

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

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**E.G., Appellant**

**and**

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

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**Docket No. 11-1950  
Issued: September 20, 2012**

*Appearances:*  
*Gordon Reiselt, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
PATRICIA HOWARD FITZGERALD, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On August 25, 2011 appellant, through her attorney, filed a timely appeal from a June 17, 2011 decision of the Office of Workers' Compensation Programs (OWCP) that denied modification of a wage-earning capacity determination. 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.

**ISSUE**

The issue is whether appellant met her burden of proof to establish that a March 28, 2001 wage-earning capacity decision should be modified.

On appeal, appellant's attorney asserts that the wage-earning capacity determination was erroneous because it was make shift, sheltered or odd lot and was designed to meet appellant's particular medical restrictions.

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

## **FACTUAL HISTORY**

This case has previously been before the Board. In an August 26, 1993 decision, the Board affirmed an August 27, 1992 decision, in which OWCP denied appellant's claim for continuation of pay on the grounds that her accepted injury was for an occupational disease as opposed to a traumatic injury.<sup>2</sup> The facts of the previous Board decision are incorporated herein by reference.

Appellant underwent surgery on her left shoulder on February 11, 1993 and September 2, 1994. She was placed on the periodic compensation rolls. In a June 27, 1997 decision, appellant's monetary compensation was terminated, effective June 19, 1997, on the grounds that she refused an offer of suitable work. By decision dated December 18, 1998, an OWCP hearing representative affirmed the June 27, 1997 termination. In decisions dated April 17 and June 27, 1997 and June 15, 1999, OWCP denied appellant's claims that she sustained an employment-related emotional condition. On June 15, 1999 it vacated the suitable work termination on the grounds that appellant's nonemployment-related psychological condition precluded her from performing the duties of the offered position. Wage-loss compensation was reinstated.

In an October 14, 1999 report, Dr. Michael B. Krinsky, an attending Board-certified orthopedic surgeon, advised that appellant was capable of sedentary work, such as answering telephones, processing passports, etc., as long as she could get up and down on an as needed basis. Lifting was restricted to five pounds. Dr. Krinsky recommended that she begin work at four hours a day, gradually increasing to an eight-hour day.

On June 8, 2000 the employing establishment offered appellant a modified letter carrier position for four hours a day with a gradual increase to an eight-hour day. The duties were described as: file 3849's (yellow delivery notice slips); verify express mail labels; process return-to-sender mail; repair and forward or return mail damaged by automation; retrieve accountable mail and items for notices left for customers (will be assisted with any package weighing more than five pounds); assist with projects in administrative offices (such as shredding); occasional delivery of express mail or hot case mail in appropriate postal service vehicle. The physical requirements were: regularly lift letter mail of one to five ounces each piece, one at a time; occasionally lift packages of less than five pounds; sit and stand as needed for comfort; regularly walk up to 100 feet; occasionally walk up to 300 feet; write intermittently throughout the workday; perform repetitive motion when processing return-to-sender mail and answering the telephone; be able to stoop, bend, squat and kneel on occasional-to-rare basis (one to two times a day).

Appellant accepted the position on June 19, 2000 and returned to work, four hours a day, on July 1, 2000. On January 12, 2001 she began working an eight-hour day.

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<sup>2</sup> Docket No. 93-546 (issued August 26, 1993). In January 1992 appellant, then a 31-year-old letter carrier, injured her left shoulder while at work. OWCP accepted the conditions of left shoulder impingement syndrome, inferior subluxation of the left shoulder and left cubital tunnel syndrome.

In a March 28, 2001 decision, OWCP found that appellant was reemployed as a modified carrier, effective January 12, 2001. It determined that her actual earnings fairly and reasonably represented her wage-earning capacity with zero loss.

In the period August 2, 2002 to April 10, 2009, appellant was offered additional modified positions. An offer, accepted by her on January 27, 2009, described duties of answering telephone and lobby director for three hours daily, WEBEIS/EVARs for one hour daily, drop off relays and deliver express mail for two hours daily and file 3971s, COARS, 4584s and e-flash copies for two hours daily. The physical requirements were: ability to lift, pull and push up to five pounds; stand and walk; occasional light grasping and gripping with hands and drive a vehicle.

