

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

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**M.P., Appellant**

**and**

**U.S. POSTAL SERVICE, COLORADO-  
WYOMING PERFORMANCE CLUSTER,  
Denver, CO, Employer**

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**Docket No. 11-1571  
Issued: September 19, 2012**

*Appearances:*  
Ron Watson, for the appellant  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On June 16, 2011 appellant, through her representative, filed a timely appeal from the January 20, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for modification of a 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.<sup>2</sup>

**ISSUE**

The issue is whether appellant met her burden of proof to establish that modification of OWCP's August 5, 2010 wage-earning capacity decision was warranted.

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> On November 28, 2011 appellant made a written request for an oral argument before the Board. The request was untimely because a request for an oral argument before the Board must be made no later than 60 days after the filing of an appeal. See 20 C.F.R. § 501.5(b).

## **FACTUAL HISTORY**

On August 6, 2003 appellant, then a 51-year-old letter carrier, filed an occupational disease claim alleging that she sustained ulnar nerve entrapment of her left arm and elbow due to answering phones and engaging in computer work. She stated that she first became aware of her condition on May 23, 2003 and first realized that her condition was caused or aggravated by her employment on August 5, 2003. OWCP accepted appellant's claim for left elbow ulnar neuritis and left cubital tunnel syndrome. Appellant returned to work in various limited-duty positions and received compensation for periods of disability.

On June 14, 2006 Dr. David Reinhard, an attending Board-certified physical medicine and rehabilitation physician, stated that appellant could work eight hours a day, five days a week, with restrictions of lifting or carrying for no more than two hours a day (no more than 5 pounds continuously or 10 pounds intermittently), standing for no more than one hour a day, walking for no more than one hour a day, sitting for six to eight hours a day and simple grasping for no more than two hours a day (no more than half a hour at a time). Appellant could not engage in stooping, bending, twisting, kneeling, climbing, pushing or pulling.

On December 23, 2006 appellant returned to a limited-duty job assignment as a modified carrier for 40 hours a week. The job duties consisted of acting as a "VPP Coordinator" for five hours a day, acting as a "PEG Coordinator" for one hour a day, engaging in "Customer Service Assistance" for one to two hours a day and answering phones for one to two hours a day.<sup>3</sup>

On April 15, 2010 as part of the National Reassessment Process (NRP), appellant was notified by the employing establishment that it was unable to identify any available tasks within her medical restrictions. Based on this notification, she filed a Form CA-2a, (notice of recurrence) on April 15, 2010. Appellant also filed numerous CA-7 forms (claims for compensation) requesting compensation benefits beginning April 15, 2010 and continuing.

In a letter dated May 7, 2010, OWCP advised appellant that the evidence of record was insufficient to make a determination in her case because the medical evidence on record did not support that she continued to suffer from residuals of her accepted work-related injuries that prevented her from performing the duties of her date-of-injury position. Appellant was provided 30 days to provide additional evidence.

In a June 29, 2010 report, Dr. Reinhard discussed appellant's medical condition and provided work restrictions which were essentially the same as those he provided on June 14, 2006.

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<sup>3</sup> The job required lifting for no more than two hours a day (no more than 5 pounds continuously or 10 pounds intermittently), carrying for no more than two hours a day (no more than 5 pounds continuously or 5 pounds intermittently), standing for no more than one hour a day, walking for no more than one hour a day, sitting for six to eight hours a day and simple grasping for no more than two hours a day (no more than a half-hour at a time). The job did not require stooping, bending, twisting, kneeling, climbing, pushing or pulling. On February 23, 2007 appellant began working in a modified clerk position which had duties and physical requirements which were similar to those of the modified clerk position she began on December 23, 2006. When she started this new modified job, she had worked in her prior modified job for 62 days.

