

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

T.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Cleveland, OH, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 12-325
Issued: September 24, 2012**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 26, 2011 appellant, through her attorney, filed a timely appeal from a June 3, 2011 decision of the Office of Workers' Compensation Programs (OWCP), which denied modification of a wage-earning capacity decision. 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 the case.

ISSUE

The issue is whether modification of OWCP's May 20, 1997 wage-earning capacity determination is warranted.

FACTUAL HISTORY

On July 2, 1986 appellant, then a 28-year-old clerk, filed an occupational disease claim alleging that she developed bilateral carpal tunnel syndrome as a result of performing repetitive

¹ 5 U.S.C. §§ 8101-8193.

keying and throwing mail at work. OWCP accepted her claim for bilateral wrist sprain, bilateral overuse syndrome and bilateral myofascial pain of the upper extremities. Appellant stopped work intermittently until she returned to full-time light-duty work on February 15, 1997.² Her pay at the date of injury was \$26,300.00 per year.

Appellant came under the treatment of Dr. James E. Culver, a Board-certified orthopedic surgeon, on October 3, 1986 for discomfort in the upper extremities. He noted tenderness over the dorsum of the left wrist and diagnosed overuse syndrome related to the repetitive type stress that she encountered in keying and throwing mail at work.

On August 6, 1988 appellant accepted a full-time position in the private sector with the Higbee Company as a sales clerk. On August 26, 1988 OWCP adjusted her compensation benefits to reflect her 30 percent wage-earning capacity as a sales clerk. It concluded that the position of full-time sales fairly and reasonably represented appellant's wage-earning capacity. Appellant worked as a sales clerk at Higbee Company until June 1989 and stopped completely. She continued to be treated by Dr. Culver for repetitive use syndrome and he opined that appellant was disabled from work.

Appellant underwent a functional capacity evaluation on June 18, 1996, which showed that she was in a medium classification. She was advised to return to work on a gradual basis, part time, 20 hours per week, avoid continuous repetitive hand motions, varied duties with breaks every two hours. A July 19, 1996 work capacity report from Dr. Culver noted that appellant could return to work part time, 20 hours per week subject to restrictions.

On November 20, 1996 appellant was offered a permanent job as a modified mail handler (rehabilitation), four hours per day for the first two weeks, increasing to six hours per day the next two weeks and then eight hours per day after four weeks. The position was effective December 7, 1996. Appellant accepted the job under duress and requested that her starting date be changed to February 1, 1997. She noted that she was not given adequate time to review the job offer and that the shift was undesirable. On November 27, 1996 Dr. Culver reviewed the limited-duty job offer and noted that appellant was able to perform the duties. Appellant returned to work on January 19, 1997. In an April 4, 1997 rehabilitation memorandum, OWCP indicated that she was increased to full-time work.

On May 20, 1997 OWCP advised that appellant had been reemployed as a modified mail handler with wages of \$806.76 per week, effective February 15, 1997. It determined that her actual earnings as a modified mail handler fairly and reasonably represented her wage-earning capacity. OWCP found that appellant had performed the position for more than 60 days without incident and it was suitable to her partially disabled condition. Because there was no loss in earnings, it found that she had zero loss of wage-earning capacity. Accordingly, appellant was not entitled to wage-loss compensation.

² On October 26, 1982 appellant filed an occupational disease claim alleging that she developed left sided tendinitis as a result of casing mail at work, file number xxxxxx031. OWCP accepted tenosynovitis of the left hand. On October 2, 1984 appellant filed an occupational disease claim for left hand and neck pain, file number xxxxxx891. OWCP accepted right wrist sprain/dorsal sprain.

On March 5, 1999 appellant was treated by Dr. Michael Stanton-Hicks, an anesthesiologist, for repetitive strain injuries of the upper extremities. Dr. Stanton-Hicks diagnosed myofascial pain syndrome and opined that this condition resulted from repetitive duties at work.

Appellant came under the treatment of Dr. Audley M. Mackel, III, a Board-certified orthopedic surgeon, on July 7, 2010, for repetitive stress syndrome of both hands. In a duty status report of the same date, Dr. Mackel noted clinical findings of chronic repetitive stress of the bilateral wrists and diagnosed tenosynovitis of the left and right hands, wrists and forearms. He noted that appellant could resume full-time, limited-duty work on July 8, 2010.

On August 3, 2010 the employing establishment offered appellant a modified limited-duty position as a modified mail handler, full time, with a salary of \$54,396.00 a year effective August 7, 2010. The duties of the modified assignment were using a hand stamp for up to six hours per day. The physical requirements of the job offer were not noted. On August 3, 2010 appellant accepted the job offer.

On August 27, 2010 appellant filed a Form CA-7, claim for compensation, leave without pay, for 28.75 hours, for the period August 16 to 27, 2010. She also requested a night differential. In a time analysis form dated August 31, 2010, appellant noted that no work was available for 28.75 hours. The employing establishment noted the employee was part of the National Reassessment Process (NRP).

In an August 16, 2010 employee leave informational letter, appellant's supervisor noted that a search for the necessary tasks meeting her medical restrictions within the facility was performed and the employing establishment was unable to identify enough available necessary tasks within her medical restrictions for her to complete a full days work.

On September 7, 2010 OWCP noted receipt of appellant's CA-7 form for the period August 16 to 27, 2010.³ It noted that the evidence showed that the specific hours of the limited-duty job were withdrawn effective August 16, 2010 as part of the employing establishment's NRP. OWCP further noted that a formal loss in wage-earning capacity decision was issued on May 20, 1997 which determined that the position of a modified handler fairly and reasonably represented her wage-earning capacity. It advised appellant of the criteria for modification of the loss of wage-earning capacity determination and requested that she submit evidence in support of her claim.

