

FACTUAL HISTORY

OWCP accepted that appellant, then a 40-year-old clerk, sustained bilateral epicondylitis due to factors of her federal employment. She underwent left elbow surgery on June 7, 2002 and then returned to full-time modified-duty work on July 9, 2002. OWCP paid wage-loss compensation and medical benefits. On July 3, 2003 it granted a schedule award for four percent permanent impairment of the right and left upper extremities.

In an October 1, 2002 report, Dr. Donald Lewis, a Board-certified orthopedic surgeon, opined that appellant was able to work full time with the following restrictions: no repetitive movement of the wrists and elbows bilaterally.

On November 20, 2002 appellant accepted a modified clerk position as a video coding system (VCS) technician which did not require any use of the hands and no manual mail handling. Her duties included: reading aloud, speaking, sitting and/or standing as needed for comfort and allowed a five-minute break every hour.

In a May 14, 2003 letter, the employing establishment advised that appellant started performing the VCS technician job on October 14, 2002. It further indicated that from July 9 through October 14, 2002 appellant was worked at a modified job assignment eight hours a day.

By decision dated June 11, 2003, OWCP reduced appellant's compensation benefits. It found that she was employed as a modified clerk effective July 9, 2002 and that her earnings fairly and reasonably represented her loss of wage-earning capacity.

By letter dated February 11, 2010, the employing establishment advised appellant that there was no work available for her within the operational needs of the service. Appellant was placed on administrative leave. It noted that, if she presented new medical documentation during her administrative leave period, the District Reassessment Team (DAT) would review the documentation and make a work assignment determination.

Appellant filed a recurrence of disability claim on March 5, 2010 for disability as of February 11, 2010. Through her attorney, she filed claims requesting wage-loss compensation. In a letter dated July 6, 2010, OWCP informed appellant that, as a formal loss of wage-earning capacity decision had been issued, she must meet the criteria to modify the loss of wage-earning capacity determination to receive compensation benefits.

By decision dated December 2, 2011, OWCP denied the claims for compensation on the basis that appellant did not meet any of the criteria to modify the wage-earning capacity determination. It noted that the employing establishment recently initiated the National Reassessment Process (NRP) and appellant's work hours were reduced beginning on February 11, 2010 because the DAT was unable to identify sufficient available necessary tasks within her medical restrictions for her to continue working in her modified position.

On December 28, 2011 appellant, through her attorney, requested a hearing before an OWCP hearing representative. She provided testimony at a telephone hearing held before an OWCP hearing representative on April 4, 2012.

By decision dated July 11, 2012, OWCP's hearing representative denied modification of the June 11, 2003 loss of wage-earning capacity determination.

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.³ When an employee cannot return to the date-of-injury job because of disability due to work-related injury or disease, but does return to alternative employment with an actual wage loss, OWCP must determine whether the earnings in the alternative employment fairly and reasonably represent the employee's wage-earning capacity.⁴

Once wage-earning capacity 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. These are the customary criteria for modification and the burden of proof is on the party attempting to show that modification of the determination is warranted.⁵

FECA Bulletin No. 09-05, however, outlines OWCP 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.⁶

ANALYSIS

After OWCP issued its formal loss of wage-earning capacity decision, the employing establishment reassessed appellant's rated position under NRP, resulting in a withdrawal of limited duty and claims for wage-loss compensation beginning June 5, 2010. OWCP analyzed the case under the customary criteria for modifying a loss of wage-earning capacity determination, but did not acknowledge FECA Bulletin No. 09-05 or fully follow the procedures outlined therein for claims, such as this, in which limited-duty positions are withdrawn pursuant to NRP.

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 Bulletin directs OWCP to confirm that the file contains documentary evidence supporting that the position was an actual

³ 5 U.S.C. § 8102(a).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (October 2009).

⁵ See *Daniel J. Boesen*, 38 ECAB 556 (1987).

⁶ FECA Bulletin No. 09-05 (issued August 18, 2009). See also *M.A.*, Docket No. 12-316 (issued July 24, 2012).

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.

The Bulletin 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.

If, after development and review 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.⁷

As OWCP failed to follow the guidelines in FECA Bulletin No. 09-05, the Board will set aside the July 11, 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 June 5, 2010.⁸

CONCLUSION

The Board finds that this case is not in posture for determination on whether appellant has met her burden of proof to modify the June 11, 2003 loss of wage-earning capacity determination. Further action by OWCP is warranted.

⁷ *Id.* at (Section I.A.1-4).

⁸ *See M.E.*, Docket No. 11-1416 (issued May 17, 2012).

ORDER

IT IS HEREBY ORDERED THAT the July 11, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: February 21, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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