

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

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**R.S., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Fleetwood, PA, Employer**

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**Docket No. 13-922  
Issued: August 6, 2013**

*Appearances:*

*Thomas R. Uliase, Esq., for the appellant  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On March 11, 2013 appellant, through her attorney, filed a timely appeal from a December 18, 2012 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.

**ISSUES**

The issues are: (1) whether appellant has established that a May 24, 2007 wage-earning capacity determination should be modified; and (2) whether appellant has established entitlement to wage-loss compensation for total disability commencing July 2, 2011.

**FACTUAL HISTORY**

On November 14, 2000 appellant, then a 45-year-old full-time carrier, filed a traumatic injury claim (Form CA-1) alleging that on November 10, 2000 she sustained injury when she

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

lifted a tub of flats while in the performance of duty. OWCP accepted the claim for lumbar sprain, displacement of a lumbar intervertebral disc and lumbar intervertebral disc disorder with myelopathy.

The record indicates that on May 25, 2004 appellant accepted a light-duty job at three hours a day. On March 7, 2007 she accepted a light-duty position as a modified express mail courier. The position was four hours a day, five days per week.

By decision dated May 24, 2007, OWCP reduced appellant's compensation finding that her actual earnings in the job since March 7, 2007 fairly and reasonably represented her wage-earning capacity.<sup>2</sup> It found that appellant had a 35 percent loss of wage-earning capacity based on actual earnings of \$592.56 per week.

Appellant continued to receive compensation based on her loss of wage-earning capacity. By letter dated July 2, 2011, the employing establishment notified appellant that, pursuant to the National Reassessment Process (NRP), a light-duty job within her work restrictions was no longer available. On August 5, 2011 appellant submitted a claim for compensation (Form CA-7) commencing July 2, 2011. She also submitted a recurrence of disability claim (CA-2a) on August 15, 2011 for the period commencing July 2, 2011. The record also contains a job offer dated August 15, 2011 for a modified rural carrier position, with work hours from 8:30 a.m. to 12:00 p.m., five days per week.

In a report dated July 18, 2011, Dr. Craig Johnson, a Board-certified neurosurgeon, provided results on examination. He diagnosed stable symptomatic and neurological status regarding lower back issues, fibromyalgia and left leg reflex sympathetic dystrophy (RSD).

By decision dated January 23, 2012, OWCP denied the claim for a recurrence of disability. It found that the medical evidence was insufficient to establish the claim. Appellant requested a hearing before an OWCP hearing representative, which was held on April 12, 2012. The medical evidence included a March 15, 2012 report from Dr. Johnson, who noted appellant's medical and work history. Dr. Johnson stated that appellant continued to manage her pain through medication and activity modification, and it was extremely unlikely that she would be able to be meaningfully, gainfully employed.

In a decision dated June 28, 2012, the hearing representative affirmed the January 23, 2012 decision. The hearing representative found insufficient evidence to modify the wage-earning capacity decision, as there was no evidence of error in the decision or evidence of a material worsening of appellant's condition as of July 2, 2011.

Appellant requested reconsideration of her claim by letter dated September 19, 2012. She argued that OWCP had failed to follow its procedures with respect to withdrawal of light duty pursuant to NRP.

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<sup>2</sup> OWCP referred to the job title as modified rural carrier, but the job offer in the record stated the position was express mail courier.

By decision dated December 18, 2012, OWCP reviewed the merits of the claim and denied modification. It found that the evidence did not establish a modification of the wage-earning capacity or a recurrence of disability.

### **LEGAL PRECEDENT -- ISSUE 1**

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>

When a light-duty position is withdrawn pursuant to NRP and a claim for total disability is filed, FECA Bulletin No. 09-05 provides guidance with respect to development of the claim.<sup>4</sup> If an LWEC decision has been issued, OWCP must determine whether the LWEC decision should be modified.<sup>5</sup>

With respect to an LWEC determination based on actual earnings, it is well established that OWCP should consider whether the kind of appointment and tour of duty are at least equivalent to the job held on the date of injury.<sup>6</sup> A part-time job is not equivalent to a full-time position.<sup>7</sup>

### **ANALYSIS -- ISSUE 1**

In the present case, the employing establishment notified appellant that, pursuant to NRP, no light-duty position within her work restrictions was available as of July 2, 2011. As noted above, when there is an LWEC in place, as in the present case, OWCP must make a determination as to whether the LWEC decision should be modified. One of the grounds for modification is whether the original determination was erroneous.

The evidence of record establishes that appellant was a full-time worker at the time of her November 14, 2000 injury. The March 7, 2007 job offered to appellant, on which the LWEC was based, was a part-time position at 4 hours per day, 20 hours per week. This was not a job that was equivalent to the kind of appointment and tour of duty as the date-of-injury position. The Board therefore finds that the evidence establishes the May 24, 2007 LWEC determination

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

<sup>4</sup> FECA Bulletin No. 09-05 (issued August 18, 2009).

<sup>5</sup> *Id.*

<sup>6</sup> *See L.L.*, Docket No. 12-1912 (issued April 22, 2013).

<sup>7</sup> *Id.*; see also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7. Revisions were made to this section of the procedure manual in June 2013 that were not in effect at the time of the decision on appeal.

was erroneous.<sup>8</sup> Appellant has established that a modification of the May 24, 2007 LWEC is warranted in this case.

### **LEGAL PRECEDENT -- ISSUE 2**

FECA Bulletin No. 09-05 states that if there has been no LWEC rating (or the LWEC has been set aside), payment for total wage loss should be made as long as certain criteria are met: the current medical evidence (within the last six months) establishes that the employment-related residuals continue, the evidence supports that light duty is no longer available, and there is no indication that a retroactive LWEC should be made (noting that retroactive LWEC determinations should not be made without approval from the district Director).<sup>9</sup> If the medical evidence is not sufficient, OWCP should request evidence from both the employing establishment and appellant.<sup>10</sup>

### **ANALYSIS -- ISSUE 2**

In the present case, the Board has found that the May 24, 2007 LWEC determination was erroneous. FECA Bulletin No. 09-05 provides specific guidance for the situation presented here: a withdrawal of a light-duty position pursuant to NRP, and an LWEC that has been set aside. Decisions below did not address the provisions of FECA Bulletin No. 09-05 or attempt to follow the guidance provided.<sup>11</sup> The decisions considered the evidence as a standard recurrence of disability claim rather than a withdrawal of light duty pursuant to NRP. The case will be remanded to OWCP to follow the guidelines provided in FECA Bulletin No. 09-05 and make a proper determination as to entitlement to wage-loss compensation commencing July 2, 2011. After such further development as OWCP deems necessary, it should issue an appropriate decision.

### **CONCLUSION**

The Board finds that the May 24, 2007 LWEC determination should be modified. The Board further finds that the case should be remanded to OWCP for further development of the evidence with respect to the claim for compensation commencing July 2, 2011.

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<sup>8</sup> See *L.L.*, *supra* note 6.

<sup>9</sup> FECA Bulletin No. 09-05 (issued August 18, 2009).

<sup>10</sup> *Id.*

<sup>11</sup> See *C.R.*, Docket No. 12-1757 (issued April 2, 2013) (noting that a withdrawal of light duty is considered a recurrence of disability under OWCP regulations, and FECA Bulletin No. 09-05 provides specific guidance regarding review of the medical evidence).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated December 18, 2012 is reversed with respect to modification of the LWEC determination, set aside with respect to the claim for compensation commencing July 2, 2011 and remanded for further action consistent with this decision of the Board.

Issued: August 6, 2013  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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