In a December 15, 2009 progress report, Dr. Krinsky advised that appellant's lifting was restricted to 20 pounds from floor to shoulder and no higher than that and five pounds shoulder and above. Appellant was not to case mail and was capable of driving a work vehicle that had power steering. Dr. Krinsky stated that she would be evaluated on an annual basis.

On December 2, 2009 the employing establishment informed appellant that, under the guidelines of the National Reassessment Process (NRP), it did not have modified duty within her medical restrictions. Appellant filed claims for compensation beginning January 8, 2010. In February 4, 2010 letters, OWCP informed her of the criteria for modifying a wage-earning capacity determination and asked Dr. Krinsky if her condition had worsened such that she could not perform her modified duties.

In a March 2, 2010 response, appellant asserted that the wage-earning capacity determination was based on a sheltered or odd-lot position, that her duties varied daily and did not constitute a real job and that through the years, the duties had varied. She attached copies of job offers for modified duties dated February 7, 2003, October 15, 2004, June 18, 2008 and January 27, 2009 and a modified position worksheet dated May 14, 2008. In a March 2, 2010 report, Dr. Krinsky advised that since March 2001 appellant's left shoulder symptoms had increased slightly but that she exhibited relatively good shoulder motion. He found that she was still capable of performing the modified duties she had been performing over the past several years, including answering telephones, doing passports, filing delivery notice slips, verifying labels, repairing mail and small parcels weighing up to five pounds, shredding paper and occasionally delivering express mail.

By decision dated March 24, 2010, OWCP found that appellant had submitted insufficient evidence to modify the March 28, 2001 wage-earning capacity decision and denied her claim for wage loss beginning January 8, 2010.

Appellant timely requested a hearing and submitted several statements in which she indicated that she had been forced off work by the employing establishment and was willing and capable of returning to work at the position she had been performing for nine years. She asserted that the original wage-earning capacity determination was in error because it was odd lot and make shift and created solely to meet her particular medical needs.

In a May 10, 2010 letter, Eugene Haynes, an employing establishment manager with health resources, advised that the employing establishment was supporting appellant's appeal to set aside the March 28, 2001 wage-earning capacity decision because the rehabilitation job on which it was based was make shift and specifically created to meet her medical restrictions and did not constitute a job available as regular employment with the postal service. In a June 7, 2010 report, Dr. Anna A. Petrova, Board-certified in family medicine, advised that appellant was excused from work for the period June 7 through 14, 2010.

At the July 12, 2010 hearing, appellant's representative argued that the March 28, 2001 wage-earning capacity decision was based on a make shift position and therefore should be modified.

By decision dated September 8, 2010, an OWCP hearing representative affirmed the March 24, 2010 decision, finding that appellant did not establish that the March 28, 2001 wage-earning capacity decision was erroneous.

Appellant filed an additional claim for wage loss for the period October 1 to 16, 2010. The employing establishment indicated no work was available. On October 27, 2010 appellant filed a recurrence claim, stating that the recurrence occurred on August 24, 2010. She also submitted a claim for compensation from October 12, 2010 to present and an October 12, 2010 progress report in which Dr. Krinsky advised that appellant's condition was pretty much unchanged but that she did have limited mobility in abducting and shoulder. Dr. Krinsky indicated that appellant was capable of working the modified duty she had been performing. On November 2, 2010 appellant requested reconsideration.

By decision dated January 13, 2011, OWCP denied appellant's claim for recurrence beginning August 24, 2010.

On March 18, 2011 appellant's union representative requested reconsideration and submitted copies of numerous job offers accepted by appellant since her return to work in 2000. The representative asserted that the March 28, 2001 wage-earning capacity determination was erroneous because it was based on a part-time, temporary job offer and was odd lot, make shift and sheltered. In a January 11, 2011 report, Dr. Krinsky advised that appellant was status quo regarding her left shoulder.

By letter dated March 1, 2011, Vicki Soriano, a former employing establishment manager, advised that she had worked with appellant from June 2009 to February 2010 and that appellant's modified duties were typically performed by clerks. She indicated that there was no single postal service job that consisted of appellant's modified duties which were carved from other existing bid jobs and given to appellant due to her work injury and to allow her to remain working at the employing establishment.

