

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

M.A., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Oakland, CA, Employer**

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**Docket No. 11-1741
Issued: September 25, 2012**

Appearances:

Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 27, 2011 appellant, through her attorney, filed a timely appeal of the June 28, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP), which denied 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 December 29, 1994 loss of wage-earning capacity determination is warranted.

On appeal, counsel contends that the June 28, 2011 OWCP decision is contrary to fact and law.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that on May 7, 1994 appellant, then a 47-year-old sack sorter machine operator, sustained right wrist and bilateral shoulder strain, bilateral carpal tunnel syndrome and left elbow tendinitis as a result of her work duties.

On September 27, 1994 appellant returned to work in a full-time light-duty nixie and rewrap clerk position at the employing establishment.

On December 29, 1994 OWCP issued a decision finding that appellant's actual earnings in the full-time light-duty nixie and rewrap clerk position fairly and reasonably represented her wage-earning capacity. It found that she worked more than 60 days in the light-duty position. OWCP reduced appellant's compensation to zero as her actual earnings equaled those of her date-of-injury position.

By letter dated January 15, 2010, the employing establishment advised appellant that it was unable to provide her with work within her medical restrictions pursuant to the National Reassessment Process (NRP). Appellant stopped work on January 15, 2010. On April 5, 2010 she filed a claim for total wage-loss compensation (Form CA-7) from April 10 through May 7, 2010.

In an October 29, 2010 decision, OWCP denied modification of its December 29, 1994 loss of wage-earning capacity decision. It found that appellant did not show that the original determination was in error, a material change in her accepted conditions or that she had been vocationally rehabilitated.

On November 22, 2010 appellant requested a telephone hearing before an OWCP hearing representative.

During the April 15, 2011 telephone hearing, appellant's attorney contended that the December 29, 1994 loss of wage-earning capacity determination was erroneous. He argued that appellant's former limited-duty position was a makeshift position created especially for her and that the position could not be used as a basis for a loss of wage-earning capacity determination. Counsel stated that the modified position was not a classified position subject to a collective bargaining agreement. He also stated that the position was not open for bid to other employees.

In a June 28, 2011 decision, an OWCP hearing representative affirmed the October 29, 2010 decision, finding that appellant failed to establish that modification of the December 29, 1994 loss of wage-earning capacity determination was warranted.

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 a work-related injury or disease, but does return to

² 5 U.S.C. § 8102(a).

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 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 the withdrawal of her light-duty position and a claim for wage-loss compensation beginning April 10, 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 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. The FECA Bulletin No. 09-05 notes that OWCP should confirm that the file contain 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.⁶

The 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

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

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

⁵ FECA Bulletin No. 09-05 (issued August 18, 2009).

⁶ *Id.* at §§ I.A.1-2.

to direct the employing establishment to review its files for contemporaneous evidence concerning the position.⁷

As OWCP failed to follow the guidelines in FECA Bulletin No. 09-05, the Board will set aside the June 28, 2011 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 April 10, 2010.⁸

CONCLUSION

The Board finds that this case is not in posture for decision on whether modification of OWCP's December 29, 1994 loss of wage-earning capacity determination is warranted.

ORDER

IT IS HEREBY ORDERED THAT the June 28, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action.

Issued: September 25, 2012
Washington, DC

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

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

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

⁷ *Id.* at § I.A.3.

⁸ *See M.E.*, Docket No. 11-1416 (issued May 17, 2012).