

employment. OWCP accepted the claim for herniated discs at L4-5 and L5-S1. On June 22, 2006 appellant underwent a discectomy at L4-5 and decompression of lateral recess stenosis. She returned to limited-duty employment on September 25, 2006.

On December 31, 2008 appellant accepted an offer of modified employment with the employing establishment. Her duties included casing mail for six hours a day, riffling through letters two hours a day, sweeping a letter case for 30 minutes a day and working “[a]s directed within restrictions” for 8 hours a day.

By decision dated April 13, 2009, OWCP found that appellant’s actual earnings as a modified mail processing clerk fairly and reasonably represented her wage-earning capacity and that her earnings met or exceeded that of the job held when injured.

On May 26, 2010 appellant filed a notice of recurrence of disability dated May 14, 2010 causally related to her accepted employment injury. She indicated that the employing establishment withdrew her job offer because there was no work available under the National Reassessment Program (NRP). Appellant also filed a claim for compensation (Form CA-7) on May 21, 2010 requesting compensation beginning May 10, 2010.

In response to OWCP’s request for additional information, by letter dated June 15, 2010, appellant related that she believed that the original loss of wage-earning capacity determination was in error as she was sent home on May 15, 2010 without accommodation.² She maintained that the nature and extent of her disability due to her employment injury had not changed. Appellant noted that the employing establishment instructed her to file a notice of recurrence of disability and claim for compensation for her lost wages.

By decision dated July 20, 2010, OWCP denied modification of the April 13, 2009 loss of wage-earning capacity determination. It found that appellant had not established a material change in her injury-related condition.

On August 18, 2010 appellant requested an oral hearing before an OWCP hearing representative. By letter dated October 12, 2010, her attorney argued that the position provided by the employing establishment was created solely for appellant and was “never available for application or bid by other employees....”³

At the hearing, held on December 28, 2010, appellant related that the job offered on December 31, 2008 was not a bid position. In the modified position she cased mail for four to five hours per day and riffling through mail to make sure letters had proper postage. After her limited-duty position was removed, she returned to work on July 4, 2010 for two and a half hours per day. Appellant’s attorney argued that the job was provided to “accommodate her restrictions

² In a report dated July 7, 2010, Dr. Charles J. Hipp, a Board-certified internist, found that appellant required modified duty due to continued low back and radicular symptoms from her work injury. He stated, “Her medical condition has been stable and has not worsened nor has it improved.”

³ On December 1, 2010 the employing establishment discussed appellant’s limited-duty position based on the December 31, 2008 job offer and asserted that the work she performed was necessary but that due to a reduction in mail volume was now done by bid employees.

after [her] work injury” rather than a position that other employees could apply for. He contended that the position was makeshift.

By decision dated March 16, 2011, the hearing representative affirmed the July 20, 2010 decision. He found that the position was not makeshift as it required casing mail and as the employing establishment described it as necessary work.

On appeal appellant’s attorney argues that OWCP improperly failed to send him a copy of the December 1, 2010 letter from the employing establishment. He further contends that the December 31, 2008 position was makeshift as it had no position title and included duties from various positions to accommodate appellant’s restrictions.

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.⁴ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.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 loss of wage-earning capacity decision has been issued, OWCP must develop the evidence to determine whether a modification of that decision is appropriate.⁶

ANALYSIS

OWCP accepted that appellant sustained herniated discs at L4-5 and L5-S1 causally related to factors of her federal employment and authorized a June 22, 2006 discectomy at L4-5 and decompression of lateral recess stenosis. She returned to limited-duty employment on September 25, 2006. On December 31, 2008 appellant accepted an offer of modified assignment. By decision dated April 13, 2009, OWCP determined that her actual earnings as a modified mail processor effective December 31, 2008 fairly and reasonably represented her wage-earning capacity.

Appellant worked in the full-time modified-duty position until May 14, 2010, when the employing establishment sent her home as part of NRP after determining that it did not have work available for her position. She filed a claim for compensation and notice of recurrence of disability based on the withdrawal of her job offer under NRP. Appellant, through her attorney, argued that the original determination was erroneous as it was a makeshift position created specifically for her needs.

⁴ *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Tamra McCauley*, 51 ECAB 375, 377 (2000).

⁵ *Id.*

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

As noted, OWCP issued a formal loss of wage-earning capacity decision on April 13, 2009. The employing establishment reassessed appellant's rated position under NRP, resulting in a withdrawal of limited duty and a claim for wage-loss compensation beginning May 14, 2010 filed by appellant. 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.⁷ 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. FECA Bulletin No. 09-05 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.⁸

Further, the Bulletin states that OWCP 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.⁹

If, after development and review by OWCP, the evidence establishes that the loss of wage-earning capacity decision was proper and none of the customary criteria for modifying the determination were met, then OWCP may issue a decision denying modification of the loss of wage-earning capacity determination.¹⁰

As OWCP failed to follow the guidelines in FECA Bulletin No. 09-05, the Board will set aside the March 16, 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 14, 2010.¹¹

CONCLUSION

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

⁷ *Id.*

⁸ *Id.* at § I.A.1-2

⁹ *Id.* at § I.A.3.

¹⁰ *Id.* at § I.A.4.

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

ORDER

IT IS HEREBY ORDERED THAT the March 16, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 13, 2012
Washington, DC

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

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

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