

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

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**K.N., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Milwaukee, WI, Employer**

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**Docket No. 11-1283  
Issued: September 24, 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 May 2, 2011 appellant, through her representative, filed a timely appeal from the March 15, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP), which denied modification of its 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 OWCP properly denied modification of its December 2, 2004 loss of wage-earning capacity determination.

**FACTUAL HISTORY**

On June 5, 2000 appellant, then a 45-year-old mail handler, sustained a left cervical strain, left lumbar strain, left shoulder strain, contusions and abrasions in the performance of

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

duty when she fell down a hole.<sup>2</sup> On January 30, 2002 she sustained acute lumbar and cervical strains in the performance of duty after an all-purpose container struck her and pushed her into a filing cabinet.<sup>3</sup>

On March 2, 2004 appellant accepted a full-time modified assignment as a pin-lock chocker technician with no wage loss. The duties included locking and unlocking trailers, chocking tires and inspecting the condition of trailers entering and exiting the dock facility.

In a decision dated December 2, 2004, OWCP determined that appellant's wages in the modified position represented her wage-earning capacity in the open labor market: "Because you have worked in this position for more than 60 days, the determination has been made that it fairly and reasonably represents your wage-earning capacity."

On September 15, 2005 OWCP's hearing representative affirmed, noting that the physical requirements of the position were within the established medical restrictions and that appellant did not dispute that she was physically capable of performing the duties.

Effective May 19, 2010, the employing establishment withdrew appellant's limited-duty under the National Reassessment Process (NRP). It notified her that it was unable to identify any available necessary tasks within her medical restrictions.

Appellant filed a claim for wage-loss compensation beginning May 19, 2010, as well as a recurrence of disability claim alleging that the employing establishment took away the job accommodating her work injury.

On August 19, 2010 OWCP denied appellant's claim for wage-loss compensation. It found that the evidence failed to satisfy the criteria for modifying a formal loss of wage-earning capacity determination.

In a decision dated March 15, 2011, OWCP's hearing representative affirmed the August 19, 2012 decision. The hearing representative found no medical evidence that appellant was unable to perform the duties of the position. The hearing representative found that appellant's position was not makeshift, seasonal sporadic or temporary, "and as she worked at the position successfully for more than 60 days, [OWCP] properly determined her wage-earning capacity based upon her actual earnings."

### **LEGAL PRECEDENT**

FECA provides that 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.<sup>4</sup> Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor

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<sup>2</sup> OWCP File No. xxxxxx656.

<sup>3</sup> OWCP File No. xxxxxx140.

<sup>4</sup> 5 U.S.C. § 8115(a).

market under normal employment conditions.<sup>5</sup> The Board has long held that actual wages earned in the open labor market more accurately represent an employee's earning capacity and constitute a more reliable gauge than a secondary method such as an opinion of a vocational rehabilitation specialist.<sup>6</sup> While wages actually earned are generally the best measure of an injured worker's capacity for employment, such wages may not be based on make-shift or sheltered employment.<sup>7</sup>

Once the loss of 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.<sup>8</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>9</sup>

FECA Bulletin No. 09-05 outlines very specific procedures for light-duty positions withdrawn pursuant to NRP. If, as in the present case, a wage-earning capacity decision has been issued and the employee claims compensation for total disability, OWCP must develop the evidence to determine whether a modification of that decision is appropriate.<sup>10</sup>

### ANALYSIS

OWCP issued a formal loss of wage-earning capacity decision on December 2, 2004. After the employing establishment withdrew her limited-duty position pursuant to NRP, appellant claimed a recurrence of total disability beginning May 19, 2010.

OWCP adjudicated appellant's recurrence claim under the customary criteria for modifying a loss of wage-earning capacity determination. It did not acknowledge FECA Bulletin No. 09-05 or fully follow the procedures outlined therein for claim 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>11</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>5</sup> *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

<sup>6</sup> *Billie S. Miller*, 15 ECAB 168 (1963).

<sup>7</sup> *A.J.*, Docket No. 10-619 (issued June 29, 2010); *Connie L. Potratz-Watson*, 56 ECAB 316 (2005).

<sup>8</sup> *Daniel J. Boesen*, 38 ECAB 556 (1987).

<sup>9</sup> *Sue A. Sedgwick*, 45 ECAB 211 (1993).

<sup>10</sup> FECA Bulletin No. 09-05 (issued August 18, 2009).

<sup>11</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>12</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>13</sup>

As OWCP failed to follow the guidelines in FECA Bulletin No. 09-05, the Board will set aside OWCP's March 15, 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 May 19, 2010.<sup>14</sup>

### **CONCLUSION**

The Board finds that this case is not in posture for decision. Further action is warranted.

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<sup>12</sup> *Id.* at §§ I.A.1-2.

<sup>13</sup> *Id.* at § I.A.3.

<sup>14</sup> *See M.E.*, Docket No. 11-1416 (issued May 17, 2012).

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 15, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action.

Issued: September 24, 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