In an August 5, 2010 decision, OWCP made a retroactive wage-earning capacity determination finding that the modified carrier position appellant returned to on December 23, 2006 fairly and reasonably represented her wage-earning capacity effective December 23, 2006. It found that she had worked in the position for more than 60 days and that her actual wages met or exceeded the current wages of the job she held when injured. The retroactive wage-earning capacity determination was approved by Shirley Bridge, the District Director of OWCP.<sup>4</sup>

Appellant requested modification of OWCP's August 5, 2010 retroactive wage-earning capacity determination. She argued that the original determination was erroneous because the modified job she returned to in December 2006 was makeshift in nature. Appellant also claimed that she had sustained a material change in her injury-related condition. She submitted documents regarding various modified job offers.

In a January 20, 2011 decision, OWCP denied appellant's request for modification of its August 5, 2010 retroactive wage-earning capacity determination. It found that the modified job she returned to in December 2006 was not makeshift in nature and that the original wage-earning capacity determination was not erroneous. OWCP also found that appellant had not established that she sustained a material change in her injury-related condition.

### **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.<sup>5</sup> Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn and not on actual wages lost.<sup>6</sup> Compensation payments are based on the wage-earning capacity determination, which remains undisturbed until properly modified.<sup>7</sup>

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.<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>

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<sup>4</sup> OWCP also indicated that modification of its retroactive wage-earning capacity determination was not warranted.

<sup>5</sup> 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).

<sup>6</sup> *K.R.*, *supra* note 5; *Roy Matthew Lyon*, 27 ECAB 186, 190 (1975). *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

<sup>7</sup> *See Sharon C. Clement*, 55 ECAB 552, 557 (2004).

<sup>8</sup> *Sue A. Sedgwick*, 45 ECAB 211, 215-16 (1993); *Elmer Strong*, 17 ECAB 226, 228 (1965).

<sup>9</sup> *Selden H. Swartz*, 55 ECAB 272, 278 (2004).

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.<sup>10</sup>

### ANALYSIS

OWCP accepted appellant's claim for left elbow ulnar neuritis and left cubital tunnel syndrome. On December 23, 2006 appellant returned to a limited-duty job assignment as a modified carrier for 40 hours a week. On April 15, 2010 as part of NRP, she was notified by the employing establishment that it was unable to identify any available tasks within her medical restrictions. Appellant claimed that she sustained a recurrence of disability beginning April 15, 2010. In an August 5, 2010 decision, OWCP made a retroactive wage-earning capacity determination finding that the modified carrier position she returned to on December 23, 2006 fairly and reasonably represented her wage-earning capacity effective December 23, 2006.<sup>11</sup> In a January 20, 2011 decision, it denied appellant's request for modification of its August 5, 2010 retroactive wage-earning capacity determination.

OWCP analyzed this 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.<sup>12</sup>

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>13</sup> 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.<sup>14</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 wage-earning capacity determination was based was a *bona fide* position at the time of the rating and to direct

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<sup>10</sup> FECA Bulletin No. 09-05 (issued August 18, 2009). FECA Bulletin No. 09-05 also dictates that retroactive wage-earning capacity determinations should not be made in NRP cases without approval from the District Director of OWCP. *Id.* at § I.B.1.

<sup>11</sup> The Board notes that, in accordance with FECA Bulletin No. 09-05, the District Director of OWCP approved the retroactive wage-earning determination issued on August 5, 2010. *See supra* note 10.

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

<sup>13</sup> FECA Bulletin No. 09-05, *supra* note 10.

<sup>14</sup> *Id.* at §§ I.A.1-2.

the employing establishment to review its files for contemporaneous evidence concerning the position.<sup>15</sup>

As the record does not reflect that OWCP followed the guidelines in FECA Bulletin No. 09-05 to determine whether the wage-earning capacity decision should be modified, the Board will set aside OWCP's January 20, 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 April 15, 2010.<sup>16</sup>

### **CONCLUSION**

The Board finds that this case is not in posture for determination on whether modification of OWCP's August 5, 2010 loss of wage-earning capacity determination is appropriate. Further action by OWCP is warranted.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the January 20, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action.

Issued: September 19, 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

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<sup>15</sup> *Id.* at § I.A.3.

<sup>16</sup> *See M.A., supra* note 12; *M.E.*, Docket No. 11-1416 (issued May 17, 2012).