

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

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M.D., Appellant

and

U.S. POSTAL SERVICE, FOX VALLEY  
PROCESSING & DISTRIBUTION CENTER,  
Aurora, IL, Employer

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**Docket No. 13-921  
Issued: August 16, 2013**

*Appearances:*  
*Appellant, pro se*  
*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 March 7, 2013 appellant filed a timely appeal from a November 29, 2012 decision of the Office of Workers' Compensation Programs (OWCP) that denied modification of a wage-earning capacity determination. 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 met her burden of proof to establish that an October 6, 1997 wage-earning capacity decision should be modified.

**FACTUAL HISTORY**

This case has previously been before the Board. In a July 11, 2012 decision, the Board set aside a December 2, 2010 decision in which OWCP denied modification of an October 6, 1997 wage-earning capacity determination. The Board noted that OWCP denied modification on the grounds that the medical evidence was insufficient to meet the requirements for modification

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

and did not discuss whether the original determination was erroneous or whether she had been retrained or vocationally rehabilitated or indicate that it had assessed her case in accordance with FECA Bulletin No. 09-05.<sup>2</sup> On remand, OWCP was to follow the procedures found in FECA Bulletin No. 09-05 to determine if appellant met her burden to modify the October 6, 1997 wage-earning capacity determination, to be followed by an appropriate decision on the merits of appellant's claims for compensation beginning on October 6, 2010.<sup>3</sup>

In correspondence dated October 10, 2012, OWCP informed appellant of the criteria needed to modify a wage-earning capacity determination. It noted that the evidence of record was assessed to determine if she had continuing residuals of the accepted conditions of bilateral carpal tunnel syndrome, right shoulder impingement and right rotator cuff tear and concluded that, at present, the medical evidence was insufficient. Appellant was asked to submit a well-rationalized medical report addressing whether she continued to suffer residuals of the accepted conditions and, if so, whether the residuals were disabling. She was allotted 30 days to provide the requested information.

In a December 7, 2010 report, Dr. Jacob Salomon, an attending Board-certified surgeon, stated that he advised appellant that she could return to work on October 6, 2010 with appropriate restrictions, but that the post office informed her that no work was available within her restrictions. On January 12, 2011 he reiterated that she was entitled to compensation because no work was available. A February 18, 2011 upper extremity electrodiagnostic study demonstrated residual left sensory motor median nerve entrapment neuropathy at the wrist or mild carpal tunnel syndrome; very mild right motor medial nerve entrapment neuropathy at the wrist for very mild carpal tunnel syndrome; right suprascapular nerve neuropathy; and no strong electrodiagnostic evidence of cervical radiculopathy. A March 23, 2012 electrodiagnostic study demonstrated persistent severe left sensory motor median nerve neuropathy at the wrist and moderate right sensory medial nerve entrapment neuropathy. In an October 18, 2012 report, Dr. Axel Vargas, a Board-certified anesthesiologist, advised that he had seen appellant in May 2010 for neck pain, which was physically and radiologically suggestive of multilevel

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<sup>2</sup> FECA Bulletin No. 09-05 discusses the procedures to be followed when a wage-earning capacity decision is in place and the dismissal of a claimant is due to the national rehabilitation process (NRP). FECA Bulletin No. 09-05 (issued August 18, 2009); *see also M.A.*, Docket No. 12-316 (issued July 24, 2012).

<sup>3</sup> Docket No. 11-733 (issued July 11, 2012). On November 29, 1994 appellant, a mail handler, filed an occupational disease claim for bilateral wrist weakness and pain. The claim, adjudicated by OWCP under file number xxxxxx291, was accepted for bilateral carpal tunnel syndrome. Appellant underwent surgery on September 25 and October 30, 1996 on the right and left respectively. She returned to a modified mail handler position on February 10, 1997. In an October 6, 1997 decision, OWCP found that appellant's actual earnings in the modified position fairly and reasonably represented her wage-earning capacity with zero loss. On April 24, 1998 appellant was granted a schedule award for 10 percent impairment of the right arm and 5 percent impairment on the left. On March 16, 1999 she filed a traumatic injury claim, alleging that she strained her arms, shoulder and hands lifting a tub of mail on March 13, 1999 when she stopped work. OWCP adjudicated the claim under file number xxxxxx777 and accepted right shoulder strain and right partial rotator cuff tear. On June 21, 1999 appellant returned to limited duty at the nixie table and continued in the job until July 26, 2004 when she underwent authorized arthroscopic repair of the torn right rotator cuff. She returned to modified duty on October 12, 2004. In March 2007, appellant began working as a security monitor. On April 11, 2007 she was granted a schedule award for an additional 18 percent impairment of the right arm. On November 26, 2007 an OWCP hearing representative affirmed the April 11, 2007 decision. Appellant returned to the nixie position in February 2009 and continued in the nixie position until October 6, 2010 when she was dismissed under NRP. She filed Form CA-7, claims for compensation, beginning October 6, 2010 and continuing. On November 9, 2010 OWCP doubled appellant's claims.

degenerative cervical spondylosis with an associated herniated disc at C4-5 and C5-6 and right-sided radiculopathy. He performed cervical and right shoulder injections and indicated that he had last seen appellant on December 27, “2012.”

