

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

S.S., Appellant

and

**U.S. POSTAL SERVICE, OMAHA MAIL
PROCESSING PLANT, Omaha, NE, Employer**

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**Docket No. 11-1972
Issued: September 18, 2012**

Appearances:

John J. Higgins, Esq., for the appellant

No appearance, for the Director

Oral Argument January 18, 2012

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 23, 2011 appellant, through his attorney, filed a timely appeal from a March 15, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) denying 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 has established that the April 25, 2007 loss of wage-earning capacity determination should be modified.

FACTUAL HISTORY

OWCP accepted that, on October 3, 1994, appellant sustained lumbar strain, thoracic strain, herniated discs, bladder dysfunction and sexual dysfunction in the performance of duty.

¹ 5 U.S.C. § 8101 *et seq.*

He underwent an L5-S1 discectomy on February 19, 1995 and an L4-5 discectomy on May 16, 1996.² Appellant sustained intermittent periods of disability following his injury.

On January 13, 2000 the employing establishment offered appellant a position as a modified distribution clerk. The duties included removing mail not more than five pounds from trays and placing the mail into letter cases. The employing establishment provided, "This job is offered to you in good faith and has been tailored to your physical needs based upon your work tolerance limitations."

By decision dated April 25, 2007, OWCP found that appellant's actual earnings as a modified distribution clerk effective January 18, 2000 fairly and reasonably represented his wage-earning capacity. It determined that he had no loss of wage-earning capacity as his actual earnings met or exceeded his earnings at the time of injury.

By letter dated May 14, 2010, the employing establishment offered appellant a new position working three and a half hours per day. It indicated that the position would have been available for eight hours a day but his restrictions prevented him from working after 3:30 p.m. in the afternoon.³

On June 23, 2010 appellant filed a claim for compensation beginning June 7, 2010 based on the employing establishment's failure to provide full-time work within his restrictions under the National Reassessment Process (NRP).⁴ By letter dated June 28, 2010, OWCP advised him of the criteria for modifying a loss of wage-earning capacity decision and requested that he submit medical evidence addressing the relationship between his present condition and his work injury.

In a decision dated July 30, 2010, OWCP denied modification of the April 25, 2007 loss of wage-earning capacity determination. It found that the medical evidence did not establish that appellant sustained a material change in the condition.

On August 18, 2010 appellant requested an oral hearing before an OWCP hearing representative.⁵ He submitted an August 5, 2010 lumbar magnetic resonance imaging (MRI)

² By decision dated February 25, 2000, OWCP granted appellant a schedule award for a 15 percent permanent impairment of the right lower extremity. On March 20, 2003 it issued him a schedule award for a 10 percent permanent impairment of the penis.

³ In reports dated June 9 and August 6, 1999, Dr. Patrick W. Bowman, a Board-certified orthopedic surgeon and impartial medical examiner, advised that appellant could work with restrictions on the day shift.

⁴ On July 19, 2010 Dr. Lewis W. Eirinberg, Board-certified in family medicine, diagnosed worsening chronic low back pain with radiculopathy and found that appellant's ability to work different hours had not changed.

⁵ In a report dated August 31, 2010, Dr. Douglas J. Long, a Board-certified neurosurgeon, discussed appellant's complaints of "severe back pain and bilateral lower extremity pain and paresthesias" and found that his condition had deteriorated. On November 3, 2010 Dr. Mark D. Andersen, Board-certified in family medicine, related that appellant's employment injury and a service-related injury had worsened resulting in a deterioration of his condition such that his ability to perform his limited duty has been "severely impacted." He concluded that appellant was totally disabled.

scan study showing arachnoiditis and L5 *pars* defects. A July 17, 2007 lumbar MRI scan study showed a questionable *pars* defect on the left at L5.

At the telephone hearing before OWCP's hearing representative, held on December 15, 2010, appellant's attorney argued that the changes demonstrated on a 2010 MRI scan study compared with a 2006 MRI scan study of the lumbar spine showed that his condition had worsened. Appellant related that in May 2010 the employing establishment reduced his hours from eight to three and a half hours per day. He noted that he was restricted to working daytime hours due to his employment injury.

By decision dated March 15, 2011, OWCP's hearing representative affirmed the July 30, 2010 decision. She found that the medical evidence did not show a worsening such that appellant was unable to perform the duties of his modified position.

On appeal, counsel contends that diagnostic studies establish that his condition has worsened. He maintains that beginning in May 2010 appellant was only allowed to work three and a half hours a day because he was restricted to working in the daytime.

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.⁶ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁷

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.⁸

ANALYSIS

OWCP accepted that appellant sustained lumbar and thoracic strain, herniated discs, bladder dysfunction and sexual dysfunction due to an October 3, 1994 employment injury. Appellant underwent a discectomy at L5-S1 on February 19, 1995 and a discectomy at L4-5 on May 16, 1996. On January 13, 2000 the employing establishment offered him a position as a modified distribution clerk. In a decision dated April 25, 2007, OWCP found that appellant's actual earnings as a modified distribution clerk effective January 2000 fairly and reasonably represented his loss of wage-earning capacity.

⁶ *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Tamra McCauley*, 51 ECAB 375, 377 (2000).

⁷ *Id.*

⁸ FECA Bulletin No. 09-05 (issued August 18, 2009).

On May 14, 2010 the employing establishment reduced appellant's work hours as part of NRP to three and a half hours a day. It indicated that it would have offered him full-time work but noted that he could not work after 3:30 p.m. due to his injury-related condition. Appellant filed claims for compensation beginning June 7, 2010, arguing a material change in his condition. Counsel argued that the employing establishment took away his full-time position based on his work restrictions from his accepted injury.

OWCP issued a formal loss of wage-earning capacity decision on April 25, 2007. 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 June 7, 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.⁹ 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.¹⁰

Further, 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.¹¹

As OWCP failed to follow the guidelines in FECA Bulletin No. 09-05, the Board will set aside the March 15, 2011 decision and remand the case for further consideration. After proper compliance with FECA Bulletin No. 09-05 guidelines, OWCP shall issue a *de novo* decision on appellant's entitlement to wage-loss compensation beginning June 7, 2010.¹²

CONCLUSION

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

⁹ *Id.*

¹⁰ *Id.* at § I.A.1-2

¹¹ *Id.* at § I.A.3.

¹² *See M.E.*, Docket No. 11-1416 (issued May 17, 2012).

ORDER

IT IS HEREBY ORDERED THAT the March 15, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: September 18, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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