

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

K.O., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Mount Prospect, IL, Employer**

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**Docket No. 11-1201
Issued: September 19, 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 18, 2011 appellant, through his attorney, filed a timely appeal from an October 22, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 his burden of proof to establish that a July 15, 2009 wage-earning capacity decision should be modified for the period January 1 to April 10, 2010.

On appeal his attorney asserts that the decision is contrary to fact and law.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On September 24, 2002 appellant, then a 42-year-old letter carrier, filed a traumatic injury claim alleging that he injured his right shoulder and neck when he fell from his postal vehicle while holding onto a handrail. OWCP accepted a right rotator cuff sprain and strain, right superior glenoid labrum lesions, right lesion and injury of the radial nerve, and injury to the cervical sympathetic nerve, excluding shoulder and pelvic girdles. On December 13, 2002 Dr. Mark A. Neault, a Board-certified orthopedic surgeon, performed right shoulder arthroscopy and repair of a superior labral tear from anterior to posterior (SLAP) lesion. On January 22, 2007 appellant was granted a schedule award for 30 percent permanent impairment of the right arm.

Under a separate claim, adjudicated under file number xxxxxx077, OWCP accepted that appellant sustained a sprain of the left shoulder and upper arm, left glenoid labrum lesion, and left disorder of bursae and tendons caused by an April 17, 2008 employment injury. On September 22, 2008 Dr. Eugene J. Bartucci, a Board-certified orthopedic surgeon, performed arthroscopic repair of the left shoulder. Appellant received appropriate wage-loss compensation.

By report dated February 23, 2009, Dr. Bartucci advised that appellant could return to work for eight hours a day, five days a week, with restrictions of five pounds lifting; four hours fine manipulation and driving; two hours simple grasping; and no climbing, kneeling, pulling, pushing or reaching above the shoulder.

On March 6, 2009 appellant accepted a full-time modified letter carrier position. The duties were described as pick-up and deliver express and priority mail for two to three hours daily; priority mail confirmation testing for two hours daily; related paperwork assistance and answering telephones for one to two hours daily; and computerized forwarding mail, no records mail and 3982's alignment for one to two hours daily. The physical requirements were described as lifting/carrying up to five pounds for one to two hours daily; no climbing, kneeling, pulling, pushing or reaching above the shoulder; two hours of simple grasping; and four hours of fine manipulation and driving.

By decision dated July 15, 2009, OWCP found that appellant was reemployed as a modified carrier, effective July 22, 2008. It found that his actual earnings fairly and reasonably represented his wage-earning capacity with zero loss.

Appellant, through his attorney, timely requested a hearing that was held on October 23, 2009, where he testified that he was still working the modified position. On November 10, 2009 he filed a claim for intermittent compensation for the period September 3 to October 30, 2009. On November 12, 2009 appellant's hours were reduced to one-and-a-half hours of pickup and delivery of express mail daily. He continued to file claims for intermittent compensation through December 31, 2009.

By decision dated December 14, 2009, an OWCP hearing representative affirmed the July 15, 2009 decision. Appellant was paid wage-loss compensation through December 31, 2009.

On January 18 and 29, 2010 appellant filed claims for compensation for approximately six hours each workday for the period January 2 through 29, 2010. He attached a disability slip from Dr. Yuliya Kin, a Board-certified anesthesiologist, who advised that appellant had a medical appointment on January 20, 2010.

In letters dated February 3, 2010, OWCP asked appellant and the employing establishment if his limited-duty hours had changed as part of the National Reassessment Process (NRP). Appellant submitted a November 12, 2009 letter from the employing establishment informing him that his hours were being reduced under NRP. In reports dated December 21, 2009 and January 20, 2010, Dr. Kin provided a review of systems and examination findings. In reports dated February 24, 2010, Dr. Bartucci noted that appellant had bilateral shoulder injuries. He provided findings and advised that appellant had permanent residuals and had developed chronic degenerative conditions in both shoulders with weakness and limitation of motion in both arms. Dr. Bartucci reiterated appellant's permanent restrictions.

On February 25, 2010 the employing establishment requested vocational rehabilitation for appellant, stating that he had severe permanent restrictions with little work capabilities and advised that it could no longer offer busy work to injured employees.

