

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

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F.G., Appellant )

and )

U.S. POSTAL SERVICE, NORTHGLENN )  
STATION, Denver, CO, Employer )

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**Docket No. 11-1926  
Issued: September 26, 2012**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On August 23, 2011 appellant filed a timely appeal of the June 28, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) determining his loss of wage-earning capacity and denying modification of the loss of wage-earning capacity. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether OWCP properly determined that appellant's actual wages as a modified clerk fairly and reasonably represented his wage-earning capacity; and (2) whether appellant established modification of OWCP's October 27, 2010 loss of wage-earning capacity determination.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

On appeal, appellant contends that he was entitled to wage-loss compensation because he was removed from a makeshift position by the employing establishment under the National Reassessment Process (NRP).

### **FACTUAL HISTORY**

On May 5, 1998 appellant, then a 49-year-old distribution clerk, filed an occupational disease claim under OWCP File No. xxxxxx036 alleging that on April 8, 1998 he first became aware of his left thumb injury. On April 15, 1998 he first realized that his injury was caused by pulling, pushing, lifting and grasping containers filled with mail with his left hand and shoulder.<sup>2</sup> On June 29, 1998 OWCP accepted appellant's claim for bilateral shoulder sprain, left hand and neck sprains and aggravation of a preexisting left thumb ligament.<sup>3</sup> Appellant received compensation for temporary disability from June 14, 1998 through July 28, 2000. He returned to work effective August 2, 2000 as a full-time modified distribution clerk. Subsequently, appellant worked in several modified positions, including another modified distribution clerk position which he accepted on March 23, 2009 and became effective on March 27, 2009. The position involved manually sorting letters. The physical requirements included lifting 10 pounds intermittently 2 hours a day, sitting 1 hour and standing 30 minutes at a time up to 4 hours a day, simple grasping 20 minutes and walking 10 to 20 minutes at a time up to 2 hours a day and no climbing or kneeling.

By letter dated February 3, 2010, the employing establishment advised appellant that, pursuant to NRP, there was no light-duty work available within his restrictions. It placed him on administrative leave.

On May 10, 2010 appellant filed a claim for wage-loss compensation (Form CA-7) from April 24 to May 7, 2010. A time analysis form (CA-7a) signed by an employing establishment official indicated that he did not work on intermittent dates from April 30 through May 7, 2010 due to the withdrawal of his limited-duty job. On May 24, 2010 appellant filed a claim (Form CA-2a) alleging a recurrence of disability commencing December 3, 2009. He stopped work on February 3, 2010.

In a May 21, 2010 work capacity evaluation (Form OWCP-5c), Dr. Christopher F. Smith, an attending Board-certified internist, noted appellant's accepted conditions. He advised that appellant could not perform his regular work duties or work eight hours a day. Appellant could work 2 to 3 hours a day with restrictions which included sitting 1/3 to 1/2 hour a day, walking 0 to 1/3 hour a day, standing 1/4 to 1/3 hour a day, reaching possibly 5 minutes a day, bending and stooping 0 to 5 minutes a day, operating a motor vehicle at work 1 hour a day, operating a motor vehicle to and from work a 1/2-hour a day and repetitive movement of the wrist and elbow 10 to 15 minutes a day. He could not reach above the shoulder, twist, push, pull, lift, squat, kneel or climb. Dr. Smith recommended 5- to 10-minute breaks every 30 minutes.

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<sup>2</sup> Prior to the instant claim, OWCP accepted that appellant sustained a cervical strain on November 20, 1986 while in the performance of duty under OWCP File No. xxxxxx187.

<sup>3</sup> In a decision dated April 13, 2007, OWCP granted appellant a schedule award for 20 percent impairment of the left upper extremity.

By letter dated May 25, 2010, OWCP addressed the factual and medical evidence appellant needed to submit to establish his recurrence claim.

On May 27, 2010 appellant filed a Form CA-7 dated May 24, 2010 for the period May 8 through 21, 2010. A Form CA-7a signed by an employing establishment official indicated that he did not work from May 10 through 21, 2010 due to the withdrawal of his limited-duty job.

On August 6, 2010 OWCP referred appellant, together with a statement of accepted facts and the medical record, to Dr. Alfred C. Lotman, a Board-certified orthopedic surgeon, for a second opinion.