In a March 16, 2011 letter, Chris Casey, appellant's postmaster, stated that the duties appellant performed did not have an official title or a formal position description and were parsed together to meet her particular medical needs. She stated that no such position existed with these duties that were primarily carved out from existing bid jobs. Ms. Casey advised that appellant did not perform all the duties everyday but that the employing establishment tried to

keep her busy for her eight-hour shift, opining that the duties would be best described as make shift in nature, especially since they did not include, other than the occasional express mail delivery, any casing or delivering of mail, both of which are essential to a letter carrier's position. She further indicated that appellant had strict physical limitations that precluded her from performing nearly all carrier duties and that, although she had worked modified duty for approximately 9.5 years, the duties were not permanent and, as of December 2009, were no longer available for her. Ms. Casey advised that the duties were typically performed by a variety of employees, including employees from the clerk craft and supervisors, noting that the duties were currently being performed by five clerks and two supervisors.

In a merit decision dated June 17, 2011, OWCP denied modification of the March 28, 2001 wage-earning capacity decision.

### **LEGAL PRECEDENT**

Once the wage-earning capacity of an injured employee 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.<sup>3</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>4</sup>

FECA Bulletin No. 09-05 outlines OWCP procedures when limited-duty positions are withdrawn pursuant to NRP. If 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.<sup>5</sup>

### **ANALYSIS**

The Board finds this case not in posture for decision. The accepted conditions are left shoulder impingement syndrome, inferior subluxation of the left shoulder and left cubital tunnel syndrome. Appellant underwent left shoulder surgeries on February 11, 1993 and September 2, 1994. She returned to a modified position for four hours a day on July 1, 2000 and increased to eight hours daily on January 12, 2001. By decision dated March 28, 2001, OWCP determined that appellant's modified carrier position fairly and reasonably represented her wage-earning capacity with zero loss. Thereafter, appellant accepted additional modified positions, most recently a January 27, 2009 offer.

Appellant worked in the full-time modified-duty position until December 2009, when the employing establishment sent her home as part of NRP after determining that it did not have work available within her medical restrictions. She filed compensation claims beginning January 8, 2010 and a recurrence of disability, based on the withdrawal of her job offer under NRP.

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<sup>3</sup> *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Tamra McCauley*, 51 ECAB 375, 377 (2000).

<sup>4</sup> *Id.*

<sup>5</sup> FECA Bulletin No. 09-05 (issued August 18, 2009).

OWCP issued a formal loss of wage-earning capacity decision on March 28, 2001. The employing establishment reassessed appellant's rated position under NRP. This resulted in a withdrawal of limited duty and claims for wage-loss compensation beginning January 8, 2010, filed by appellant. 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 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.<sup>6</sup> FECA Bulletin No. 09-05 asks OWCP to confirm that the file contains documentary evidence supporting that the position was an actual *bona fide* position. Appellant submitted evidence relevant to this injury. FECA Bulletin No. 09-05 requires OWCP to also determine 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.<sup>7</sup>

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 to direct the employing establishment to review its files for contemporaneous evidence concerning the position.<sup>8</sup>

If, after development and review by OWCP, the evidence establishes that the loss of 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 loss of wage-earning capacity determination.<sup>9</sup>

As OWCP failed to follow the guidelines in FECA Bulletin No. 09-05, the Board will set aside the June 17, 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 8, 2010.<sup>10</sup>

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at § I.A.1-2

<sup>8</sup> *Id.* at § I.A.3. The Board notes that appellant submitted statements from Mr. Haynes, Ms. Soriano and Ms. Casey who discussed whether appellant's modified job was a *bona fide* position. It is not clear, however, if they worked at the employing establishment in 2001, at the time the wage-earning capacity decision was issued, and the record does not indicate that OWCP forwarded these statements to the agency for comment.

<sup>9</sup> *Id.* at § I.A.4.

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

**CONCLUSION**

The Board finds this case is not in posture for decision.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 17, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further proceedings consistent with this decision of the Board.

Issued: September 20, 2012  
Washington, DC

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

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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