In a November 29, 2012 decision, OWCP denied modification of the October 6, 1997 wage-earning capacity determination. It stated that the record was reviewed consistent with the procedures outlined in FECA Bulletin No. 09-05 and that the medical evidence failed to establish that appellant continued to have disabling residuals of the accepted condition. Appellant’s claim for compensation commencing October 6, 2010 was denied.

### **LEGAL PRECEDENT**

A wage-earning capacity 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. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.<sup>4</sup>

OWCP’s procedures provide that, “[i]f a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss. In this instance the [claims examiner] will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity.”<sup>5</sup>

Chapter 2.814.11 of the procedure manual contains provisions regarding the modification of a formal loss of wage-earning capacity. The relevant part provides that a formal loss of wage-earning capacity will be modified when: (1) the original rating was in error; (2) the claimant’s medical condition has changed; or (3) the claimant has been vocationally rehabilitated. OWCP’s procedures further provide that the party seeking modification of a formal loss of wage-earning capacity decision has the burden to prove that one of these criteria has been met. If OWCP is seeking modification, it must establish that the original rating was in error, that the injury-related condition has improved or that the claimant has been vocationally rehabilitated.<sup>6</sup>

The Board has held that OWCP may accept a limited period of disability without modifying a standing wage-earning capacity determination. This occurs when there is a demonstrated temporary worsening of a medical condition of insufficient duration and severity to warrant modification of a wage-earning capacity determination. This narrow exception is only applicable for brief periods of medical disability. It does not apply to situations where there is a wage-earning capacity determination in place and the employee claims additional wage-loss compensation due to the withdrawal of light-duty work.<sup>7</sup>

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<sup>4</sup> *Katherine T. Kreger*, 55 ECAB 633 (2004).

<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

<sup>6</sup> *Id.* at Chapter 2.814.11 (June 1996).

<sup>7</sup> *K.R.*, Docket No. 09-415 (issued February 24, 2010).

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, *inter alia*, further develop the medical evidence and inquire from the postal service whether the position on which the rating was based was a bona fide position at the time of the rating before issuing a decision denying modification.<sup>8</sup>

### ANALYSIS

The Board finds this case is not in posture for decision. OWCP issued a loss of wage-earning capacity on October 6, 1997. On October 6, 2010 appellant's position on the nixie Desk was reassessed under NRP, which resulted in a withdrawal of her modified position. She thereafter filed claims for wage-loss compensation.<sup>9</sup> Following the Board's remand of July 11, 2012 for OWCP to assess appellant's claim in accordance with FECA Bulletin No. 09-05,<sup>10</sup> OWCP issued a November 29, 2012 decision denying her claims for wage-loss compensation.

The criteria for addressing cases under NRP, when a formal wage-earning capacity decision has been issued are delineated above. OWCP, however, did not fully follow the procedures outlined in FECA Bulletin No. 09-05 following the Board's remand. It asked appellant on October 10, 2012 to submit a well-rationalized medical report addressing whether she continued to suffer residuals of the accepted conditions and, if so, whether the residuals were disabling. OWCP did not request that the post office address whether the position on which the wage-earning capacity determination was based was a bona fide position at the time of the rating.<sup>11</sup>

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. OWCP is to review the loss of wage-earning capacity decision to determine whether it was based on an actual *bona fide* position. To this end, the FECA Bulletin No. 09-09 directs OWCP to confirm that the file contains documentary evidence supporting that the position was an actual *bona fide* position. It also requires OWCP to review the record to determine whether a current medical report supports employment-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 loss of wage-earning capacity determination 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. OWCP did not do so in this case. The case will be remanded to OWCP to fully address the procedures outlined in FECA Bulletin No. 09-05. If, after development and review

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<sup>8</sup> FECA Bulletin No. 09-05, *supra* note 2.

<sup>9</sup> *Supra* note 3.

<sup>10</sup> FECA Bulletin No. 09-05, *supra* note 2.

<sup>11</sup> *Id.*

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>12</sup>

As OWCP failed to follow the guidelines in FECA Bulletin No. 09-05, the Board will set aside the November 29, 2012 decision and remand the case for further consideration. After proper compliance with FECA Bulletin No. 09-05 guidelines, OWCP shall issue a *de novo* decision on appellant's entitlement to wage-loss compensation beginning October 6, 2010.<sup>13</sup>

### **CONCLUSION**

The Board finds this case is not in posture for decision.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the November 29, 2012 decision of the Office of Workers' Compensation Programs is vacated and the case remanded to OWCP for proceedings consistent with this order of the Board.

Issued: August 16, 2013  
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

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<sup>12</sup> *Id.*

<sup>13</sup> *See R.R.*, Docket No. 12-1712 (issued February 21, 2013).