In an August 9, 2010 statement, appellant related that on April 24, 2010 he had a very difficult time falling asleep due to increased pain in his left shoulder and neck for which he subsequently sought medical treatment. Since his return to work in 2000, he had difficulty sleeping. Appellant participated in physical therapy due to his employment injuries. He took pain medications to live with his injuries. In December 2009, appellant's work conditions aggravated his shoulder, neck, hand and lower back conditions.

In an August 7, 2010 report, Dr. Smith provided findings from March 3, May 21 and June 7, 2010 examinations related to appellant's status postsurgery on August 24, 2009 for a lumbar decompression at L3-4, obstructive sleep apnea and left shoulder and neck conditions. He advised that the physical examination findings were compatible with appellant's history of a significant left shoulder strain/rotator cuff complex, left thumb strain or tear and pain intensification or new strain due to a lifting injury from cumulative casing that involved lots of reaching and turning at work on April 22, 2010. Dr. Smith further advised that his findings were chronic and likely permanent and irreversible. Appellant's functional work capacity had been enormously compromised by his impairments. His prognosis was unfavorable, even if rehabilitation was offered, given his age and comorbidities.

In a partially illegible 2009 report, Dr. Jeffrey B. Kleiner, a Board-certified orthopedic surgeon, advised that appellant was doing well from a decompression standpoint following a wound infection that was treated with irrigation and debridement. The wound was healing well and his leg pain symptoms had resolved. Appellant's sutures were removed. In a discharge report dated August 27, 2009, Dr. Kleiner advised that appellant had spinal stenosis at L4-5 following an uncomplicated decompressive laminectomy at L3-4.

In an August 25, 2010 report, Dr. Lotman listed a history of the accepted employment injuries and appellant's medical treatment and social background. On physical examination of the cervical spine, he reported essentially normal findings with the exception of limited range of motion, positive apprehension testing with firm end point and finger percussion over the spinous process in the neck which produced mild tenderness with radiation down the left shoulder internally terminating at the elbow. On examination of the left hand, Dr. Lotman also reported essentially normal findings with the exception of "STS" about the metatarsophalangeal (MP) joint on the left thumb with reduced motion that was painful and tenderness that was most prominent at the site of the ulnar collateral ligament. He advised that appellant had a sprain of the cervical spine, left shoulder and MP joint of the left thumb. It was medically probable that appellant's loss of motion in these areas was an aggravation of preexisting conditions subsequent

to the injuries he sustained in 1971. Dr. Lotman stated that no additional diagnostic testing was necessary. He opined that appellant was not totally disabled. Appellant could perform his modified work duties. He was limited to overhead work, grasping, pushing and pulling. Appellant was able to take or give supervision, cooperate with others and work under deadlines. Dr. Lotman concluded that he had residuals of his work-related conditions that included loss of motion in the neck and left shoulder and thumb. In an August 25, 2010 Form OWCP-5, he listed appellant's restrictions which included sitting 8 hours a day with 10-minute breaks every 2 hours, walking, standing, repetitive movement of the wrists, squatting and kneeling 2 hours a day and reaching, twisting, bending and stooping 1 hour a day. Appellant could not reach above the shoulder or drive a vehicle at work, push or pull more than 10 pounds more than two hours a day, lift more than 10 pounds one hour a day or climb.

In an October 27, 2010 decision, OWCP determined that appellant's actual earnings as a modified clerk fairly and reasonably represented his retroactive loss of wage-earning capacity effective March 23, 2009. It pointed out that the position was medically and vocationally suitable and he demonstrated his ability to perform the duties of the position for 60 days or more. As appellant's actual earnings of \$991.71 exceeded the current pay rate for his date-of-injury job of \$923.00, it reduced his wage-loss compensation to zero. OWCP also denied modification of its loss of wage-earning capacity determination on the grounds that the medical evidence failed to establish that appellant sustained a material worsening of his accepted conditions.

On November 8, 2010 appellant, through his representative, requested an oral hearing before an OWCP hearing representative.

On May 31, 2011 Dr. Smith reported findings on physical examination and advised that repetitive lifting in the workplace most probably caused appellant's left shoulder, neck and hand conditions and inability to work. Resultant stress, dysomnia and emotional distress directly attributable to his left upper extremity weakness and pain additionally impaired him for a return to work. Dr. Smith concluded that appellant's prognosis for meaningful improvement was poor.

