

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

R.G., Appellant)
and) Docket No. 11-1190
U.S. POSTAL SERVICE, PROCESSING &) Issued: September 12, 2012
DISTRIBUTION CENTER, Spokane, WA,)
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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 19, 2011 appellant filed a timely appeal of a March 28, 2011 Office of Workers' Compensation Programs' (OWCP) merit decision denying modification of his loss of wage-earning capacity determination. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUE

The issue is whether appellant has met his burden of proof to modify the April 7, 2009 loss of wage-earning capacity determination.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On December 22, 2005 appellant then a 53-year-old clerk, filed an occupational disease claim alleging that he developed tendinitis of the left thumb due to factors of his federal employment. OWCP accepted his claim for left thumb tendinitis on February 24, 2006 and later accepted left thumb trigger finger. Appellant underwent left thumb surgery on April 21, 2006. He returned to full duty on July 6, 2006. Appellant stopped work on August 7, 2006 and filed a claim for recurrence of disability which OWCP accepted. He returned to full-time light-duty work on October 4, 2006. Appellant underwent a functional capacity evaluation on August 2, 2007 which found that he could perform medium work eight hours a day. He was directed to avoid repetitive grasping and fingering and to use his left hand on an occasional basis. Appellant's lifting restriction was 35 pounds, occasionally.

On December 30, 2008 appellant accepted a light-duty position as a distribution clerk at the employing establishment working eight hours a day lifting with his left hand 2 to 5 pounds a day for two hours and lifting up to 20 pounds with both hands not involving his left thumb. He was to perform repetitive movements of the left hand for one hour and no gripping or grasping with the left hand. Appellant's duties entailed casing manual flats, casing manual letters and working and monitoring the computer at the no read tower. The position description stated, "All assigned duties will be in strict compliance with the medical limitations placed upon you by your treating physician. It will be your responsibility to work in a safe manner at all times and within those restrictions."

By decision dated April 7, 2009, OWCP found that appellant was employed as a distribution clerk effective December 30, 2008 and that this position fairly and reasonably represented his loss of wage-earning capacity. It reduced his compensation benefits to zero.

Appellant filed a claim for compensation requesting wage-loss compensation beginning February 3, 2011 due to the National Reassessment Process (NRP). In a letter dated February 15, 2011, OWCP informed him that as a formal loss of wage-earning capacity decision had been issued, he must meet the criteria to modify the loss of wage-earning capacity determination to receive compensation benefits.

In a letter dated February 22, 2011, the employing establishment stated that it was unable to provide sufficient work within appellant's restrictions to allow him to work eight hours a day. Appellant telephoned OWCP on February 24, 2011 and stated that he had been working in the modified position for five years and that his medical condition had not changed. He stated that the employing establishment was cutting his hours even though there was work available.

Appellant submitted a letter and alleged that his loss of wage-earning capacity position was an odd-lot job designed for his needs and was not a regular position.

By decision dated March 28, 2011, OWCP denied modification of the April 7, 2009 loss of wage-earning capacity determination.

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.² Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn and not on actual wages lost.³ Compensation payments are based on the wage-earning capacity determination, which remains undisturbed until properly modified.⁴

Modification of a standing wage-earning capacity 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 erroneous.⁵ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁶

FECA Bulletin No. 09-05 outlines OWCP procedures when limited-duty positions are withdrawn pursuant to NRP. If, as in the present case, a formal wage-earning capacity decision has been issued, OWCP must develop the evidence to determine whether a modification of that decision is appropriate.⁷

ANALYSIS

OWCP accepted that appellant sustained employment-related left thumb tendinitis and left thumb trigger finger. Following surgery, appellant returned to work as a modified distribution clerk with the employing establishment. By decision dated April 7, 2009, OWCP found that he was employed as a distribution clerk effective December 30, 2008 and that this position fairly and reasonably represented appellant's wage-earning capacity.

On February 3, 2011 the employing establishment reduced appellant's work hours as part of NRP after determining that it did not have work available for his position. Appellant filed claims requesting compensation for wage loss beginning February 3, 2011. He further requested modification of the April 7, 2009 loss of wage-earning capacity decision. OWCP analyzed this case under the customary criteria for modifying a loss of wage-earning capacity determination,

² 5 U.S.C. § 8115(a); *K.R.*, Docket No. 09-415 (issued February 24, 2010); *Lee R. Sires*, 23 ECAB 12, 14 (1971) (the Board held that actual wages earned must be accepted as the measure of a wage-earning capacity in the absence of evidence showing they do not fairly and reasonably represent the employee's wage-earning capacity).

³ *K.R.*, *supra* note 2; *Roy Matthew Lyon*, 27 ECAB 186, 190 (1975). *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

⁴ See *Sharon C. Clement*, 55 ECAB 552, 557 (2004).

⁵ *Sue A. Sedgwick*, 45 ECAB 211, 215-16 (1993); *Elmer Strong*, 17 ECAB 226, 228 (1965).

⁶ *Selden H. Swartz*, 55 ECAB 272, 278 (2004).

⁷ FECA Bulletin No. 09-05 (issued August 18, 2009).

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.⁸

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 To this end, the Bulletin asks OWCP to confirm that the file contains 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 the Bulletin 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 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

As OWCP failed to follow the guidelines in FECA Bulletin No. 09-05, the Board will set aside OWCP's March 28, 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 3, 2011.¹²

CONCLUSION

The Board finds that this case is not in posture for determination on whether modification of OWCP's April 7, 2009 loss of wage-earning capacity determination is appropriate. Further action by OWCP is warranted.

⁸ See M.A., Docket No. 12-316 (issued July 24, 2012).

⁹ *Supra* note 7.

¹⁰ *Id.* at §§ I.A.1-2.

¹¹ *Id.* at § I.A.3.

¹² See *supra* note 8; M.E., Docket No. 11-1416 (issued May 17, 2012).

ORDER

IT IS HEREBY ORDERED THAT the March 28, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action.

Issued: September 12, 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