

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

K.S., Appellant

and

**U.S. POSTAL SERVICE, BULK MAIL
CENTER, Chicago, IL, Employer**

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**Docket No. 11-1966
Issued: September 13, 2012**

Appearances:
Belinda Jackson, 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 September 8, 2011 appellant, through her representative, filed a timely appeal from an April 29, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) denying modification of a loss of wage-earning capacity decision. She also appeals from an August 19, 2011 nonmerit decision finding that she abandoned her hearing request. 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.

ISSUES

The issues are: (1) whether appellant has established that the January 28, 2010 loss of wage-earning capacity decision should be modified; and (2) whether OWCP properly determined that she abandoned her request for an oral hearing.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On January 23, 2009 appellant, then a 34-year-old part-time flexible mail handler, filed a traumatic injury claim alleging that on January 14, 2009 she sustained an injury to her right hip, right thigh and left ankle when she was hit by a forklift. OWCP accepted the claim for left ankle sprain and a left medial meniscus tear.

On March 8, 2009 the employing establishment offered appellant a reassignment position. The duties consisted of culling loose mail items for 7.92 hours a day and required no reaching over the shoulder, excessive walking or standing or lifting, pushing and carrying over 10 pounds. The job indicated that the modified position was “in accordance with the physical restrictions listed below based on medical documentation dated [March 3, 2009]” and that updated medical information was required no later than April 8, 2009. The employing establishment further provided that the position “will remain within the physical restrictions furnished by [appellant’s] treatment physician” and that the assignment was “subject to revision based on changes” in either work restrictions or operational needs.

By decision dated January 28, 2010, OWCP reduced appellant’s compensation to zero based on its finding that her actual earnings as a modified part-time flexible mail handler, effective March 8, 2009, fairly and reasonably represented her wage-earning capacity.

On November 4, 2010 appellant filed a recurrence of disability claim beginning October 28, 2010 due to her January 14, 2009 employment injury. She related that she was sent home as part of the National Reassessment Program (NRP). On November 19, 2010 appellant filed a claim for compensation beginning October 30, 2010.

By letter dated December 1, 2010, OWCP advised appellant of the criteria for modifying a loss of wage-earning capacity determination.²

By decision dated April 29, 2011, OWCP denied modification of its January 28, 2010 wage-earning capacity determination.

On May 7, 2011 appellant requested a telephone hearing. In a properly addressed letter dated June 23, 2011, OWCP advised her that it would hold a telephone hearing on August 3, 2011 at 1:00 p.m. eastern time. On June 27, 2011 OWCP notified appellant that it had received her request for a hearing and that, if it was determined that her case was in posture for a hearing, it would appear on the docket in six to eight months.

² In a report dated December 10, 2010, Dr. Viju John, an attending Board-certified internist, discussed appellant’s history of bilateral knee arthritis and a left knee meniscal tear due to a January 2009 work injury. He found that she could work with restrictions on lifting, pushing or pulling no more than 20 pounds with no prolonged standing or lifting. On February 1, 2011 Dr. John diagnosed bilateral ankle strain due to the January 2009 forklift injury and a consequential left medial meniscal tear. He noted that appellant was unable to work as of October 28, 2010 but listed the same work restrictions of no prolonged standing or lifting and no lifting, pushing or pulling over 20 pounds. In a January 15, 2011 report, Dr. John related that he believed that appellant’s left knee pain was due to her work injury as a consequential injury and that it may have “worsened as she bore more weight on her left knee.”

By letter dated July 11, 2011, appellant designated a representative. She further informed the Branch of Hearings and Review that she had received the June 27, 2011 letter and again noted that she was requesting an “expedited telephone hearing or teleconference.” Appellant advised that her representative was unavailable from September 11 to 16 and October 5 to 11, 2011.

In a decision dated August 19, 2011, OWCP determined that appellant had abandoned her request for a telephone hearing.

On appeal, appellant argues that neither she nor her representative received notification of the date of the telephone hearing.

LEGAL PRECEDENT -- ISSUE 1

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.³ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.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 -- ISSUE 1

OWCP accepted that appellant sustained a left ankle sprain and a left medial meniscus tear as the result of a January 14, 2009 employment injury. Appellant returned to a modified position with the employing establishment on March 8, 2009. In a decision dated January 28, 2010, OWCP reduced appellant’s compensation to zero based on its finding that her actual earnings in her modified position fairly and reasonably represented her wage-earning capacity. Appellant filed a claim for compensation beginning October 28, 2010 after she was sent home with no work available under NRP.

As noted, OWCP issued a formal loss of wage-earning capacity decision on January 28, 2010. 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 October 28, 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 follow the procedures outlined therein for claims, such as this, in which limited-duty positions are withdrawn pursuant to NRP.

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

⁴ *Id.*

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

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 FECA Bulletin No. 09-05 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 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.⁷

Further, FECA Bulletin No. 09-05 states that OWCP 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.⁸

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.⁹

As OWCP failed to follow the guidelines in FECA Bulletin No. 09-05, the Board will set aside the April 29, 2011 decision and remand the case for further consideration. After proper compliance with FECA Bulletin No. 09-05 guidelines, OWCP shall issue an appropriate decision on appellant's entitlement to wage-loss compensation beginning October 28, 2010.¹⁰

CONCLUSION

The Board finds that the case is not in posture for decision.¹¹

⁶ *Id.*

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).

¹¹ In view of the Board's disposition of the merits, the issue of whether appellant abandoned her request for a telephone hearing, as addressed in the August 19, 2011 decision, is moot.

ORDER

IT IS HEREBY ORDERED THAT that the August 19 and April 29, 2011 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded to OWCP for further proceedings consistent with this opinion of the Board.

Issued: September 13, 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