

postal container. Following the injury, she returned to light-duty work. By decision dated February 5, 1999, OWCP determined that appellant had no loss of wage-earning capacity as she had been working as a modified mail processor at retained pay for more than 60 days.

On June 4, 1999 Dr. James J. Jesko, an attending osteopathic physician Board-certified in orthopedic surgery, performed arthroscopic acromioplasty and acromioclavicular ligament resection. On May 9, 2000 he performed a left open acromioplasty to repair impingement syndrome of the left shoulder and remove a spur on the distal clavicle. Following the surgery, appellant returned to modified duty on September 10, 2000 with restrictions against repetitive use and working above shoulder level with the left arm and no lifting over 10 pounds. On September 17, 2001 she accepted a new modified position as an automated mail processor, with lifting and carrying up to 10 pounds.

In a December 19, 2003 report, Dr. Jesko opined that appellant had reached maximum medical improvement. He provided permanent restrictions limiting lifting, pushing and pulling with the left arm to eight pounds, with limited reaching and reaching above shoulder level.² Dr. Jesko provided an additional restriction on January 3, 2008, limiting grasping to four hours a day. He clarified prior restrictions by limiting reaching above shoulder level to one hour a day. On April 17, 2008 appellant accepted a rehabilitation job offer as a modified mail processor, conforming to Dr. Jesko's January 3, 2008 restrictions. She remained on modified duty.

On December 11, 2010 appellant accepted a light-duty assignment as a modified mail processing clerk at the Davison Postal Station. The position required standing up to eight hours a day, walking up to three hours a day and sorting mail up to eight hours a day. Appellant noted that she accepted the position "under duress" and the job was not in her commuting area.

On December 14, 2010 appellant claimed two hours of wage-loss compensation on December 11, 2010. She filed additional claims for wage loss from December 20, 2010 through January 14, 2011 and continuing. On the reverse of the forms, the employing establishment wrote "NRP, No Work Available."

In a December 20, 2010 letter, the employing establishment advised appellant that, under the limited-duty guidelines of NRP, there was no work available within her restrictions as of that day. A review of area operations demonstrated that there were no necessary tasks within appellant's medical restrictions available in her commuting area. Appellant was not to report for duty until work could be found for her. The employing establishment instructed her to claim wage-loss compensation under FECA.³

By decision dated February 10, 2011, OWCP denied appellant's claim for wage-loss compensation for two hours on December 11, 2010 and from December 20, 2010 onwards, on

² On March 16, 2004 OWCP granted appellant a schedule award for a 16 percent permanent impairment of the left upper extremity.

³ In December 21 and 27, 2010 letters, OWCP advised appellant to submit an updated medical report. In a January 26, 2011 letter, appellant requested that OWCP authorize an appointment with her attending orthopedic surgeon so she could provide the updated medical information requested.

the grounds that she had not submitted medical evidence establishing a worsening of the accepted conditions such that she was totally disabled for work.

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁴ 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, OWCP must determine whether the earnings in the alternative employment fairly and reasonably represent the employee's wage-earning capacity.⁵

Once OWCP determines the employee's wage-earning capacity, a modification of the determination is not warranted unless there is a material change in the nature and extent of the employment-related condition, the employee has been vocationally rehabilitated or retrained, or the original determination was erroneous. These are the customary criteria for modification. The burden of proof is on the party attempting to demonstrate that a modification of the wage-earning capacity determination is warranted.⁶

FECA Bulletin No. 09-05, however, outlines OWCP's procedures when limited-duty positions are withdrawn pursuant to NRP. If, as in the present case, OWCP issued a formal wage-earning capacity determination, it must develop the evidence to determine whether a modification of that determination is appropriate.⁷

ANALYSIS

OWCP accepted that appellant sustained a left shoulder strain with impingement syndrome on December 28, 1995.⁸ Appellant returned to light duty. OWCP issued a formal wage-earning capacity determination on February 5, 1999, finding that she had no loss of wage-earning capacity as she had been working a modified job at retained pay for more than 60 days. Appellant claimed that she sustained a recurrence of total disability when limited-duty work was not available for two hours on December 11, 2010 and when her modified position was withdrawn effective December 20, 2010 under NRP.

This case presents a situation where OWCP issued a formal wage-earning capacity decision, then withdrew appellant's rated position under NRP. Appellant claimed wage-loss compensation for a two-hour period on December 11, 2010 and on December 20, 2010 and

⁴ 5 U.S.C. § 8102(a).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claim, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (October 2009). *See also M.A.*, Docket No. 12-316 (issued July 24, 2012).

⁶ *Daniel J. Boesen*, 38 ECAB 556 (1987).

⁷ FECA Bulletin No. 09-05 (issued August 18, 2009). *See also M.A.*, *supra* note 5.

⁸ The Board notes that, although appellant underwent left shoulder surgery on June 4, 1999 and May 9, 2000, after the February 5, 1999 wage-earning capacity determination, there is insufficient medical evidence of record indicating that the surgeries superseded or warranted modification of the wage-earning capacity determination.

continuing. OWCP analyzed the case under the customary criteria for a recurrence of disability while in the performance of light duty. However, it did not acknowledge FECA Bulletin No. 09-05 or fully follow the procedures outlines therein for claims, such as this, in which limited-duty positions are withdrawn pursuant to NRP.

When a wage-earning capacity determination is issued, FECA Bulletin No. 09-05 requires OWCP to develop the evidence to determine whether a modification of the decision is appropriate. To this end, the Bulletin 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 results from residuals of the accepted injury, and to further develop the evidence from both the claimant and the employing establishment if the case lacks current medical evidence.

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 the employing establishment to review its files for contemporaneous evidence concerning the position.

As OWCP failed to follow the guidelines in FECA Bulletin No. 09-05, the Board will set aside the February 10, 2011 decision and remand the case for further consideration. After proper compliance with FECA Bulletin No. 09-05 guidelines, OWCP shall issue a *de novo* decision on appellant's entitlement wage-loss compensation for two hours on December 11, 2010 and on December 20, 2010 and continuing.⁹

CONCLUSION

The Board finds that this case is not in posture for determination on whether modification of OWCP's February 5, 1999 wage-earning capacity determination is appropriate. The case will be remanded to OWCP for further development, to be followed by issuance of a *de novo* decision.

⁹ See *M.E.*, Docket No. 11-1416 (issued May 17, 2012), *M.A.*, *supra* note 5.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 10, 2011 is set aside, and the case remanded to OWCP for further action consistent with this decision.

Issued: September 17, 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