



## **ISSUES**

The issues are: (1) whether appellant met her burden of proof to establish intermittent periods of disability from May 8 to October 8, 2010; and (2) whether she met her burden of proof to modify OWCP's April 8, 2009 loss of wage-earning capacity decision.

On appeal appellant, through counsel, argued that she established a recurrence of disability because the employing establishment withdrew her light-duty position. She also contended that the loss of wage-earning capacity determination was erroneous because the position she held was makeshift.

## **FACTUAL HISTORY**

On November 21, 2007 appellant, then a 58-year-old letter carrier, filed a traumatic injury claim alleging that on November 5, 2007 she was hit by a car and sustained an injury to her left leg. On January 2, 2008 OWCP accepted her claim for a closed fracture of the upper end of the left tibia. It later accepted appellant's claim for traumatic arthropathy of the left lower leg. On July 28, 2008 appellant accepted a modified limited-duty position as a carrier. Her position had restrictions of sitting five hours a day and walking and standing were limited to one hour a day. Appellant was also restricted to pushing/pulling/lifting up to 15 pounds for one hour a day. She returned to work in this light-duty full-time position on August 1, 2008.

In a February 2, 2009 report, Dr. Gene Shaffer, a treating Board-certified orthopedic surgeon, stated that appellant was status post tibial plateau fracture, with post-traumatic arthritis. He noted that she had resumed work on a modified-duty schedule, which involved sitting, restricted standing and walking and less driving of a truck. Appellant had no brace or support but used a cane occasionally. Dr. Shaffer stated that he agreed with the modified-duty assignment at the employing establishment.

In a decision dated April 8, 2009, OWCP found that appellant had been recently employed in a modified carrier position for eight months with wages of \$1,032.38 a week. It found that her actual wages resulted in no loss in earning capacity.

On May 21, 2010 appellant filed a claim for compensation for the period May 8 through 21, 2010. A May 25, 2010 time analysis form indicated that she did not work intermittent hours between May 12 and 21, 2010. The reason given for leave was "no work."

By decision dated June 29, 2010, OWCP denied appellant's claim for compensation from May 8 through 21, 2010. It determined that she had not met the requirements for modifying the 2009 wage-earning capacity determination.

Appellant requested an oral hearing before an OWCP hearing representative that was held on October 6, 2010. She testified that she returned to full-time work in August 2008 in a position that allowed her to sit or stand and that she was okay doing that job. Appellant continued to work in that position until May 8, 2010 when she was told to go home after five or six hours because there was no light-duty work available. She missed three hours of work that day and, thereafter, was sent home earlier and earlier.

In a December 28, 2010 decision, an OWCP hearing representative affirmed the June 29, 2010 decision as the evidence failed to establish that the loss of wage-earning capacity determination of April 8, 2009 should be modified. The hearing representative further determined that the evidence failed to establish that appellant was disabled from May 8 to 21, 2010.

Appellant submitted additional claims for compensation for missed hours.

Appellant's claim for compensation for the period June 19 through July 2, 2010 was denied by OWCP in an August 24, 2010 decision. This decision was affirmed by a hearing representative in a decision dated January 11, 2011. The hearing representative found that appellant did not meet the burden of proof for modification of the April 8, 2009 loss of wage-earning capacity determination. The hearing representative noted that the medical evidence of record did not establish that the accepted condition worsened or that an increase in injury-related disability occurred.

In an August 4, 2010 decision, OWCP denied appellant's claim for compensation for the period June 5 through 18, 2010. This decision was affirmed by an OWCP hearing representative on February 28, 2011. The hearing representative found that the evidence failed to establish any error with regard to the loss of wage-earning capacity determination rendered on April 8, 2009.

Appellant's claim for compensation for the period July 3 through 16, 2010 was denied by OWCP on September 14, 2010. This decision was affirmed by an OWCP hearing representative on April 26, 2011. The hearing representative found that appellant had not established that the April 8, 2009 loss of wage-earning capacity decision should be modified.

Appellant's claim for compensation for the period July 17 through August 13, 2010 was denied by OWCP on September 24, 2010. This decision was affirmed by an OWCP's hearing representative on April 26, 2011. The hearing representative found that appellant had not established that the April 8, 2009 decision should be modified.

Appellant's claim for compensation for August 14 through September 13, 2010 was denied by OWCP on October 18, 2010. By decision dated November 3, 2010, OWCP denied her claim for compensation for the period September 10 through 24, 2010. It denied appellant's claim for compensation for the period September 27 to October 8, 2010 in a November 15, 2010 decision.

By letter dated November 15, 2010, OWCP noted that it had received appellant's claim for wage loss from October 23 through November 7, 2010. It advised that the evidence indicated that specific hours of her limited-duty assignment had been withdrawn as part of the National Reassessment Process (NRP).

The decisions of October 18, November 3 and 15, 2010 were affirmed by an OWCP hearing representative on May 25, 2011. The hearing representative found that appellant had not established that the loss of wage-earning capacity determination should be modified. The hearing representative did find that there was sufficient evidence to support that appellant had developed left knee post-traumatic arthritis in the lateral compartment due to her work-related injury. The hearing representative determined that the medical evidence did not establish that

the left knee arthritis impacted her ability to perform her modified duty. The hearing representative noted that the diagnosis of lateral tibial plateau fracture, left knee was medically connected to her work-related injury.

### **LEGAL PRECEDENT**

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.<sup>3</sup> 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.<sup>4</sup>

Once the 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.<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 appellant's claim for closed fracture of the upper end of the left tibia and for traumatic arthropathy of the left lower leg. Appellant returned to work in a limited-duty assignment on July 28, 2008. On May 8, 2010 the employing establishment reduced her hours of work in her modified position. Appellant filed claims for compensation that showed loss of intermittent hours for periods starting May 8, 2010. She indicated that she was sent home because no work was available.

On April 8, 2009 OWCP issued a loss of wage-earning capacity 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 loss of wage-earning capacity determination, but did not acknowledge

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<sup>3</sup> 5 U.S.C. § 8102(a).

<sup>4</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (October 2009)

<sup>5</sup> *Daniel J. Boesen*, 38 ECAB 556 (1987)

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

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.<sup>7</sup>

When a loss of wage-earning capacity decision has been issued and the position is later withdrawn pursuant to NRP, FECA Bulletin No. 09-05 requires OWCP to develop the evidence to determine whether a modification of the decision is appropriate.<sup>8</sup> To this end, FECA Bulletin No. 09-05 states that OWCP should 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.<sup>9</sup>

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>10</sup>

As OWCP failed to follow the guidelines in FECA Bulletin No. 09-05, the Board will set aside the December 28, 2010 and January 11, February 28, April 26 and May 25, 2011 decisions 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 8, 2009.<sup>11</sup>

### **CONCLUSION**

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

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<sup>7</sup> See *M.A.*, Docket No. 12-316 (issued July 24, 2012).

<sup>8</sup> FECA Bulletin No. 09-05, *supra* note 6.

<sup>9</sup> *Id.* at §§ I.A.1-2.

<sup>10</sup> *Id.* at § I.A.3.

<sup>11</sup> *M.A.*, *supra* note 7; see also *M.E.*, Docket No. 11-1416 (issued May 17, 2012).

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 25, April 26, February 28 and January 11, 2011 and December 28, 2010 decisions of the Office of Workers' Compensation Programs are set aside and the case remanded for further action.

Issued: September 26, 2012  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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