In a June 24, 2011 affidavit, Bobby Rollins, executive vice president of the union, contended that appellant's modified position was a makeshift position. He argued that, after the employing establishment determined that it no longer had any work available for appellant, he was placed in a nonpay status. Mr. Rollins contended that the employer was conducting a reduction-in-force due to appellant's injuries. He contended that appellant could have continued to work.

At an April 12, 2011 hearing, appellant's representative contended that appellant's former modified position was a makeshift position since it was not available as a bid position and was tailored to his physical restrictions. He asserted that the loss of wage-earning capacity determination which was based on the modified position was erroneous. The representative argued that if appellant left employment then the modified position would cease to exist. He further argued that the position was odd-lot as demonstrated by the employing establishment's movement of appellant to various modified assignments. The representative contended that he had sustained a material change in the nature and extent of his injury-related conditions based on Dr. Smith's May 21, 2010 OWCP-5c form which addressed changes in his work hours and medical restrictions.

In a June 28, 2011 decision, an OWCP hearing representative affirmed the October 27, 2010 decision. She found that the modified position on which the loss of wage-earning capacity determination was based, fairly and reasonably represented appellant's wage-earning capacity and was not makeshift in nature. The hearing representative further found the fact that the employing establishment subsequently reduced or eliminated his work hours was not in and of itself sufficient to demonstrate that the modified job was temporary. She denied modification of the October 27, 2010 loss of wage-earning capacity determination, finding that the medical evidence was insufficient to establish a material worsening of appellant's accepted conditions.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8115(a) of FECA provides that, in determining compensation for partial disability, the wage-earning of an employee is determined by the employee's actual earnings if the actual earnings fairly and reasonably represent the employee's wage-earning capacity.<sup>4</sup> Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such a measure.<sup>5</sup> OWCP calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the current pay rate for the date-of-injury job.<sup>6</sup> Its procedures provide that OWCP can make a retroactive wage-earning capacity determination if the claimant worked in the position for at least 60 days, the position fairly and reasonably represented his or her wage-earning capacity and the work stoppage did not occur because of any change in his injury-related condition affecting the ability to work.<sup>7</sup>

FECA Bulletin No. 09-05, however, outlines procedures for light-duty positions withdrawn pursuant to NRP. Retroactive loss of wage-earning capacity determinations should not be made in these NRP cases without approval from the district Director.<sup>8</sup>

### **ANALYSIS -- ISSUE 1**

The October 27, 2010 retroactive loss of wage-earning capacity determination was premised on appellant's actual wages as a modified distribution clerk since March 23, 2009. OWCP found that the modified position was medically and vocationally suitable and that he demonstrated the ability to perform the duties of the position for more than 60 days. The Board finds, however, that OWCP failed to establish that appellant's actual wages as a modified distribution clerk fairly and reasonably represented his wage-earning capacity.

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<sup>4</sup> 5 U.S.C. § 8115(a); *Loni J. Cleveland*, 52 ECAB 171 (2000).

<sup>5</sup> *Lottie M. Williams*, 56 ECAB 302 (2005).

<sup>6</sup> 20 C.F.R. § 10.403(c).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity* Chapter 2.814.7(a) (July 1997); *Selden H. Swartz*, 55 ECAB 272 (2004).

<sup>8</sup> FECA Bulletin No. 09-05 (issued August 18, 2009).

The record supports that the employing establishment withdrew appellant's modified distribution clerk position under NRP as of February 3, 2010. By letter of the same date, it informed him that no work within his restrictions was available under NRP. CA-7a forms signed by employing establishment officials indicated that from April 30 through May 21, 2010 appellant did not work due to the withdrawal of his limited-duty position.

The Board finds that OWCP did not adjudicate the claim with regard to 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 record does not establish that OWCP obtained the district Director's approval prior to the issuance of its October 27, 2010 retroactive loss of wage-earning capacity determination. As OWCP failed to properly follow the guidelines in FECA Bulletin No. 09-05, the Board finds that it did not fully consider all criteria for making a retroactive wage-earning capacity determination.

In light of the Board's decision regarding Issue 1 and Issue 2 is rendered moot.

**CONCLUSION**

The Board finds that OWCP improperly determined appellant's loss of wage-earning capacity.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 28, 2011 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 26, 2012  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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