did not date it.

Appellant was again off work for the period July 25 to August 23, 2008. On August 18, 2008 Kim Page, a vocational rehabilitation counselor assigned to the case, advised that the employing establishment informed her that appellant had a new job offer to case mail for two hours daily and sit on a stool for the rest of the day doing nothing.

In October 2008, OWCP referred appellant to Dr. Kevin F. Hanley, Board-certified is orthopedic surgery, for a second-opinion evaluation. In an October 22, 2008 report,⁴ Dr. Hanley noted the history of injury and his review of the medical record. He provided physical examination findings and diagnosed tarsal tunnel syndrome, right, surgically treated, with residual symptomatic neuritis of the posterior tibial nerve; bilateral plantar fasciitis; and tarsal tunnel syndrome, left, untreated, all of which were related to the cumulative activities of appellant's mail carrier position. Dr. Hanley indicated that appellant continued to have residuals

² In a December 26, 2006 report, Dr. Arthur M. Auerbach, a Board-certified orthopedist who provided a second-opinion evaluation for OWCP, diagnosed history of bilateral plantar fasciitis and tarsal tunnel syndrome with residuals including chronic pain syndrome of the right foot and ankle, due to the employment injury. He advised that appellant could work 8 hours daily with permanent restrictions on standing and walking of 1.5 hours daily, operating a motor vehicle for 4 hours daily and no squatting or climbing.

³ The position description indicated that appellant was to case mail for four hours intermittently, process undeliverable mail for three hours intermittently and deliver mail for one-hour intermittently. He was physically restricted to standing, bending, pushing and pulling intermittently for 1.5 hours, walking intermittently for 1 hour, climbing intermittently for .5 hours and driving and operating machinery intermittently for 4 hours.

⁴ Dr. Hanley's report is dated August 27, 2008. However, he stated in the report that he evaluated appellant on October 22, 2008.

of significant sensitivity about the released nerves and appeared to be in the early phases of a complex regional pain syndrome. He recommended pain management and advised that appellant could work eight hours a day with weight-bearing limited to two hours daily and intermittent breaks. Lifting was restricted to 30 pounds.

On February 20, 2009 Dr. Ambrosino advised that appellant could perform sedentary work for 8 hours daily with climbing limited to 0.5 hours daily; driving, walking, lifting and squatting restricted to 1-hour daily; standing, bending, stooping, pushing and pulling to 1.5 hours daily; and kneeling to 2 hours daily with a 35 pound weight restriction.

On July 9, 2009 the employing establishment informed OWCP that appellant was working, based on the July 22, 2008 job offer, at an annual salary of \$51,466.00 and noted that the current salary for his date-of-injury position was \$46,920.00.

In a July 30, 2009 decision, OWCP noted that appellant was reemployed as a modified carrier, effective July 22, 2008. It found that his actual earnings represented his wage-earning capacity with zero loss. On August 17, 2009 the employing establishment removed appellant from his bid position at route number 11003, effective August 22, 2009 and on October 23, 2009, informed him that, following guidelines set forth by the National Reassessment Process (NRP), it did not have limited duty within his medical restrictions.

Appellant filed Form CA-7, claims for compensation, beginning on October 24, 2009.⁵ On November 30, 2009 OWCP informed him of the requirements for modifying a wage-earning capacity determination. On December 29, 2009 appellant asserted that the July 30, 2009 wage-earning capacity decision was in error.

In a January 28, 2010 decision, OWCP denied modification of the July 30, 2009 wage-earning capacity decision and denied the wage-loss claim beginning October 24, 2009.

Appellant timely requested a hearing. He submitted additional evidence including a February 19, 2008 employing establishment memorandum regarding nonproductive limited duty and a grievance settlement regarding an August 27, 2009 removal. A February 16, 2010 equal employment opportunity (EEO) notice of right to file in a mixed case regarding appellant's removal under NRP informed him that he could file an appeal with the Merit Systems Protection Board or, in the alternative, file a formal EEO complaint of discrimination with the employing establishment. In treatment notes dated December 2, 2009 to June 21, 2010, Dr. Ambrosino described appellant's condition. He noted that appellant stopped work on October 23, 2009. Dr. Ambrosino provided no additional restrictions.

At the hearing, held telephonically on May 24, 2010, counsel asserted that the modified position, on which the wage-earning capacity determination was based, indicated that appellant's position was not a real job because he was performing no work at all for five hours a day. Thus,

⁵ In July 2009, OWCP referred appellant to Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon, for an impairment rating. In an August 3, 2009 report, Dr. Swartz advised that appellant had three percent impairment of the right leg and one percent impairment on the left. On November 9, 2009 appellant was granted a schedule award for three percent impairment of the right leg and one percent impairment on the left.

the position was, in actuality, only a three-hour a day job, which was part-time and sheltered and therefore the wage-earning capacity determination was in error. On June 2, 2010 OWCP's hearing representative provided the employing establishment a copy of the hearing transcript and allowed it 20 days to submit comments or additional evidence.

By decision dated July 21, 2010, OWCP's hearing representative affirmed the January 28, 2010 decision.

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.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 loss of wage-earning capacity decision has been issued, OWCP must develop the evidence to determine whether a modification of that decision is appropriate.⁸

ANALYSIS

The Board finds this case is not in posture for decision. OWCP accepted that appellant sustained bilateral plantar fasciitis and tarsal tunnel syndrome and he underwent surgery on his feet on June 10 and October 28, 2004. Appellant returned to a modified carrier position in 2005. On July 22, 2008 the employing establishment offered a modified position that he accepted. In a July 30, 2009 decision, OWCP found that appellant's actual earnings effective July 22, 2008 represented his wage-earning capacity with zero loss.

Appellant continued to work full-time in the modified position until October 23, 2009 when the employing establishment sent him home as part of NRP, after determining that it did not have limited duty within his medical restrictions. He filed claims for wage loss beginning October 24, 2009, based on the withdrawal of his modified position under NRP. Appellant argued on appeal that the wage-earning capacity decision was in error.

As noted above, OWCP issued a formal loss of wage-earning capacity decision on July 30, 2009. The employing establishment reassessed appellant's rated position under NRP. This resulted in a withdrawal of appellant's modified duty, and he filed claims for wage-loss compensation beginning October 24, 2009.

⁶ *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Tamra McCauley*, 51 ECAB 375, 377 (2000).

⁷ *Id.*

⁸ 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.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 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.¹¹

In the case at hand, while OWCP's hearing representative referred to FECA Bulletin No. 09-05 in the July 21, 2010 decision, the Board finds that he did not adequately explore the medical evidence under the standard described above, *i.e.*, 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.

As OWCP failed to fully follow the guidelines in FECA Bulletin No. 09-05, the Board will set aside the July 21, 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 October 24, 2009.¹²

CONCLUSION

The Board finds this case not in posture for decision.

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).

ORDER

IT IS HEREBY ORDERED THAT the July 21, 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 21, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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