

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

|  |   |                           |
|--|---|---------------------------|
| D.D., Appellant  | ) |                           |
|  | ) |                           |
| and  | ) | Docket No. 12-729         |
|  | ) | Issued: September 5, 2012 |
| U.S. POSTAL SERVICE, POST OFFICE,<br>Decatur, IL, Employer | ) |                           |
|  | ) |                           |

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
RICHARD J. DASCHBACH, Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On February 14, 2012 appellant, through his attorney, filed a timely appeal from a September 14, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (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 established that modification of a July 30, 2009 wage-earning capacity determination was warranted.

**FACTUAL HISTORY**

OWCP accepted that appellant, a 41-year-old letter carrier, sustained a cervical disc displacement and root lesions in the performance of duty on February 16, 2005 in File No. xxxxxx054. In File No. xxxxxx218, it accepted his occupational disease claim for herniated lumbar disc and lumbar strain. The cases were consolidated, with File No. xxxxxx054 serving as

---

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

the master file. OWCP approved several injury-related surgeries and paid compensation benefits.

On April 2, 2009 appellant accepted a position as a modified mail carrier. The written job offer indicated that appellant would not be required to work more than eight hours per day and would take frequent breaks, in accordance with restrictions provided by his treating physician.

By decision dated July 30, 2009, OWCP determined that appellant's actual earnings fairly and reasonably represented his wage-earning capacity.

On January 26, 2011 appellant was advised that, pursuant to the National Reassessment Program (NRP), he was being offered a modified position working only four hours a day. Appellant accepted the position under protest.

On January 27, 2011 appellant filed a notice of recurrence (Form CA-2a), claiming that his light-duty job had been withdrawn under NRP. The CA-2a form contained a confirmation by the employing establishment that the January 26, 2011 job offer was made under NRP.

By letter dated February 17, 2011, OWCP informed appellant that, as a formal decision establishing his wage-earning capacity had been issued, he must meet the criteria for modifying the July 30, 2009 wage-earning capacity determination. Appellant must therefore show that there had been a material change in the nature and extent of the injury-related condition, that he had been retrained or otherwise vocationally rehabilitated or that the original determination was, in fact, erroneous.

In a letter dated February 28, 2011, appellant contended that the original loss in wage-earning capacity (LWEC) decision was erroneous because it was based on a regular position, rather than a modified position. He stated that his medical condition had not changed.

By decision dated April 4, 2011, OWCP denied modification of the July 30, 2009 wage-earning capacity determination. The claims examiner found that the position on which the LWEC decision was based was a modified position, in that it reflected restrictions provided by appellant's physician.

Appellant requested a telephonic hearing before an OWCP hearing representative, which was held on July 13, 2011. Appellant's representative argued that the modified position was sheltered or makeshift in nature and that, therefore, the original LWEC decision was erroneous.

By decision dated September 14, 2011, the hearing representative affirmed the April 4, 2011 decision, finding that there was no error in the original determination and appellant had not established a material change in an employment-related condition. Based on Board precedent, the hearing representative found that the modified position on which the July 30, 2009 LWEC decision was based was not makeshift in nature.<sup>2</sup>

---

<sup>2</sup> The claims examiner analyzed the issues in this case under Board precedent, citing *A.J.*, Docket No. 10-619 (issued June 29, 2010) and *M.R.*, Docket No. 10-1407 (issued April 4, 2011).

## 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.<sup>3</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>4</sup>

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

The Board finds this case not in posture for decision. OWCP accepted appellant's claims for cervical disc displacement, herniated lumbar discs and lumbar strain and approved several injury-related surgeries. Based upon the medical restrictions recommended by appellant's treating physician, the employing establishment offered him a modified letter carrier position, which he accepted on April 2, 2009. By decision dated July 30, 2009, OWCP found that appellant's actual earnings in the modified position fairly and reasonably represented his wage-earning capacity.

The record reflects that appellant worked in the full-time modified position until January 26, 2011, when the employing establishment offered him a modified position working only four hours per day, rather than eight hours per day. Appellant filed a claim for a recurrence of disability based on the withdrawal of his job offer under NRP. By letter dated February 17, 2011, OWCP advised him that as it had issued a formal decision establishing his wage-earning capacity, he must meet the criteria for modifying the July 30, 2009 wage-earning capacity determination. Appellant, therefore, argued that the original LWEC decision was erroneous because it was based on a full-time, regular position. Alternatively, he argued that the decision was erroneous because the position was makeshift in nature.

In its September 14, 2011 decision, OWCP denied appellant's claim for modification of the July 30, 2009 wage-earning capacity decision on the grounds that the original LWEC decision was not erroneous, as it was not based on either a full-duty or a make-shift position. It further found that there was no evidence indicating vocational rehabilitation or a worsening of appellant's work-related disability. OWCP, however, did not acknowledge that the original modified position was withdrawn pursuant to NRP or make any relevant findings on the issue. In this regard, the Director of OWCP set forth guidelines, in FECA Bulletin No. 09-05, for developing the issue of modification of a wage-earning capacity determination when the job has been withdrawn pursuant to NRP.<sup>5</sup>

---

<sup>3</sup> *Sue A. Sedgwick*, 45 ECAB 211 (1993).

<sup>4</sup> *Id.*

<sup>5</sup> FECA Bulletin No. 09-05 (issued August 18, 2009).

In light of the requirements of FECA Bulletin No. 09-05, OWCP did not discuss the medical evidence of record as it pertains to appellant's employment-related residuals. 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 medical development as OWCP deems necessary, it should issue an appropriate decision.

The Board therefore finds the case is not in posture for decision and will be remanded to OWCP. On remand, OWCP should follow the procedures found in FECA Bulletin No. 09-05 to determine if appellant met his burden to modify the July 30, 2009 wage-earning capacity determination.

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated September 14, 2011 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: September 5, 2012  
Washington, DC

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

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

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