

from a prior injury² and the repetitive activity of casing mail had caused her injury. OWCP accepted the claim for right shoulder bicipital tendinitis and right lateral epicondylitis.

Appellant underwent right shoulder arthroscopic surgery on April 27, 2007. She stopped working and received compensation for wage loss. The record indicates that appellant returned to work in a light-duty position on October 4, 2007. On May 6, 2008 the employing establishment offered her a permanent full-time position as a modified clerk, effective May 10, 2008. The salary was reported as \$51,355.00 annually. The job description indicated that the position involved four hours of work as a facility greeter and four hours in manual letter operations. The physical restrictions included intermittent lifting of 10 pounds. Appellant accepted the position on May 6, 2008.

By decision dated June 2, 2008, appellant received a schedule award for a 22 percent right arm permanent impairment. The period of the award was 68.64 weeks commencing December 18, 2007. In a memorandum dated July 30, 2008, OWCP indicated that the current pay rate for the date-of-injury position was a base pay of \$38,645.00, plus \$361.92 in night differential and \$292.88 in Sunday premium pay.

By decision dated August 1, 2008, OWCP determined that appellant's actual earnings fairly and reasonably represented her wage-earning capacity. It further determined that she had no loss of wage-earning capacity as her current earnings were greater than or equal to the current date-of-injury position earnings.

On January 20, 2010 appellant filed a claim for compensation (Form CA-7) for December 4, 2009. By decision dated February 22, 2010, OWCP denied the claim for compensation.

On May 27, 2010 OWCP received a Form CA-7. An accompanying time analysis Form CA-7a stated that the light-duty job had been withdrawn through the National Reassessment Program (NRP) as of May 11, 2010. The record indicates that on July 14, 2010, the employing establishment offered appellant a light-duty position as a clerk and appellant declined the job offer.

In a letter received on September 27, 2010, appellant indicated that she was requesting reconsideration of the February 22, 2010 decision. By decision dated October 12, 2010, OWCP denied the reconsideration request without merit review of the claim.

In a letter dated March 22, 2011, appellant requested modification of the wage-earning capacity determination.³ She argued that the August 1, 2008 decision was in error because the light-duty job was odd lot or makeshift in nature. Appellant argued that the decision should be modified because the position was withdrawn through NRP, and also that the medical evidence showed a material worsening of her condition.

² The record indicates that appellant had an accepted claim for plantar fasciitis.

³ The letter appears to a general form letter in which appellant has inserted her specific job titles.

Appellant submitted a March 3, 2011 duty status report (Form CA-17) from an orthopedic surgeon,⁴ indicating that she could work with restrictions. There is also a narrative report dated March 3, 2011 from a physician's assistant.

By decision dated September 12, 2011, OWCP denied the request for reconsideration without merit review of the claim. In a decision dated September 20, 2011, it stated that since it had failed to timely respond to appellant's reconsideration request, the case would be reviewed on its merits. OWCP found the medical evidence did not establish a material worsening of an employment-related condition and the evidence was not sufficient to warrant modification of the August 1, 2008 wage-earning capacity determination.

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.⁵ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁶

FECA Bulletin No. 09-05 outlines very specific procedures for light-duty positions withdrawn pursuant to NRP. Regarding claims for total disability when a wage-earning capacity decision has been issued, OWCP should develop the evidence to determine whether a modification of that loss of wage-earning capacity position is appropriate.

ANALYSIS

In the present case, appellant has argued that the original August 1, 2008 wage-earning capacity determination was in error because the modified clerk position was an odd-lot or makeshift position. She has also argued that the August 1, 2008 decision should be modified because the light-duty job was withdrawn in 2010 pursuant to NRP. OWCP made no findings on the issue other than to note that appellant was placed off work under NRP.

In this regard there are specific guidelines for developing the issue of modification of a wage-earning capacity determination when the job has been withdrawn pursuant to NRP.⁷ FECA Bulletin No. 09-05 sets forth the Director's guidance as to how claims for wage loss should be handled if work has been withdrawn pursuant to NRP. If a formal loss of wage-earning capacity rating is in place, OWCP is instructed to review the evidence of record to confirm that the loss of wage-earning capacity rating was based upon an actual *bona fide* position. To proactively manage these cases, OWCP may request the employing establishment to address in writing whether the position on which the loss of wage-earning capacity rating was based was a *bona fide* position. It is also instructed to review the file to determine whether there is a current medical report (within six months) regarding employment-related residuals. If there

⁴ The signature is illegible.

⁵ *Sue A. Sedgwick*, 45 ECAB 211 (1993).

⁶ *Id.*

⁷ FECA Bulletin No. 09-05 (issued August 18, 2009).

is no current medical evidence then OWCP should request appellant submit a narrative medical report as to the nature and extent of employment-related residuals. The employing establishment can also be requested to submit relevant medical evidence in its possession. Such requests are “essential where employees may not have been requested to provide recent medical evidence because they have a zero loss of wage-earning capacity rating....”⁸

OWCP found that appellant had no loss of wage-earning capacity. However, there is no indication that this finding was made pursuant to the guidelines of FECA Bulletin No. 09-05. The case will be remanded to OWCP to properly analyze the modification issue presented in accord with FECA Bulletin No. 09-05. After such further development as OWCP deems necessary, it should issue an appropriate decision.

CONCLUSION

The Board finds that the case must be remanded to OWCP for a proper decision on the issues presented.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers’ Compensation Programs dated September 20, 2011 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: September 6, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees’ Compensation Appeals Board

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

⁸ *Id.*