In a letter dated September 13, 2010, appellant noted that the change in her work hours was due to NRP. According to her restrictions, she was working 40 hours per week and the changes in her schedule were due to NRP. Appellant noted that none of the criteria for modification of a wage-earning capacity decision applied to her situation as the change in schedule was solely due to NRP. She noted the employing establishment was no longer accommodating limited-duty employees with jobs based on their restrictions. In a September 28, 2010 statement, appellant amended her prior statement and indicated that her medical condition had not changed and that any activity at work could aggravate her condition. She indicated that

³ Appellant continued to submit CA-7 form, claims for compensation, through May 20, 2011.

the current job offer on the hand cancel belt aggravated her condition and involved continuous facing and cancelling mail with no variety in the activities. Appellant noted that she could tolerate this job for four hours per day with the help of medication and braces but that she could not tolerate an eight-hour day. She indicated that the employing establishment refused to offer her a limited-duty position within her restrictions.

On September 14, 2010 appellant filed a claim for recurrence of disability. She submitted a report from Dr. Mackel dated October 6, 2010, who treated her for continuing discomfort from repetitive use syndrome of the upper extremities. Appellant reported a reassignment of her job with more repetitive use of the hand, which was a change from her previous more sedentary functional use of her hand. Dr. Mackel diagnosed repetitive use syndrome of the bilateral upper extremities.

In a decision dated October 15, 2010, OWCP denied appellant's claim for compensation commencing August 16, 2010. It noted that she failed to meet the three criteria for modifying a wage-earning capacity determination.

On November 8, 2010 appellant requested a review of the written record. She submitted reports from Dr. Mackel dated January 5 to 15, 2011.⁴ In a January 5, 2011 report, Dr. Mackel treated appellant for continuing discomfort of her wrists bilaterally. In a January 15, 2011 report, he noted treating her since 2000 for chronic repetitive stress syndrome of both wrists, tenosynovitis and bilateral myofascial pain in the upper extremities. Dr. Mackel noted appellant's job restrictions. He addressed OWCP's September 7, 2010 letter and noted that the accepted employment condition had materially changed. Dr. Mackel noted the change in the sense that appellant has remained unable to do repetitive-type activities with her hands. He noted the repetitive activity would flare her symptoms causing her to work less hours or not at all. Dr. Mackel noted the need for appellant to remain at her present employment level and function.

In a decision dated February 17, 2011, an OWCP hearing representative affirmed the October 15, 2010 OWCP decision.

On May 4, 2011 appellant requested reconsideration. In an accompanying statement she asserted that OWCP erroneously used the modified mail handler position to establish her wage-earning capacity determination on May 20, 1997. She noted that she was never rehabilitated for this job, that the employer changed her craft from clerk to mail handler and that for years she had not been allowed to work this job. Appellant noted that Dr. Mackel's January 15, 2011 report supported that her condition materially changed and that she was unable to perform repetitive activities. She submitted a job offer dated January 9, 1997 and a January 15, 2011 report from Dr. Mackel, all previously of record. Appellant submitted an April 6, 2011 report from Dr. Mackel who noted appellant's symptoms were stable. Dr. Mackel diagnosed repetitive stress syndrome of the upper extremities. He continued appellant's present level of work activity and advised that her condition was unchanged and that she would need appropriate protection of her hands and time off when her hand symptoms flared. In an April 6, 2011 duty status report,

⁴ Dr. Mackel's report was dated January 15, 2010; however, this appears to be a typographical error and should be January 15, 2011.

Dr. Mackel noted that appellant reached maximum medical improvement and diagnosed tenosynovitis of the left and right hands, wrists and forearms. He noted that appellant could resume work on April 9, 2011, with restrictions.

In a decision dated June 3, 2011, OWCP denied modification of the February 17, 2011 decision.

LEGAL PRECEDENT

Section 8102 of FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁵ When an employee cannot return to the date-of-injury job because of disability due to a 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 employees wage-earning capacity.⁶

Once the loss of wage-earning capacity 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.⁷ The burden of proof is on the party attempting to show modification of the award.⁸

FECA Bulletin No. 09-05, outlines certain 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.⁹

ANALYSIS

After OWCP issued its formal wage-earning capacity decision in 1997, the employing establishment reassessed appellant's rated position under NRP, resulting in a reduction of limited-duty hours and a claim for wage-loss compensation beginning August 16, 2010. It analyzed the case under the customary criteria for modifying a 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.

⁵ 5 U.S.C. § 8102(a).

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

⁷ *George W. Coleman*, 38 ECAB 782, 788 (1987); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

⁸ *James D. Champlain*, 44 ECAB 438 (1986); *Jack E. Rohrabough*, 38 ECAB 186, 190 (1986).

⁹ FECA Bulletin No. 09-05 (issued August 18, 2009).

When a 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. It thereby shifts the burden onto OWCP to review wage-earning capacity decision to determine whether it was based on an actual *bona fide* position. To this end, 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.

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 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.

As OWCP failed to follow the guidelines in FECA Bulletin No. 09-05, the Board will set aside the June 3, 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 August 16, 2010.¹⁰

CONCLUSION

The Board finds that this case is not in posture for determination on whether modification of OWCP's May 20, 1997 wage-earning capacity is appropriate.

¹⁰ *M.A.*, Docket No., 12-316 (issued July 24, 2012); *see M.E.*, Docket No. 11-1416 (issued May 17, 2012).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated June 3, 2011 is set aside and the case remanded for further action consistent with this decision.

Issued: September 24, 2012
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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