

FACTUAL HISTORY

On January 24, 1992 appellant, then a 38-year-old distribution clerk, filed a claim for occupational disease, claiming bilateral upper extremity conditions as a result of her federal employment. OWCP accepted her claim for bilateral carpal tunnel syndrome as well as left cubital tunnel syndrome. Appellant initially returned to work at a limited-duty assignment but subsequently stopped work and received total disability compensation.

In 2001, appellant underwent second opinion and referee medical evaluations in order to determine her ongoing medical limitations as a result of the accepted medical conditions. By report dated July 31, 2001, the referee physician, Dr. Andrew J. Stein, a Board-certified orthopedic surgeon, opined that she remained partially disabled as a result of her accepted medical conditions. He indicated that appellant could work for four hours a day with no repetitive lifting, pushing or pulling and no carrying greater than five pounds.

On May 14, 2002 the employing establishment offered appellant a video coding system technician position, for four hours a day, which she accepted. As indicated in the job description form dated April 18, 2002, the position required that she read addresses into a headset microphone as individual pieces of mail are displayed on a computer screen. The job description further indicated that the work duties did not require any use of appellant's hands. Appellant accepted the job and began work on May 20, 2002. She worked for four hours a day and received compensation from OWCP for the remaining hours.

On July 23, 2002 OWCP issued a formal decision regarding appellant's wage-earning capacity, finding that her part-time employment as a video coding system technician with the employing establishment fairly and reasonably represented her wage-earning capacity.

In 2003, appellant stopped work while she underwent surgery for cubital tunnel syndrome. In 2004, she was returned to her previous work limitations and resumed work at the part-time video coding system position.

The employing establishment changed appellant's duties to include work outside the coding technician work as video coding work became unavailable. Appellant was assigned to a new position on September 29, 2004 to remove tags and empty sacks. She never performed that job; instead, her actual activities included keying in the computer as well as completing the basic form. Appellant continued to work at four hours a day, although she had some flare-ups of pain in 2008.

In September 2009, the employing establishment withdrew work from appellant as part of the national reassessment process (NRP). Appellant filed a Form CA7, claiming total disability as her work had been withdrawn.

By letter dated September 17, 2009, OWCP advised appellant that because a formal decision had been issued regarding her wage-earning capacity, she would need to establish that modification of the decision was warranted. Appellant was asked to provide evidence that she had sustained a material change in the nature and extent of her accepted medical condition, that she had been retrained or vocationally rehabilitated or that the original determination was

erroneous. OWCP also wrote her treating physician asking for additional medical evidence with regards to whether her medical condition had materially changed.

Appellant submitted medical evidence which noted that she had been sent home from work; but did not report a material change in her medical condition.

On November 10, 2009 OWCP denied the claim for compensation on the basis that appellant had not provided the necessary evidence to modify the wage-earning capacity decision. Appellant disagreed with the decision and requested an oral hearing before an OWCP representative.

The hearing was held on February 23, 2010. Appellant was represented at hearing by her attorney. At hearing, counsel argued that the video coding system technician position was makeshift in nature. He noted that appellant was allowed to stay in the job even though her error rate in performing the job was very high, due to the fact that English was her second language. Counsel maintained that no employer would actually allow such performance if the job were more than makeshift.

Appellant testified that she was assigned to the video coding position for as long as the position remained available. She further testified that she did in fact work at the job for the four hours a day that she was at work. However, appellant asserted that because English was not her first language, the voice assisted software did not respond well to her speech, and as a result, her entries had a very high error rate. She stated that the employing establishment nevertheless allowed her to continue in the job, even though little of her work was satisfactory.

In a May 4, 2010 decision, OWCP's hearing representative found that it was apparent that appellant had difficulty expressing herself in English, and that she was very difficult to understand. The hearing representative found that the video coding position to which appellant was assigned was "make[-]work" and did not represent her actual wage-earning capacity as it was apparent that no voice activated system would be able to pick up appellant's speech. The hearing representative reversed the wage-earning capacity determination made by OWCP on July 23, 2002.

However, by decision dated June 2, 2010, OWCP reviewed and vacated the May 4, 2010 decision of OWCP's hearing representative, reinstating the July 23, 2002 loss in wage-earning capacity (LWEC) determination. This decision noted that the issue of appellant's limited English skills was not raised during the time period in which she performed the position.

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.³ Section 8115(a) of FECA provides that, in determining compensation for partial

³ See 5 U.S.C. § 8115 (determination of wage-earning capacity).

disability, 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.⁴

OWCP procedures offer further instruction that OWCP will not consider the reemployment suitable for a wage-earning capacity determination when the tour of duty is not at least equivalent to that of the job held at the time of injury.⁵

The Director of OWCP pursuant to FECA Bulletin 09-05 has also outlined very specific procedures for light-duty positions withdrawn pursuant to the NRP. If the claimant has been on light duty due to an injury-related condition without an LWEC rating or if the LWEC rating has been set aside, payment for total wage loss should be made based on the Form CA-7 as long as the following criteria are met:

“the current medical evidence in the file (within the last 6 months) establishes that the injury-related residuals continue;

“the evidence of file supports that light duty is no longer available; and

“there is no indication that a retroactive LWEC determination should be made....”

If the medical evidence is not sufficient, the claims examiner should request current medical evidence from both the Postal Service and the claimant. As with the previous scenario, the claimant should be requested to provide a narrative medical report within 30 days that addresses the nature and extent of any employment-related residuals of the original injury.

ANALYSIS

The Board finds this case is not in posture for decision. OWCP issued a formal wage-earning capacity decision on July 23, 2002 finding that her part-time employment as a video coding technician fairly and reasonably represented her wage-loss capacity.

Appellant claimed wage-loss compensation when her position was eliminated under NRP. OWCP denied modification of the LWEC position. It did not, however, acknowledge that the original position had been withdrawn pursuant to NRP or make any reference to the specific procedures established by which to evaluate these cases.

The case will be remanded to OWCP to properly analyze the modification issue in accord with FECA Bulletin No. 09-05. After such further development as OWCP deems necessary, it should issue an appropriate decision.

⁴ *Id.* at § 8115(a); *Loni J. Cleveland*, 52 ECAB 171 (2000).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.2 (December 1993). *See O.V.*, Docket No. 11-98 (issued September 30, 2011).

CONCLUSION

The Board finds that this case is not in posture for decision and will be remanded for further development of the medical evidence consistent with FECA Bulletin No. 09-05.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated June 2, 2010 is set aside and this case is remanded for further proceedings consistent with this opinion.

Issued: September 4, 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