

FACTUAL HISTORY

On April 13, 1998 appellant, then a 44-year-old automation clerk, filed a traumatic injury claim alleging that on that date she injured her lower back after lifting bulk mail. OWCP accepted her claim for a lumbar strain. It paid appropriate compensation and medical benefits.

On July 5, 2011 appellant filed a claim for compensation for June 25 through July 1, 2011. In a supporting document, an “agency official” indicated that appellant was sent home on June 27, 2011 after working 1.79 hours as no work was available. The form also indicated that appellant did not work on June 28, 29, 30 and July 1, 2011 for the same reason and that the unavailability of work was due to the National Reassessment Program (NRP). By letters dated July 7, 2011, the employing establishment indicated that, pursuant to NRP, it was unable to identify any available necessary tasks within appellant’s medical restrictions. Appellant filed claim forms for additional periods and OWCP determined that it was not able to issue payment for those periods.

By letter dated July 26, 2011, OWCP indicated that it had received appellant’s claim for compensation and noted that her limited-duty assignment was withdrawn effective June 27, 2011. It also noted that a formal loss of wage-earning capacity decision was previously issued in this case on February 1, 2011 which found that the position of modified mail processor fairly and reasonably represented appellant’s loss of wage-earning capacity. OWCP informed appellant of the criteria necessary for modifying a loss of wage-earning capacity decision and the documents that she needed to submit in support of her claim.

By decision dated September 6, 2011, OWCP denied appellant’s claims for compensation for the period June 27 through July 1, 2011 and July 4 through 15, 2011. It found that the evidence of record failed to support disability during the period claimed. In a separate decision of the same date, OWCP denied appellant’s claim for wage-loss compensation for the period July 16 through August 26, 2011 for the reason that she had not established that her previous loss of wage-earning capacity determination dated February 1, 2001 should be modified.

On October 4, 2011 appellant requested review of the written record by an OWCP hearing representative.

By decision dated December 12, 2011, OWCP’s hearing representative vacated the September 6, 2011 decisions. The hearing representative noted that OWCP’s basis for denial was technically incorrect in that it did not address whether the withdrawal of appellant’s limited duty due to NRP met one of the three criteria necessary to modify the established loss of wage-earning capacity, and accordingly, they did not place appellant on notice of the appropriate basis for denial of compensation. The hearing representative remanded the case and gave OWCP instructions to fully evaluate whether appellant met any of the criteria set forth for modification of the original loss of wage-earning capacity decision and to issue a *de novo* decision.

By decision dated May 1, 2012, OWCP denied appellant’s claim for periods of compensation after June 27, 2011. On May 1, 2012 it also made a preliminary determination that she had received an overpayment of compensation in the amount of \$34,693.44 because OWCP erroneously paid her compensation benefits from June 27, 2011 to May 5, 2012. OWCP

noted that appellant was without fault in creating the overpayment, and instructed appellant to complete the enclosed financial forms and the Overpayment Action Request. Appellant did not submit the requested financial documentation.

On May 3, 2012 appellant requested an oral hearing. On the same date, she also requested a precoupment hearing as she disagreed that an overpayment occurred. Appellant stated that her completed financial form and supporting documents would be presented at the hearing, if requested.

At the hearing held on August 16, 2012, appellant's attorney contended that OWCP did not properly develop or evaluate the evidence. He noted that OWCP did not properly follow the established procedures as set forth in FECA Bulletin No. 09-05 concerning NRP cases. Counsel also argued that an overpayment decision was inappropriate at this time. By letter dated August 24, 2012, he noted that OWCP failed to apply FECA Bulletin No. 09-05. Counsel also contended again that certain evidence was not properly evaluated.

By decision dated November 28, 2012, the hearing representative found that appellant had not met her burden to modify the prior loss of wage-earning capacity determination. She also found that appellant had received an overpayment in the amount of \$34,693.44 as she was incorrectly paid compensation for the period June 27, 2011 to May 5, 2012. The hearing representative noted that, although appellant was not at fault in the creation of the overpayment, she failed to submit financial forms and documentation and accordingly, as appellant did not provide the necessary financial information, OWCP was directed to collect the overpayment.

LEGAL PRECEDENT

A wage-earning capacity (WEC) decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages.² Compensation for a loss of wage-earning capacity is based upon loss of the capacity to earn and not on actual wages lost.³ Compensation payments are based on loss of wage-earning capacity determination, which remains undisturbed until properly modified.⁴

Modification of a standing loss of wage-earning capacity 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

² 5 U.S.C. § 8115(a); *K.R.*, Docket No. 09-415 (issued February 24, 2010); *Lee R. Sires*, 23 ECAB 12, 14 (1971) (the Board held that actual wages earned must be accepted as the measure of a wage-earning capacity in the absence of evidence showing they do not fairly and reasonably represent the employee's wage-earning capacity).

³ *K.R.*, *supra* note 2; *Roy Matthew Lyon*, 27 ECAB 186, 190 (1975). *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

⁴ *See Sharon C. Clement*, 55 ECAB 552, 557 (2004).

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

FECA Bulletin No. 09-05 outlines OWCP's 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.⁷

ANALYSIS

OWCP analyzed this case under the customary criteria for modifying a loss of wage-earning capacity determination. However, the Board finds that it did not fully follow the procedures outlined in FECA Bulletin No. 09-05 for claims, such as this, in which limited-duty positions are withdrawn pursuant to NRP.⁸

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 To this end, FECA Bulletin No. 09-05 asks OWCP to confirm that the file contains 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

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.¹¹

As OWCP failed to follow the guidelines in FECA Bulletin No. 09-05, the Board will set aside OWCP's November 28, 2012 decision and remand the case for further consideration. After proper compliance with FECA Bulletin No. 09-05 guidelines, OWCP shall issue an appropriate

⁵ *Sue A. Sedgwick*, 45 ECAB 211, 215-16 (1993); *Elmer Strong*, 17 ECAB 226, 228 (1965).

⁶ *Selden H. Swartz*, 55 ECAB 272, 278 (2004).

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

⁸ *See M.P.*, Docket Nos. 12-1846 and 13-349 (issued March 14, 2013).

⁹ *Supra* note 7.

¹⁰ *Id.* at §§ 1.A.1-2.

¹¹ *Id.* at § 1.A.3.

de novo decision on appellant's entitlement to wage-loss compensation beginning June 27, 2011.¹²

CONCLUSION

The Board finds that this case is not in posture for determination on whether modification of OWCP's February 1, 2001 loss of wage-earning capacity determination is warranted. Further action by OWCP is necessary.

ORDER

IT IS HEREBY ORDERED THAT the November 28, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action.

Issued: August 15, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

¹² In light of the Board's disposition of this issue, the remaining issues are moot.