

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

T.H., Appellant

and

**U.S. POSTAL SERVICE, DETROIT
PERFORMANCE CLUSTER, Detroit, MI,
Employer**

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**Docket No. 11-993
Issued: September 17, 2012**

Appearances:

*Steve Burt, for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 14, 2011 appellant, through her representative, filed a timely appeal from a February 1, 2011 decision of the Office of Workers' Compensation Programs (OWCP) denying modification of an April 16, 2003 loss of wage-earning capacity (LWEC) determination. 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 modify OWCP's April 16, 2003 wage-earning capacity.

On appeal, appellant, through her representative, contends that the position with the employing establishment was makeshift in nature and not of the open job market.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 30, 2000 appellant, then a 31-year-old mail carrier, filed a traumatic injury claim alleging that she twisted her left ankle while she was walking. Her claim was accepted for left ankle sprain, left ankle instability impingement and left ankle lateral ligament reconstruction/arthroscopy. Appellant returned to sedentary work for the employing establishment for six hours a day on February 26, 2001 and full-time restricted duty effective May 24, 2001.

By decision dated April 16, 2003, OWCP determined that appellant had been reemployed in a limited-duty full-time position with the employing establishment with wages of \$35,064.00 a year effective May 24, 2001. The position was sedentary in nature with sitting up to eight hours a day, minimal walking and standing as tolerated and no pushing, pulling, stooping, twisting, climbing or kneeling. OWCP determined that this position represented appellant's LWEC and that appellant had a wage-earning capacity of 100 percent. This decision was affirmed by a hearing representative on February 18, 2004. On March 16, 2004 OWCP issued a schedule award for nine percent impairment of the left lower extremity.

Appellant received and accepted several other restricted-duty job offers. On January 8, 2004 the employing establishment made her a new offer of a "permanent reassignment" in compliance with her work restrictions, a position appellant refused. In an August 25, 2004 letter, OWCP also found this position unsuitable. On August 31, 2004 it made appellant another rehabilitation job offer for full-time work within strict compliance to physical activity restrictions. Appellant accepted the position under protest. Another offer of modified assignment was made on October 17, 2006 with a note that she would work within her medical restrictions eight hours a day and she accepted this assignment. On March 9, 2007 another offer was made for full-time employment with restrictions and was accepted by appellant.

On August 19, 2009 the employing establishment made appellant a reemployment/reassignment offer. It noted that the position was in strict compliance with her medically-defined work limitations, and included intermittent standing and walking for one hour and no kneeling, bending, stooping, twisting and climbing. Appellant accepted the job offer under protest. By letter dated September 22, 2009, the employing establishment indicated that the offered position would become effective October 10, 2009 and that she should report to the new location on that date at the Fenkell Station in Detroit. The hours for the position were 8:00 a.m. to 9:30 a.m. five days a week. On November 3, 2009 appellant again indicated that she accepted this job offer under protest as she was a full-time employee and should be offered at least full-time work in her own building and that the job was against her duty status report.

On November 2, 2009 appellant filed a notice of recurrence, stating that, due to the receipt of the job offer, she was no longer working full time as she was now working less than 10 hours a week. Appellant requested compensation commencing October 10, 2009.

In a letter dated April 21, 2010, the employing establishment indicated that, as part of the National Reassessment Process (NRP), all rehabilitation modified positions and limited-duty modified assignment were reassessed and on March 9, 2007 appellant was offered a rehabilitation modified job based on her most recent medical documentation. Appellant accepted

a position as a call center agent. The letter noted that in 2009 she elected to leave the customer care center, that on August 19, 2009 she was offered a rehabilitation modified job based on her most recent medical documentation dated October 3, 2008 and noted that on September 3, 2009 she accepted the job offer under protest.

By decision dated July 7, 2010, OWCP denied appellant's claim for modification of the LWEC decision dated April 16, 2003.

On July 12, 2010 appellant requested an oral hearing before an OWCP hearing representative. At the hearing held on November 4, 2010, appellant argued that the original loss of wage-earning capacity decision was in error as the job offer was for a makeshift work to specifically accommodate her medical restrictions. There was no evidence that appellant could secure a position in the community at large. Appellant contended that the employing establishment arbitrarily, through NRP, assigned her to a different office and slashed her workday from 8 hours to 90 minutes a day. She also testified that when she returned to limited-duty work at the employing establishment wherein she answered the telephones, wrote certified cards, did casing and nixies and separated mail for carriers. Appellant noted that she never delivered mail and that her jobs were primarily sitting jobs. She estimated that over the last 10 years she had about six or seven different job offers, and that each time there was a list of new things to do.

By decision dated February 1, 2011, OWCP's hearing representative affirmed the July 7, 2010 decision denying modification of the LWEC decision.

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.² When an employee cannot return to the date-of-injury job because of disability due to work-related injury or disease, but does return to alternative employment with an actual wage loss, OWCP must determine whether the earnings in the alternative employment fairly and reasonably represent the employee's wage-earning capacity.³

Once 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. These are the customary criteria for modification, and the burden of proof is on the party attempting to show that modification of the determination is warranted.⁴

² 5 U.S.C. § 8102(a).

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (October 2009).

⁴ *Daniel J. Boesen*, 38 ECAB 556 (1987).

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 LWEC decision has been issued, OWCP must develop the evidence to determine whether a modification of that decision is appropriate.⁵

ANALYSIS

OWCP accepted that appellant sustained a left ankle sprain, left ankle impingement and underwent left ankle lateral ligament reconstruction/arthroscopy. Appellant returned to a full-time limited-duty position with the employing establishment effective May 24, 2001 and, by decision dated April 16, 2003, OWCP determined that this position represented her wage-earning capacity.

After OWCP issued its formal LWEC decision, the employing establishment reassessed appellant's position under NRP which resulted in her being assigned to a limited-duty position with limited hours. OWCP analyzed the case under the customary criteria for modifying a LWEC 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.⁶

When a LWEC 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.⁷ 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

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 LWEC 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

As OWCP failed to follow the guidelines in FECA Bulletin No. 09-05, the Board will set aside the February 1, 2011 decision and remand the case for further consideration. After proper

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

⁶ See *M.A.*, Docket No. 12-316 (issued July 24, 2012).

⁷ FECA Bulletin No. 09-05, *supra* note 5.

⁸ *Id.* at §§ I.A.1-2.

⁹ *Id.* at § I.A.3.

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 10, 2009.¹⁰

CONCLUSION

The Board finds that this case is not in posture for determination on whether modification of OWCP's April 16, 2003 WEC determination is appropriate. Further action by OWCP is warranted.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 1, 2011 is set aside and the case remanded for further action.

Issued: September 17, 2012
Washington, DC

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

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

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

¹⁰ *M.A.*, *supra* note 6; *see also M.E.*, Docket No. 11-1416 (issued May 17, 2012).