

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

R.T., Appellant

and

**U.S. POSTAL SERVICE, WARRENVILLE
POST OFFICE, Warrenville, IL, Employer**

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**Docket No. 11-1406
Issued: September 24, 2012**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 27, 2011 appellant filed a timely appeal of the December 8, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) denying modification of its 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 over the merits of this case.

ISSUE

The issue is whether appellant established that modification of OWCP's June 10, 2010 loss of wage-earning capacity determination is warranted.

On appeal, appellant contends that the most recent duty status report (Form CA-17) of record established that his employment-related conditions had worsened. He stated that this evidence clearly showed that his restrictions had changed and that his injuries were permanent in nature.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On May 25, 2007 appellant, then a 52-year-old rural carrier, filed an occupational disease claim alleging that on April 24, 2007 he first became aware of his right carpal tunnel syndrome. On April 26, 2007 he first realized that his condition was caused by repetitive right hand motion while working at the employing establishment. Appellant worked seven and one-half hours per day from 8:00 a.m. to 3:30 p.m., six days per week. He stopped work on May 17, 2007. In an undated narrative statement, appellant related that he worked five days one week and then six days the next week. He worked seven and one-half hours to nine hours per day depending on the volume of mail to be delivered. Subsequently, OWCP accepted appellant's claim for right carpal tunnel syndrome, right cubital tunnel syndrome and right epicondylitis as a result of his repetitive work duties.²

Appellant accepted the employing establishment's December 29, 2009 job offer for a modified rural carrier position which was based on the physical restrictions set forth by Dr. John C. Elser, a Board-certified family practitioner, in an October 20, 2009 medical report. He returned to work on January 2, 2010.

On June 10, 2010 OWCP issued a decision finding that appellant's actual earnings as a modified rural carrier effective December 29, 2009 fairly and reasonably represented his wage-earning capacity. It found that he had no loss of wage-earning capacity as his actual earnings exceeded the current earnings of the date-of-injury position.

On October 8 and 22 and November 12 and 19, 2010 appellant filed CA-7 forms claiming wage-loss compensation from September 16 to November 5, 2010 as a result of a reduction in his work hours under the National Reassessment Process (NRP). In time analysis CA-7a forms dated October 8 and 22 and November 12, 2010 and signed by an employing establishment official, he claimed 340.46 hours of time loss from work during the stated period because he was sent home pursuant to NRP due to the unavailability of limited-duty work. On November 5, 2010 appellant filed a recurrence of disability claim (Form CA-2a) due to the accepted employment injuries commencing September 16, 2010. He experienced pain, numbness and swelling in his right hand and elbow. Appellant also had limited movement of his right hand and elbow. He contended that his ongoing condition was caused by repetitive motion.

In a November 10, 2010 letter, appellant requested modification of OWCP's June 10, 2010 loss of wage-earning capacity determination. He contended that the modified rural carrier position was designed solely for his medical needs. It was not a regular position readily available to other employees. Appellant also contended that the modified position was makeshift as the employing establishment advised him that his work was no longer necessary.

In a September 8, 2010 Form CA-17, Dr. Elser advised that appellant had right ulnar and carpal tunnel syndrome. Appellant was unable to perform his regular rural carrier work duties, but could work with restrictions. Dr. Elser concluded that appellant's injury was permanent and irreversible and his limitations were life-long.

² Following appellant's return to work on January 7, 2009 he filed claims for wage-loss compensation (Form CA-7) from May 13 through December 25, 2009, which OWCP accepted and paid through December 25, 2009.

In a December 8, 2010 decision, OWCP denied modification of the June 10, 2010 loss of wage-earning capacity determination. It found that appellant had not shown a material change in the nature and extent of his injury-related conditions, that the original determination was made in error or that he had been vocationally rehabilitated.

LEGAL PRECEDENT

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

Once 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.⁵

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 wage-earning capacity decision has been issued, OWCP must develop the evidence to determine whether a modification of that decision is appropriate.⁶

ANALYSIS

After OWCP issued its formal loss of wage-earning capacity decision, the employing establishment reassessed appellant's rated position under NRP, resulting in a withdrawal of limited duty and claims for wage-loss compensation and a recurrence of disability beginning September 16, 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. It thereby shifts the burden onto OWCP to review the loss of wage-earning

³ 5 U.S.C. § 8102(a).

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

⁵ *Daniel J. Boesen*, 38 ECAB 556 (1987).

⁶ FECA Bulletin No. 09-05 (issued August 18, 2009).

capacity decision to determine whether it was based on an actual *bona fide* position. To this end, FECA Bulletin No. 09-05 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.⁷

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.⁸

As OWCP failed to follow the guidelines in FECA Bulletin No. 09-05, the Board will set aside the December 8, 2010 decision and remand the case for further consideration. After proper compliance with FECA Bulletin No. 09-05 guidelines and such further development as OWCP deems necessary, it shall issue an appropriate decision on appellant's entitlement to wage-loss compensation beginning September 16, 2010.⁹

CONCLUSION

The Board finds that this case is not in posture for decision on whether modification of OWCP's June 10, 2010 wage-earning capacity determination is warranted.

⁷ *Id.* at §§ I.A.1-2.

⁸ *Id.* at § I.A.3.

⁹ *See M.E.*, Docket No. 11-1416 (issued May 17, 2012).

ORDER

IT IS HEREBY ORDERED THAT the December 8, 2010 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action.

Issued: September 24, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board