



truck she was driving was hit by an automobile. OWCP later accepted the claim for cerebral concussion without loss of consciousness and fractured teeth.<sup>2</sup> Appellant stopped work on December 5, 1996.

On July 13, 1998 appellant accepted a rehabilitation job as modified clerk.<sup>3</sup> The duties of the position included answering telephones, providing customer support, photocopying, scanning incoming Express Mail labels, light filing, filing Express Mail labels, nixie mail, data entry/station input delivery point sequencing, filing change of address cards and clearing carriers on their return to the office. All of the above-noted duties were to conform to appellant's physical restrictions, which included no walking, standing, reaching, twisting, operating a motor vehicle, reaching above the shoulder, pushing, pulling, lifting, squatting, kneeling and climbing and up to eight hours of sitting, simple grasping and fine manipulation of the hands. The modified clerk position paid an hourly rate of \$14.37. Appellant assumed her new duties on July 18, 1998.

By decision dated September 24, 1998, OWCP issued a loss of wage-earning capacity determination based upon her actual earnings as modified clerk working eight hours a day beginning July 18, 1998 and earning a weekly salary of \$644.40. It found no wage loss and that the position fairly and reasonably represented her wage-earning capacity.

On September 28, 2010 appellant filed a recurrence of disability claim beginning that date due to the employing establishment's withdrawal of her limited-duty under the National Reassessment Program (NRP). She also filed claims for wage-loss compensation (Form CA-7) beginning September 28, 2010.

By letter dated December 6, 2010, OWCP informed appellant of criteria and evidence required for establishing modification of a loss of wage-earning capacity. Appellant was given 30 days to provide the evidence.

In a November 17, 2010 report, Dr. Michael L. Silverstein, a treating Board-certified orthopedic surgeon, conducted a physical examination and noted that appellant's work restrictions had not changed since his February 26, 2007 evaluation. The restrictions included sitting up to eight hours, walking up to 100 yards, standing for 10 to 15 minutes, no reaching above the shoulder, driving a postal vehicle, squatting, kneeling or climbing, lifting up to 5 pounds and pushing and pulling up to 20 pounds

In correspondence dated December 13, 2010, appellant informed OWCP that the modified position upon which the loss of wage-earning capacity was based and its duties was specifically tailored for her work restrictions. She also alleged a worsening in her medical condition.

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<sup>2</sup> On February 18, 1999 OWCP granted appellant a schedule award for a 39 percent permanent impairment of the right lower extremity.

<sup>3</sup> Appellant noted that her acceptance of the position was under protest.

By decision dated January 6, 2011, OWCP denied modification of the September 24, 1998 loss of wage-earning capacity determination.<sup>4</sup>

In a January 17, 2011 letter, appellant's attorney requested a hearing before an OWCP hearing representative, which was held on May 19, 2011.

In a report dated January 31, 2011, Dr. Silverstein provided physical findings and concluded that appellant was capable of performing her limited-duty job.

Subsequent to the May 19, 2011 hearing, counsel submitted statements from two coworkers in support of appellant's contention that the modified clerk position was makeshift work and not a real position. In a February 18, 2011 statement, Marianne Moore, a coworker, stated that appellant had worked as supervisor assistant and provided her training for her role as a supervisor. She noted that appellant never performed any clerk functions in the office and that her duties included maintaining daily reports, passport appointments, reconciling billing statements, carrier attendance, customer forwarding, vehicle maintenance and customer service.

In a March 16, 2011 statement, Pamela Archer, a coworker, agreed with Ms. Moore that appellant did not perform clerk duties and that her primary duties were scheduling passport appointments and answering the telephone. She also stated that appellant would be assigned work from the supervisor duties and computer work to keep her busy.

In e-mail correspondence dated June 18, 2010, Carmela McDonough, a supervisor, noted that no work was available for appellant within her restrictions that were not duties of a supervisor. She also noted that appellant no longer performed supervisor work, answering the telephone, writing up second notice or doing any automated vehicle utilization system.

By decision dated July 29, 2011, OWCP's hearing representative affirmed the denial of modification of the September 24, 1998 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.<sup>5</sup> 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 loss of wage-earning capacity.<sup>6</sup>

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<sup>4</sup> OWCP also issued a separate decision dated January 6, 2011 denying appellant's claim for a recurrence of disability beginning September 28, 2010. As more than 180 days has elapsed from the date of issuance of the January 6, 2011 decision, to the filing of this appeal, the Board concludes that it has no jurisdiction to review it. *See* 20 C.F.R. § 501.3(e).

<sup>5</sup> 5 U.S.C. § 8102(a).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (October 2009).

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>7</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>8</sup>

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 wage-earning capacity decision has been issued, OWCP must develop the evidence to determine whether a modification of that decision is appropriate.<sup>9</sup>

### ANALYSIS

OWCP accepted that appellant sustained cerebral concussion without loss of consciousness, closed fracture of the tibia and fibula shafts and fractured teeth due to a December 5, 1996 employment injury. On September 24, 1998 it found that her actual earnings as a modified clerk effective July 18, 1998 fairly and reasonably represented her wage-earning capacity and reduced her compensation to zero. On September 28, 2010 appellant filed a recurrence of disability and claims for wage-loss beginning that day due to the withdrawal of her limited-duty assignment as part of NRP.

On appeal to the Board, counsel argues that the September 24, 1998 loss of wage-earning capacity was erroneous as the clerk position upon which it was based was odd-lot and makeshift work. The hearing representative considered the issue of whether the light-duty job had been a makeshift position.<sup>10</sup>

As noted above, OWCP issued a formal wage-earning capacity decision on September 24, 1998. 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 September 28, 2010. 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>11</sup> FECA Bulletin No. 09-05 asks OWCP to confirm that the file contain

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<sup>7</sup> *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Tamra McCauley*, 51 ECAB 375 (2000).

<sup>8</sup> *Id.*

<sup>9</sup> FECA Bulletin No. 09-05 (issued August 18, 2009).

<sup>10</sup> A position that is makeshift in nature is not appropriate for a wage-earning capacity determination. *See Selden H. Swartz*, 55 ECAB 272 (2004).

<sup>11</sup> *Supra* note 9.

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.<sup>12</sup>

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.<sup>13</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>14</sup>

As OWCP failed to follow the guidelines in FECA Bulletin No. 09-05, the Board will set aside the July 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 *de novo* decision on appellant's entitlement to wage-loss compensation beginning September 28, 2010.<sup>15</sup>

### **CONCLUSION**

The Board finds that the case is not in posture for decision and will be remanded to OWCP for further development.

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<sup>12</sup> *Id.* at §§ I.A.1-2.

<sup>13</sup> *Id.* at § I.A.3.

<sup>14</sup> *Id.* at (Section I.A.1-4).

<sup>15</sup> *See M.E.*, Docket No. 11-1416 (issued May 17, 2012).

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 29, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: September 14, 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