

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

A.H., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Seattle, WA, Employer**

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**Docket No. 11-1876
Issued: September 7, 2012**

Appearances:
Appellant, prose
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On August 12, 2011 appellant filed an appeal of the April 25, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) denying modification of the prior 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.²

ISSUE

The issue is whether OWCP properly denied modification of the May 27, 2010 loss of wage-earning capacity determination.

¹ 5 U.S.C. §§ 8101-8193.

² The Board notes that, following the issuance of the April 25, 2011 OWCP decision, appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. See 20 C.F.R. § 501.2(c)(1).

On appeal appellant contends that the loss of wage-earning capacity rating was made in error as the modified clerk position was makeshift, did not include the duties of parcel post distribution clerk and thus it cannot form the basis of a loss of wage-earning capacity determination.

FACTUAL HISTORY

On July 18, 2008 appellant, then a 53-year-old clerk keyer, filed a traumatic injury claim (Form CA-1) for an alleged employment-related left shoulder injury. OWCP accepted his claim for left shoulder sprain and neck sprain and paid compensation benefits.

On October 26, 2008 appellant accepted a job offer from the employing establishment for a modified clerk position which required manual distribution and parcel keying for eight hours a day while rotating every hour.

In a report dated November 13, 2008, Dr. Reiko K. Johnson, a Board-certified family medicine physician, released appellant to work that same day with the following restrictions: limited lifting, pulling and pushing up to 20 pounds.

On April 20, 2009 appellant underwent left shoulder arthroscopic surgery.

In a June 24, 2009 report, Dr. J. Chriss Cancro, a Board-certified orthopedic surgeon, reviewed appellant's job description and released him to work with limited use of his left upper extremity.

On July 22, 2009 Dr. Cancro approved a light-duty position at the employing establishment and released appellant to work full time on July 27, 2009.

On August 20, 2009 appellant accepted a job offer from the employing establishment as a full-time modified clerk. The position duties included manual distribution of loose mail for up to eight hours a day and working on a computer for up to two hours a day. The physical requirements included lifting or carrying up to 1 pound with the left arm and 10 pounds maximum for eight hours a day; pushing or pulling up to 2 pounds with the left arm for eight hours a day; simple grasping up to 1 pound at waist level with the left arm for eight hours a day; and no fine manipulation with the left hand, reaching above the shoulder with the left arm or climbing ladders. Appellant accepted the same position again on September 15, 2009.

In an October 9, 2009 work capacity evaluation, Dr. Cancro indicated that appellant had not reached maximum medical improvement and restricted him from reaching above the shoulder with the left arm at waist level; pushing and pulling up to 2 pounds with the left arm; lifting up to 10 pounds and no climbing ladders.

In a November 12, 2009 work capacity evaluation, Dr. Cancro expanded appellant's work restrictions to include reaching with the left arm at waist level and lifting up to two pounds for eight hours a day.

By decision dated May 27, 2010, OWCP reduced appellant's compensation to zero based on its findings that his actual earnings as a modified clerk effective July 27, 2009 fairly and

reasonably represented his wage-earning capacity. It determined that his actual earnings met or exceeded his wages at the time of his injury.

On December 30, 2010 appellant accepted a job offer from the employing establishment for a full-time modified parcel post distribution clerk position. The position required assistance in scanning and placards for up to eight hours a day, computer work for up to two hours a day and being on standby as directed by a supervisor for up to eight hours a day. The physical requirements and restrictions were the same as the modified clerk position appellant accepted on August 20 and September 15, 2009, except the limitation on climbing ladders was removed.

Appellant worked in his modified-duty position until January 26, 2011, when the employing establishment withdrew his limited-duty assignment as part of the National Reassessment Process (NRP).

On March 21, 2011 appellant filed a claim for wage-loss compensation (Form CA-7) as the employing establishment had no work available for him due to NRP.

By decision dated April 25, 2011, OWCP denied appellant's claim for compensation finding that he failed to meet his burden of proof to modify the May 27, 2010 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.³ 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.⁴

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.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-

³ 5 U.S.C. § 8102(a).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (October 2009).

⁵ See *Daniel J. Boesen*, 38 ECAB 556 (1987).

earning capacity decision has been issued, OWCP must develop the evidence to determine whether a modification of that decision is appropriate.⁶

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 for the period February 25 to March 11, 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.

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 To this end, the Bulletin asks OWCP to 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 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.⁸

Further, the Bulletin 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.⁹

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.¹⁰

As OWCP failed to follow the guidelines in FECA Bulletin No. 09-05, the Board will set aside the April 25, 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.

⁶ FECA Bulletin No. 09-05 (issued August 18, 2009). *See also* M.A., Docket No. 12-316 (issued July 24, 2012).

⁷ FECA Bulletin No. 09-05, *supra* note 6.

⁸ *Id.* at § I.A.1-2.

⁹ *Id.* at § I.A.3.

¹⁰ *Id.* at § I.A.4.

CONCLUSION

The Board finds that this case is not in posture for determination on whether OWCP properly denied modification of the May 27, 2010 wage-earning capacity determination. Further action by OWCP is warranted.

ORDER

IT IS HEREBY ORDERED THAT the April 25, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action.

Issued: September 7, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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