

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

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**J.K., Appellant**

**and**

**U.S. POSTAL SERVICE, BULK MAIL  
CENTER, Cincinnati, OH, Employer**

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**Docket No. 11-1136  
Issued: September 5, 2012**

*Appearances:*

*Alan J. Shapiro, Esq., for the appellant  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

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

**JURISDICTION**

On April 7, 2001 appellant, through counsel, filed a timely appeal from a March 8, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) denying modification of a loss of wage-earning capacity determination. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (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 has met his burden of proof to establish that a modification of the loss of wage-earning capacity determination is warranted.

**FACTUAL HISTORY**

On September 12, 2001 appellant, then a 36-year-old mail handler, filed an occupational disease claim alleging an employment-related foot condition. He first became aware of the

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

condition and its relationship to his employment on April 1, 2001. OWCP accepted the claim for bilateral plantar fasciitis and placed appellant on the periodic rolls for temporary total disability.

On September 18, 2003 Dr. Richard T. Sheridan, a second opinion Board-certified orthopedic surgeon, reviewed the medical evidence, statement of accepted facts and performed a physical examination. He diagnosed employment-related bilateral foot plantar fasciitis. Dr. Sheridan found that appellant was capable of working with restrictions of no operating a motor vehicle, no standing, no squatting, no walking and no kneeling.

On April 4, 2004 the employing establishment offered appellant a modified mail handler position. The duties of the position included repairing and taping damaged parcels and replacing items into packaging for eight hours a day. The physical requirements were the ability to repair damaged parcels and use a standard tape gun. Appellant accepted the job offer on April 10, 2004 and returned to work that day.

By decision dated December 27, 2004, OWCP reduced appellant's compensation to zero based on its finding that his actual earnings as a modified mail handler effective April 10, 2004 fairly and reasonably represented his wage-earning capacity.

On February 17, 2010 appellant filed a claim for a recurrence of total disability beginning that day due to his accepted employment injury. He attributed the recurrence of disability to the withdrawal of his limited-duty position under the National Reassessment Program (NRP) by the employing establishment. Appellant filed claims for wage-loss compensation (Form CA-7) beginning February 17, 2010.

By correspondence dated March 22, 2010, OWCP noted that appellant had filed a claim for disability beginning February 17, 2010. Appellant's limited-duty assignment had been withdrawn as part of the employing establishment's NRP. OWCP informed him of the requirements for establishing modification of an established wage-earning capacity determination and requested that he submit supporting evidence, including a rationalized medical opinion, within 30 days.

By decision dated May 13, 2010, OWCP denied appellant's claim for compensation for finding that he did not establish modification of the December 27, 2004 loss of wage-earning capacity determination.

On May 20, 2010 appellant's counsel requested a telephonic hearing before an OWCP hearing representative which was held on September 7, 2010.

By decision dated March 8, 2011, an OWCP hearing representative affirmed the May 13, 2010 decision.

### **LEGAL PRECEDENT**

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.<sup>2</sup> When an employee cannot return to the date-

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<sup>2</sup> 5 U.S.C. § 8102(a).

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.<sup>3</sup>

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.<sup>4</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>5</sup>

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.<sup>6</sup>

### ANALYSIS

OWCP accepted that appellant sustained bilateral plantar fasciitis due to his employment duties as a mail handler. On December 27, 2004 it found that his actual earnings as a modified mail handler effective April 10, 2004 fairly and reasonably represented his wage-earning capacity and reduced his compensation to zero. On February 17, 2010 appellant filed a recurrence of disability claim due to the withdrawal of his limited-duty assignment as part of NRP.

OWCP issued a formal loss of wage-earning capacity decision on December 27, 2004. The employing establishment reassessed appellant's rated position under NRP, resulting in a withdrawal of limited duty. OWCP analyzed the case under the customary criteria for modifying a loss of wage-earning capacity determination. It 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 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.<sup>7</sup> 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

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

<sup>4</sup> *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Tamra McCauley*, 51 ECAB 375 (2000).

<sup>5</sup> *Id.*

<sup>6</sup> FECA Bulletin No. 09-05 (issued August 18, 2009).

<sup>7</sup> *Id.*

residuals, and to further develop the evidence from both the claimant and the employing establishment if the case lacks current medical evidence.<sup>8</sup>

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.<sup>9</sup>

If, after development and review by OWCP, the evidence establishes that the loss of wage-earning capacity decision was proper and none of the customary criteria for modifying the determination were met, then OWCP may issue a decision denying modification of the loss of wage-earning capacity determination.<sup>10</sup>

As OWCP failed to follow the guidelines in FECA Bulletin No. 09-05, the Board will set aside the March 8, 2011 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 February 17, 2010.<sup>11</sup>

### **CONCLUSION**

The Board finds that the case is not in posture for decision and will be remanded to OWCP for further development.

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<sup>8</sup> *Id.* at § I.A.1-2

<sup>9</sup> *Id.* at § I.A.3.

<sup>10</sup> *Id.* at § I.A.4.

<sup>11</sup> *See M.E.*, Docket No. 11-1416 (issued May 17, 2012).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated March 8, 2011 is set aside and the case remanded for further action.

Issued: September 5, 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