The February 26, 2010 magnetic resonance imaging (MRI) scans of the right and left shoulder demonstrated normal rotator cuffs and minimal hypertrophy of the acromioclavicular joint without significant impingement. In reports dated March 8, 2010, Dr. Neault advised that appellant was having increasing difficulties at work with his right shoulder and was unable to perform his limited duties without pain. He noted appellant's report that his left shoulder was not doing well either. Dr. Neault provided examination findings of the right shoulder and diagnosed SLAP lesion and labrum tear, right shoulder following repair. He advised that appellant could work eight hours a day with restrictions of lifting five pounds for two hours daily; fine manipulation for four hours daily; working in temperature extremes and high humidity for four to five hours daily; simple grasping and driving for two hours daily; and no climbing, kneeling, pulling, pushing and reaching above the shoulder. Dr. Kin performed a right cervical facet injection for cervical degenerative disc disease on March 12, 2010. She provided a disability slip on March 19, 2010, stating that appellant was seen for a medical appointment on March 18, 2010. On March 24, 2010 Dr. Bartucci reported that appellant's shoulders were still bothering him. He reviewed the MRI scan findings and advised that repeat left shoulder surgery could be indicated.

In a decision dated March 31, 2010, finalized on April 2, 2010, OWCP denied his claim for compensation benefits, effective November 12, 2009, on the grounds that the evidence did not support modification of the July 15, 2009 wage-earning capacity determination.

On April 6, 2010, through his attorney, appellant requested a hearing and continued to submit claims for wage-loss compensation. On April 15, 2010 Dr. Bartucci performed left shoulder arthroscopic with debridement of labrum, subacromial decompression and distal clavicle resection.

On April 30, 2010 OWCP modified the July 15, 2009 decision, effective April 10, 2010, because the medical evidence established that appellant's work-related condition had worsened.

Appellant received wage-loss compensation beginning April 10, 2010. He was also paid compensation for 34.46 hours, for doctor visits on January 20, February 19 and 24, March 8, 12, 18 and 24, 2010.

At the hearing, held telephonically on July 12, 2010, appellant testified that in November 2009 the employing establishment told him that there was no work available for him under NRP based on his injuries and reduced his hours to an hour-and-a-half a day. He stated that until that time he was delivering express mail and priority mail in the morning and would deliver express mail in the afternoon. Appellant testified that this work was still available but was being performed by other employees. He asserted that the position was a makeshift job, tailored specifically for him, and that it had been withdrawn in November 2010. Appellant's attorney argued that, because appellant's light-duty job had been withdrawn, he was entitled to total wage-loss compensation.

On August 30, 2010 Dr. Bartucci performed arthroscopy of the right shoulder with debridement of labrum, subacromial decompression and distal clavicle resection. Appellant was placed on the periodic compensation rolls effective September 26, 2010.

By decision dated October 22, 2010, an OWCP hearing representative affirmed the April 2, 2010 decision with respect to its denial of modification of the wage-earning capacity determination. She set aside and remanded the case in regard to appellant's claim for intermittent wage-loss for time out of work for medical reasons from January to March 2010.

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.² The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.³

FECA Bulletin No. 09-05 outlines OWCP procedures when limited-duty positions are withdrawn pursuant to NRP. If 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.⁴

ANALYSIS

The Board finds this case not in posture for decision. OWCP accepted that appellant sustained employment-related injuries to his right and left shoulders. Appellant had right shoulder surgery on December 13, 2002 and left shoulder surgery on September 22, 2008. On

² *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Tamra McCauley*, 51 ECAB 375, 377 (2000).

³ *Id.*

⁴ FECA Bulletin No. 09-05 (issued August 18, 2009).

March 6, 2009 he accepted a modified full-time position. By decision dated July 15, 2009, OWCP found that appellant's modified position fairly and reasonably represented his wage-earning capacity.

Appellant filed claims for partial wage loss beginning on September 3, 2009 when his hours were reduced under NRP and was paid appropriate wage-loss compensation through December 31, 2009. He continued to file claims for partial wage loss and asserted that the position on which the wage-earning capacity decision was based was makeshift and tailored specifically for him.

OWCP issued a formal loss of wage-earning capacity decision on July 15, 2009. The employing establishment reassessed appellant's rated position under NRP. This resulted in a reduction in his work hours for which he filed claims for wage-loss compensation beginning in January 2010. OWCP analyzed the case under the customary criteria for modifying a loss of wage-earning capacity 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.

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.⁵ 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.⁶

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.⁷

As OWCP failed to fully follow the guidelines in FECA Bulletin No. 09-05, the Board will set aside the October 22, 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 in January 2010.⁸

⁵ *Id.*

⁶ *Id.* at § I.A.1-2

⁷ *Id.* at § I.A.3.

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

CONCLUSION

The Board finds this case not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the October 22, 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 19, 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