

right arm and right hand while moving a full tray of flats which OWCP accepted for cervical strain. On April 19, 1997 appellant bent over and pulled a tray of flats when he experienced pain in his left shoulder and neck. He was restricted from lifting above five pounds for three days after which he was supposed to be released to regular duty; however, he continued to work with restrictions. Appellant underwent a C7-T1 fusion surgery on September 2, 1998.

On November 20, 1998 appellant accepted a light-duty position as a modified letter carrier. According to a Notification of Personnel Action (PS Form 50), she had been working the position since November 2, 1998. Appellant worked under the following restrictions: sitting, standing and walking intermittently for four hours in an eight-hour day, lifting up to 20 pounds intermittently for six hours in an eight-hour day, pulling and pushing for two hours per day, simple grasping intermittently for two hours per day while writing, driving for four hours per day, twisting, bending, stooping and reaching above the shoulder for two hours per day and no kneeling or climbing. His duties included: telephone assistance; assisting vehicle operations maintenance assistant (VOMA); filing; special delivery/Express Mail; clearly accountable mail/fixed credit; assisting supervisor and customer service with clerical duties; retrieving vacation hold mail, lobby sweeps, customer assistance; assisting in box section; changing locks for all stations; accountable mail/parcels, second notices and returns.

By letter dated February 10, 2011, the employing establishment stated that following the guidelines established by the National Reassessment Process (NRP) it was unable to provide sufficient work within appellant's restrictions to allow him to work eight hours a day.

On February 15, 2011 appellant accepted, under protest, a limited-duty position as a letter carrier. His duties included: Express Mail delivery (Tuesday through Friday) for an average of three hours a day; passports for an average of two hours a day; delivery of mounted swings for an average of one hour a day; and lock changes (Monday only) for an average of three hours a day. The physical requirements of the position included: operation of motor vehicle/sitting, standing, walking and simple grasping for an average of four hours a day and lifting for an average of .75 hours a day.

By decision dated May 4, 2011, OWCP found that appellant was employed as a modified letter carrier effective November 2, 1998 and that this position fairly and reasonably represented appellant's wage-earning capacity. It retroactively reduced his compensation benefits to zero.

Appellant filed claims for compensation requesting wage-loss compensation beginning January 29, 2011 due to NRP. In a letter dated May 9, 2011, OWCP informed him that as a formal loss of wage-earning capacity decision had been issued, he must meet the criteria to modify the wage-earning capacity determination to receive compensation benefits.

By letter dated May 26, 2011, appellant, through his representative, alleged that his loss of wage-earning position was an odd-lot job designed for his needs and was not a regular position.

By decision dated June 10, 2011, OWCP denied modification of the May 4, 2011 loss of wage-earning capacity determination.

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.² 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.³

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.⁴

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.⁵

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 a claim for wage-loss compensation beginning January 29, 2011. OWCP analyzed the case under the customary criteria for modifying a 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. Moreover, the May 4, 2011 decision constituted a retroactive wage-earning capacity determination which, according to FECA Bulletin No. 09-05, should not be made in NRP cases absent approval from the district director. Such approval is not documented in the record on appeal.

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.⁶ To this end, FECA Bulletin No. 09-05 asks OWCP to confirm that the file

² 5 U.S.C. § 8102(a).

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (October 2009).

⁴ See *Daniel J. Boesen*, 38 ECAB 556 (1987).

⁵ FECA Bulletin No. 09-05 (issued August 18, 2009). See also *M.A.*, Docket No. 12-316 (issued July 24, 2012).

⁶ FECA Bulletin No. 09-05 *id.*

contain documentary evidence supporting that the position was an actual *bona fide* position. It requires OWCP to review whether a current medical report supports employment-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 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

If, after development and review by OWCP, the evidence establishes that the 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 wage-earning capacity determination.⁹

As OWCP failed to follow the guidelines in FECA Bulletin No. 09-05, the Board will set aside the June 10, 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 January 29, 2011.¹⁰

CONCLUSION

The Board finds that this case is not in posture for determination on whether appellant met his burden of proof to modify the May 4, 2011 loss of wage-earning capacity determination. Further action by OWCP is warranted.

⁷ *Id.* at §§ I.A.1-2.

⁸ *Id.* at § I.A.3.

⁹ *Id.* at § I.A.4.

¹⁰ *See M.E.*, Docket No. 11-1416 (issued May 17, 2012).

ORDER

IT IS HEREBY ORDERED THAT June 10, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action.

Issued: September 14, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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